

CANADA / JUDGMENT

Parhar v. Weaver

2022 BCCA 134

COURT

British Columbia Court of Appeal

DECIDED

1 April 2022

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2022 BCCA 134 Parhar v. Weaver

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Parhar v. Weaver,

2022 BCCA 134

Date: 20220401

Docket: CA47251

Between:

Karunbir Parhar

Appellant

(Plaintiff)

And

Dr. Brennan James Weaver

Respondent

(Defendant)

Before:

The Honourable Chief Justice Bauman

The Honourable Madam Justice Saunders

The Honourable Madam Justice Stromberg-Stein

On appeal from: An order of the Supreme Court of British Columbia,

dated January 28, 2021 (Parhar v. Weaver, 2021 BCSC 123,
Vancouver Docket S177047).

Oral Reasons for Judgment

Counsel for the Appellant:

D.O. Shane

Counsel for the Respondent:

S.R. Gersbach

G.A. Woods

Place and Date of Hearing:

Vancouver, British Columbia

April 1, 2022

Place and Date of Judgment:

Vancouver, British Columbia

April 1, 2022

Summary:

Mr. Parhar claimed that his dentist, Dr. Weaver, was negligent when he failed to disclose a material risk of chronic nerve pain associated with a root canal. He also claimed that this was a breach of contract. After a trial, these claims were dismissed. The trial judge found that the evidence in this case established that "the incidence of moderate to severe chronic nerve-related pain following a root canal is extremely low, to the point that the risk cannot be meaningfully quantified." Thus, this was not a risk that Dr. Weaver was required to disclose; failure to disclose this risk could not give rise to a claim in negligence or breach of contract. The trial judge also ruled that this issue is not properly considered as a contract claim; failure to obtain informed consent is to be decided under negligence principles. Mr. Parhar appeals, alleging two errors: (1) the risk of chronic nerve pain was significant enough to require disclosure; and (2) the law does or should recognize a claim in contract law for a breach of that duty.

Held: Appeal dismissed. Based on the expert evidence available to the trial judge, it was open to him to conclude as he did that this was not a material, special, or unusual risk that required disclosure. Given this Court's conclusion on that first issue, it is not necessary to consider whether a failure to disclose a material, special, or unusual risk generally gives rise to a breach of contract claim.

BAUMAN C.J.B.C.:

Overview

- [1] Karunbir Parhar brings this proceeding against his dentist, Dr. Brennan James Weaver.
- [2] After a root canal performed by Dr. Weaver on one of Mr. Parhar's molars, Mr. Parhar sought damages in negligence (on the basis of failure to obtain informed consent) and in contract. He claimed that Dr. Weaver failed to disclose a material risk of chronic nerve pain. On 28 January 2021, after a trial before a judge alone, the action was dismissed: *Parhar v. Weaver*, 2021 BCSC 123 [Trial Judgment]. Mr. Parhar appeals, arguing that the judge erred in his conclusions that: (1) the risk of chronic nerve pain was not a material risk that required disclosure; and (2) that there was no cause of action in contract for this alleged wrong.
- [3] In 2012, Mr. Parhar began to receive treatment from Dr. Weaver. Dr. Weaver presented a treatment plan that proposed various procedures, including extractions, root canals, or fillings, with estimated costs. Dr. Weaver also conducted, without complications, an extraction of tooth 28 (an upper-left molar) on 12 September 2012, and a root canal on tooth 24 (an upper-right canine) on 19 November 2012. Through 2013 and early 2014, Dr. Weaver placed fillings on some of Mr. Parhar's teeth, including on tooth 46, the lower-right molar which is the subject of this appeal. That procedure was on 20 January 2014 and was uneventful.
- [4] On 24 September 2014, Mr. Parhar again visited Dr. Weaver, complaining of pain in tooth 46, which had begun a few weeks earlier and had become constant, "more severe than any tooth pain he had experienced before": Trial Judgment at para. 26. Dr. Weaver examined the tooth, determined it was infected, and recommended a root canal.
- [5] Dr. Weaver testified that he would have told Mr. Parhar that "nothing is guaranteed" but that a root canal was "viable." Mr. Parhar said that he initially expressed a preference for extraction but ultimately accepted Dr. Weaver's recommendation for a root canal. Dr. Weaver said that a discrepancy between patient preference and doctor recommendation would have been noted in his chart, but that it was not noted in the chart.
- [6] On 29 September 2014, Dr. Weaver performed the root canal. Mr. Parhar was not asked to sign a consent form. Dr. Weaver testified that he would have given a standard description of the procedure and that this is not noted in the chart because it is the same thing he says every time.
- [7] Dr. Weaver did not advise Mr. Parhar about the possibility of chronic nerve pain, as this risk was not taught to him in dental school nor in continuing education seminars, and he had never encountered it in practice. He said he would have only told Mr. Parhar about the possibility of post-operative pain, but not chronic nerve pain.

