

CANADA / JUDGMENT

McGlone v. Kelly

2001 BCSC 1329

COURT

Supreme Court of British Columbia

DECIDED

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Date: 20010925
2001 BCSC 1329

Docket: 99 4707
Registry: VICTORIA
IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN: TAYLOR MCGLONE (ALSO KNOWN AS TAYLOR FLEMING), AN INFANT, BY HER
GUARDIAN AD LITEM, TRACY MCGLONE, TRACY MCGLONE AND MARC FLEMING
PLAINTIFFS

AND: DR. PHILLIP KELLY, DR. MANVILLE, DR. J. BALFOUR, DR. J. MATTHEW, NURSE D.
GRONEBERG, NURSE D. MARGETTS, NURSE JOHN OR JANE DOE AND THE
GREATER VICTORIA HOSPITAL SOCIETY, AND NURSE J. MCMILLAN AND NURSE C.
STAFFORD
DEFENDANTS

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE SHABBITS

IN CHAMBERS

Counsel for the plaintiffs:

I.C. Faulkner

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Greater Victoria Hospital Society, Dr. Manville, Nurses Groneberg, Margetts, McMillan and Stafford

C.L. Woods

Date and Place of hearing:

13 September 2001

Nanaimo, BC

- [1] Taylor Fleming was born on October 16, 1997. She suffers from cerebral palsy and other disorders. On October 13, 1999, this action was brought on her behalf by her mother, Tracy McGlone. Taylor Fleming's parents, Tracy McGlone and Mark Fleming, are the other plaintiffs.
- [2] This proceeding is in negligence. It lies in allegations of medical malpractice. The plaintiffs allege that the defendants were negligent in respect of the events surrounding Taylor Fleming's birth. The damages sought are consequential to that negligence.
- [3] Misoprostal was used to induce Taylor Fleming's birth. The plaintiffs have in this proceeding always alleged that the administration of Misoprostal to Tracey McGlone was a cause of Taylor Fleming's injuries, and that its use was negligent. With this application, the plaintiffs seek to add new causes of action to their claims. They now claim that the defendants Dr. Kelly and the Greater Victoria Hospital Society failed to secure the informed consent of Tracey McGlone for the administration to her of Misoprostal. The plaintiffs also claim that the administration of the Misoprostal was a battery upon Tracy McGlone.

Separate Causes of Action

- [4] In *Karsanjii Estate v Roque* (B.C.) 1993, W.W.R. 612 Taylor J.A., in discussing section 6 of the Limitation Act, said this at page 637:

Section 6(3)(i) speaks of postponement of the running of time in respect of an action on "the cause of action". It seems to me that each cause of action which lies is a separate matter for the purpose of the limitation period. The claim for what is broadly described as "want of informed consent" in this case is based on a different event occurring at a different time, and involves different considerations from that based on negligent choice of procedure and negligent performance of the procedures in fact adopted. I think they must constitute separate causes of action for the present purpose.

- [5] In *Nandha v. Singh et al*, unreported, April 27, 2001, New Westminster Registry 2001 B.C.S.C. 638, Master Bolton said this at paragraph 17:

Obviously, the old and new causes of action are closely linked with respect to time, the identity of the parties, and the consequences to the plaintiff. But as I understand it, there is little connection between the causes of action. On the existing action for negligence, it is not necessary to know what the plaintiff was told about the procedures she was to undergo. The issue is simply whether the doctors did or did not meet the appropriate standard of care. But in an action based on lack of informed consent, the question of negligence is largely - perhaps entirely - irrelevant. The doctors may have been supremely competent but may nevertheless be liable if a foreseeable but unavoidable risk materialized that would have caused the plaintiff to decline the surgery if she had been fully informed of the risk in advance.

Thus, for negligence the exclusive focus is the performance of the surgery. For informed consent, it is largely the pre-surgery discussions that will determine liability, although the surgery itself will have to be considered in regard to foreseeable risk and perhaps the existence of an emergency foreclosing the possibility of consent from the patient.

- [6] In *Reibl v. Hughes*, [1980] 2 S.C.R. 880, Laskin C.J., writing for the Supreme Court of Canada, said this at p. 890:

The well-known statement of Cardozo J. in *Schloendorff v. Society of New York Hospital*, at pp. 129-30 and at p. 93 respectively, that "Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent commits an assault, for which he is liable in damages" cannot be taken beyond the compass of its words to support an action of battery where there has been consent to the very surgical procedure carried out upon a patient but there has been a breach of the duty of disclosure of attendant risks. 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.