- [8] Mr. Parhar said Dr. Weaver did not tell him about the possibility of pain of any kind. He also testified in cross-examination that if he had been told the risk of nerve damage was the same for an extraction or a root canal, he would have opted for an extraction. He also said that he would have "leaned toward" extraction but said that a root canal "was an option" and that "it is hard to say for sure what he would have done, but if there was any risk at all he would have chosen to get an extraction": Trial Judgment at para. 44.
- [9] Dr. Weaver did not recall this specific procedure but observed that his notes indicated the procedure was uneventful. Mr. Parhar says that during the procedure, he experienced a sharp pain just below the tooth, but he did not say anything about this until years later.
- [10] Following the root canal, Mr. Parhar's pain intensified. He initially felt it around tooth 46, in the lower right of the mouth, but also in the lower-left and upper-right quadrants. He said it moved around. He was examined by Dr. Tambert (from the same clinic as Dr. Weaver). Dr. Tambert's notes indicate that Mr. Parhar said that tooth 46 was "better" but still causing sharp pain occasionally. He reported pain around two molars on the left side of his mouth and wanted tooth 27 and 37 extracted. This led to further procedures by Dr. Weaver.
- [11] Mr. Parhar continues to experience pain, "about 90 percent of the time." He has declined to have tooth 46 extracted to avoid the risk that it might worsen his condition.

Trial Judgment

- [12] The trial judge found both Mr. Parhar and Dr. Weaver to be credible, concluding that both tried their best to recount their experiences. He found Dr. Weaver's resort to his clinical notes to be understandable and consistent with the jurisprudence. The trial judge sets out the key factual findings in paragraphs 85-87 of the trial judgment, largely summarizing the earlier narrative. I emphasize three additional points.
- a) "Left untreated, [Mr. Parhar's] tooth decay was likely to cause intermittent but increasing pain, infection, and tooth loss": para. 85(a).
 - b) Mr. Parhar had a subjective preference for extraction of tooth 46 but did not express this to Dr. Weaver: para. 86(d).
 - c) With the exception of the sharp pain during the root canal of tooth 46, Mr. Parhar has experienced and is experiencing the pain he describes: paras. 86(i), 87.

Negligence claim

- [13] The judge set out the test for establishing a negligence claim based on failure to obtain informed consent. Mr. Parhar had to prove: (1) the defendant failed to inform him about the nature of the medical procedure and any material, special, or unusual risks that it entails; (2) a reasonable person standing in his shoes, properly informed of the nature of the procedure and the relevant risks, would not have consented to the procedure; and (3) the particular risk that was not explained to him was in fact the cause of the injuries for which

he claims damages: Brock v. Anderson, 2003 BCSC 1359 at para. 12; Chen v. Ross, 2014 BCSC 374 at para. 308, aff'd 2015 BCCA 250.