[7] It seems clear that the present allegations are that Tracy McGlone consented to the very procedure that was used to induce the birth of her child, but that there was a breach of the duty of disclosure of attendant risks. Such allegations go to negligence rather than battery. However, that negligence is anterior to the claim of negligence on which this suit was brought. It refers to a different event which occurred at a different time. I am of the opinion that the amendments sought by the plaintiffs relate to different and separate causes of actions from those on which the proceeding has thus far been prosecuted. That is so, whether what is sought to be added is a claim in anterior negligence, or in battery.

The Limitation Act

- [8] Taylor Fleming is an infant. There is no limitation period which is yet of effect to any of her claims.
- [9] The limitation period may have expired in respect of the further claims of Tracy McGlone. The plaintiffs submit that the running of time in respect of those claims has been postponed by s.6 (3)(i) and (j) of the Limitation Act.
- [10] One of the foundations of this application is the plaintiffs' allegation that it was not until the examination for discovery of Dr. Kelly, on January 22, 2001, that they became aware that on October 13, 1997, Misoprostal was being used in a pilot study at the Victoria General Hospital.
- [11] The plaintiffs refer to *Halushka v. University of Saskatchewan* (1965), 52 W.W.R. 608 (Sask. C.A.). It is authority for the proposition that a higher level of disclosure of information is required if treatment is for research, then if it is therapeutic in nature. The plaintiffs submit that before January of this year, they were not aware that this higher level of disclosure was of application.
- [12] When this proceeding was brought, the plaintiffs pleaded that Misoprostal was not approved for use for the induction of labour in Canada. When particularizing the details of their claim of medical malpractice, they alleged that the defendants were negligent in failing to induce labour by alternative and safer means than the use of Misoprostal.

- [13] This action was brought on October 13, 1999. At that time, Tracy McGlone knew that Misoprostal had been used to induce her labour, and she knew that she had not consented to its use for that purpose. She believed that Misoprostal had not been approved for use in Canada for the induction of labour. She alleged that there were alternative and safer means to induce labour, and she alleged that the use of Misoprostal was an act of negligence for which the defendants are liable in damages.
- [14] The proposed cause of action is that Misoprostal was used without Tracy McGlone's consent. That Misoprostal was the subject of a pilot study was surely a consideration which had a bearing on the issue of whether it ought to have been used to induce Tracy McGlone's labour, and it surely bore on the issue whether, if asked, she or a reasonable person in her position would have agreed to its use, but it is not of itself the cause of action.
- [15] S.6 of the Limitation Act, reads in part as follows:
- (4) Time does not begin to run against a plaintiff with respect to an action referred to in subsection (3) until the identity of the defendant is known to the plaintiff and those facts within the plaintiff's means of knowledge are such that a reasonable person, knowing those facts and having taken the appropriate advice a reasonable person would seek on those facts, would regard those facts as showing that
 - (a) an action on the cause of action would, apart from the effect of the expiration of a limitation period, have a reasonable prospect of success, and
 - (b) the person whose means of knowledge is in question ought, in the person's own interest and taking the person's circumstances into account, to be able to bring an action.
- [16] In my opinion, the statement of claim filed October 13, 1999, demonstrates that by October 13, 1999, Tracy McGlone had the "means of knowledge" referred to in s.6 of the Limitation Act. She believed that an unauthorized medication had been administered to her. She was by then able to bring an action for its use upon her without her consent.
- [17] I accept that it is unlikely that Tracy McGlone had that means of knowledge on the date of her child's birth. It is likely that Tracy McGlone could establish that the commencement of time for the application of the limitation period was postponed to a time between October 16, 1997 and October 13, 1999. Under s. 6(6) of the Limitation Act, the burden of proving the running of time has been postponed is on the person claiming the benefit of the postponement.
- [18] The evidence in front of me does not establish the extent to which the running of time was postponed. There is no apparent reason to consider that that postponement would be of relevance to this application. Whatever the extent of the postponement, there has been significant delay in the bringing of this application.

[19] This application is being considered on the basis that Tracy McGlone's cause of action in battery and/or lack of informed consent is prima facie barred by the operation of the Limitation Act. The plaintiffs have not shown, for the purposes of this application, that the running of time was postponed.

Would the proposed amendments benefit Taylor Fleming's claims?

[20] The defendants submit that the intended amendments relate to causes of action which could be of benefit to Tracy McGlone alone. They submit that the amendments relate to causes of action that are personal to her.

[21] The plaintiffs abandoned their submission that Taylor Fleming could have a cause of action for a battery committed to her mother when she was as yet unborn. It is problematic whether Taylor Fleming might have a cause of action if the claim in respect of lack of informed consent is based in negligence. This was alluded to by counsel for the plaintiffs, who submitted that such a claim might "partially" entitle Taylor Fleming to damages.

[22] The factual basis on which the anterior negligence claim for compensation for Tracy Fleming might be advanced was not presented on this application. In the result, it seems to me unlikely, but possible, that an anterior negligence cause of action could assist the infant plaintiff's suit.

The Proceeding against Greater Victoria Hospital Society

[23] The defendant, Greater Victoria Hospital Society, submits that the proposed amendments do not raise a reasonable cause of action as against it. It submits that the amendments ought not to be allowed to permit these further claims as against it.

[24] The defendants refer to *McNaughton v. Baker* (1988), 25 B.C.L.R. (2d), in which McLachlin, J.A., (as she then was), said that the first question in considering proposed amendments is whether they raise a reasonable cause of action.

[25] The Society submits that the law is clear that the duty to obtain informed consent lies solely with the health professional that will be performing the treatment at issue.

[26] An analogous submission is advanced in respect of the claim in battery. The Society submits that it did not administer any course of treatment to Tracy McGlone, and that that cause of action, as against it, is frivolous with no prospect of success.

[27] I was referred to an array of jurisprudence, which suggests that a hospital owes no independent duty with regard to the obtaining of informed consent. These include *Hayes v. Royal Columbia Hospital et al.* (2000), B.C.S.C. 1669, and *Coughlin v. Kuntz* (1987), B.C.J. No. 1869, and others.

- [28] I am of the opinion that the plaintiffs have not shown that they have a reasonable cause of action as against the Greater Victoria Hospital Society in battery or for failure to obtain Tracy McGlone's informed consent to her treatment. For that reason alone, the application to include the Hospital Society as a defendant in those causes of actions must fail.
- [29] The amendments, which the plaintiffs seek, are set out in Schedule A to the Notice of Motion dated August 9, 2001. They include some amendments relating to the existing cause of action. The proposed amendments particularize or allege further acts of negligence against the defendant Society within the present proceeding.
- [30] For example, in paragraph 14 of the proposed second further statement of claim, the plaintiffs say:
- the hospital protocols relating to the use of Misoprostal were insufficient.
- [31] In 37(k), it is alleged that in breach of its contract, the defendant Society:
- ...failed to institute adequate policies with respect to the use of the drug Misoprostal.
- [32] I would allow the application to amend to the extent that it particularizes or details the present claims in medical malpractice.

Prejudice to the respondent Dr. Kelly

- [33] The governing legal principles relating to a claim based in failure to obtain a fully informed consent, were the subject of comment by Sinclair Prowse, J. in *Brito et al. v. Woolley et al.* (2001), B.C.S.C. 1178. In paragraphs 132 to 137, Sinclair Prowse, J. said this:

A patient cannot be taken to have consented to a particular treatment or medical procedure unless he or she has been fully informed as to the material risks of that treatment or procedure, and informed of alternative treatments or procedure, if any: *Reibl v Hughes*, [1980] 2 S.C.R. 880; *Arndt v. Smith*, [1997] 2 S.C.R. 539; *Hopp v Lepp*, [1980] 2 S.C.R. 192; *Bauer (Litigation Guardian of) v. Seager*, [2000] 11 W.W.W. 621, 2000 MBQB 113 (Man. Q.B.); *Mangalji (Next Friend of) v. Graham* (1997), 47 Alta. L.R. (3d) 19 (Q.B.); *Rhine v. Millan*, [2000] 7 W.W.R. 136, 2000 ABQB 212 (Alta.Q.B.). Every physician owes a duty to their patient to independently disclose any special, material, or unusual risks associated with the treatment or procedure being recommended and, in certain circumstances, to disclose alternative treatments reasonably available to the patient.

What constitutes a special, material, or unusual risk will depend on the particular facts of the case. A mere possibility will be included as a material risk if the occurrence of that mere possibility is serious, for example, if it can result in paralysis or death: *Reibl v. Hughes*, *supra*; *Puranen v. Thomson* (1987), 46 Man.R. (2d) 55 (Q.B.). Material risks include those risks which the doctor knows, or ought to know, that a reasonable person in the patient's position would consider in deciding whether to undergo a procedure or treatment: *Ciarlariello v. Schacter*, [1993] 2 S.C.R. 119.

The professional standards of physicians as to whether a risk is material are not in themselves determinative of this issue. Specifically, expert medical evidence as to whether a particular risk should normally be explained to a patient is relevant but not conclusive: *Puranen v. Thomson*, supra. Rather, this evidence is simply a factor to be considered together with the evidence of the patient and his or her circumstances.

Evidence of a physician's practice in providing information to patients when securing their consent to a treatment or procedure is both admissible and important in deciding whether the physician did so on any particular occasion: E.I. Pichard & G.B. Robertson, *Legal Liability of Doctors and Hospitals in Canada*, 3rd ed. (Scarborough: Carswell 1996) at 157.

If there was a material risk, and if the physician failed to disclose that risk to the plaintiff, the Court must then determine if the risk materialized and caused the plaintiff's injury; *Hopp v. Lepp*, supra. If so, the Court must then decide both whether the plaintiff, and whether a reasonable patient in the plaintiff's position, would have foregone the recommended procedure in favour of the alternative treatment: *Arndt v. Smith*, supra; *Riebl v. Hughes*, supra

In determining whether a reasonable patient would have chosen the alternative treatment, the particular circumstances and concerns of the plaintiff must be considered and must be given reasonable weight: *Arndt v. Smith*, supra; *Riebl v. Hughes*, supra.

[34] Unless it is adjourned, this trial will commence on October 22, 2001. There is no application for adjournment; the parties wish it to be heard.

[35] It was submitted that the claims in battery and in lack of informed consent could be tried without adjournment of the trial.

[36] I am of the opinion that to do so would be highly prejudicial to the respondent Dr. Kelly. At issue is what ought to have been disclosed to Tracy McGlone. At issue is whether the plaintiff, and a reasonable patient in her position, would have consented to the use of Misoprostal. Expert medical evidence, although not conclusive, is relevant and admissible. The practice of other physicians who were involved in the pilot study may be admissible and of relevance. Evidence as to whether there were any particular reasons for this plaintiff to decline induction by Misoprostal, and whether any other persons in the position of the plaintiff declined to the use of Misoprostal, may be admissible.

[37] Although it is true that the plaintiffs warned Dr. Kelly earlier this year that they would apply to amend, they did not apply until August 9, 2001. It is reasonable that Dr. Kelly would not take the steps required to investigate and defend before amendment. Those steps would likely require applications to disclose particulars of events concerning other persons, and the obtaining of expert medical opinions. These could involve applications to deal with the privacy rights of others. I think it unlikely that the claims forming the subject of the proposed amendments could be fully investigated before the date of the trial. In my opinion, allowing the amendments would prejudice Dr. Kelly in his defence.

Conclusion

- [38] This application is one by the plaintiffs to advance new causes of action.
- [39] The application is made on the eve of trial.
- [40] The plaintiffs have not shown that there is a reasonable cause of action as against the defendant Hospital Society.
- [41] The plaintiffs have not shown that the infant plaintiff has a reasonable cause of action in battery.
- [42] If the claim of lack of informed consent is based on anterior negligence, the infant plaintiff may have a claim for damages based on that negligence, but the evidence on this application did not set out the factual basis on which she may have thereby suffered damages.
- [43] The claim of Tracy McGlone is prima facie barred by the Limitation Act.
- [44] Allowing the amendments would prejudice the defendant, Dr. Kelly, in the defence of the new claims.
- [45] This proceeding was advanced on the basis of medical malpractice. At the time that it was commenced, the plaintiffs did not advance claims based in battery or lack of informed consent. They could have done so. The existing action includes the allegation that the defendants were negligent in using Misoprostal to induce Taylor Fleming's birth.
- [46] My opinion is that in all of these circumstances, it is not just and convenient that the proposed amendments be allowed, save as in paragraph 32 above.
- [47] The plaintiffs are not entitled to costs of this application as costs in the cause. The respondents to this application are entitled to costs as costs in the cause.

"S.J. Shabbits, J."

The Honourable Mr. Justice S.J. Shabbits

October 16, 2001 - Corrigendum (2001 BCSC 1432) to the Reasons for Judgment (2001 BCSC 1329) issued by Mr. Justice S.J. Shabbits advising that there are two typographical errors contained in that decision that I wish to correct.

In paragraph 1, the word "celebral" should be "cerebal".

In paragraph 29, the word "defendant's sanity" should be "defendant Society".

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