- [14] There were competing expert opinions about the incidence of chronic nerve-related pain following a root canal. Dr. Mehta estimated that the rate was between 3.0 and 13.0%. However, Dr. Coil noted that many of these reports were of "altered sensation" rather than of moderate to severe pain. The most persuasive figure from Dr. Mehta was 3.4%, but this does not distinguish between pre-existing pain and pain that arose from the procedure. Dr. Coil was of the opinion that moderate to severe chronic pain was "rare as he has only seen perhaps two or three cases in 27 years." Dr. Nielson said that he has never personally encountered such a case in his many years of practice.
- [15] The judge weighed the expert evidence and concluded that "the incidence of nerve-related symptoms following a root canal is something in excess of 3.0%" but that "the incidence of moderate to severe chronic nerve-related pain following a root canal is extremely low, to the point that the risk cannot be meaningfully quantified": Trial Judgment at para. 106(e). Thus, the plaintiff failed to establish that "non-odontic, nerve-related chronic pain is a material, special, or unusual risk associated with a root canal procedure": Trial Judgment at para. 108.
- [16] To complete the negligence analysis, the judge also concluded Mr. Parhar did not establish that he would not have consented if informed of the risk, nor did he establish that his pain was a result of the undisclosed risk materializing. These points are not contested on appeal.

Contract claim

- [17] The judge dismissed the breach-of-contract claim for two reasons. First, the law of informed consent has developed in recent decades for the issue to be decided under the law of negligence: see generally Trial Judgment at paras. 155-57, citing Reibl v. Hughes, [1980] 2 S.C.R. 880, 114 D.L.R. (3d) 1 [Reibl] and Arndt v. Smith, [1997] 2 S.C.R. 539, 148 D.L.R. (4th) 48 [Arndt]. The plaintiff's approach, in which breach of contract would be actionable per se, avoids the requirement to prove causation of actual damages. That would upset the balance of policy considerations established in the existing informed-consent jurisprudence. Second, just as in the negligence claim, even if Mr. Parhar's claim were actionable as a breach of contract, Mr. Parhar failed to establish that Dr. Weaver failed to advise him of a material, special, or unusual risk: Trial Judgment at para. 159.

Issues

- [18] Mr. Parhar appeals on the following grounds, with the goal of being awarded nominal damages for a breach of contract, and costs.
- a) Mr. Parhar says that the risk of chronic nerve pain for this procedure was in excess of 3% and the judge erred in concluding otherwise and in concluding that Dr. Weaver was not required to disclose this risk.

- b) Mr. Parhar argues that a breach of the duty to advise of material risk can ground a claim in contract law.

[19] Notably, Mr. Parhar is not appealing the ultimate conclusion on the negligence claim.

Appeal

Issue #1: Was the risk of chronic nerve pain a risk that required disclosure?

Positions of the Parties

- [20] Both parties agree that Dr. Weaver did not inform Mr. Parhar of the risk of chronic nerve-related pain following a root canal. The issue is whether he should have.
- [21] Mr. Parhar notes that the judge concluded that the incidence of nerve-related symptoms is "something in excess of 3.0%." Mr. Parhar uses this 3% figure throughout his argument that Dr. Weaver should have disclosed this risk to him, "particularly so where the consequences of nerve pain can be dire." Mr. Parhar presents two comparator cases in which risks of 1% (for permanent paresthesia) and 1.5% to 2% (for nerve injury) were accepted to be material, special, or unusual risks that required disclosure.
- [22] The respondent highlights that Mr. Parhar's argument conflates the incidence of "nerve-related symptoms" with the incidence of "chronic nerve pain." The respondent notes that the judge distinguished between the two and found that "the incidence of moderate to severe chronic nerve-related pain following a root canal is extremely low, to the point that the risk cannot be meaningfully quantified." This of course impacts the relevance of the comparator cases mentioned above, including the decision in *Warlow v. Dr. Sadeghi*, 2019 BCSC 463, aff'd 2021 BCCA 46, upon which the appellant places some reliance.
- [23] The respondent also reviews the expert evidence, noting:
- a) that much of the literature did not distinguish between pain that pre-existed a procedure and pain that arose from the procedure;
 - b) that literature relied upon by Dr. Mehta did not distinguish between pain and mere "altered sensation" or having a tooth that "feels different"; and
 - c) Dr. Coil testified that he had only personally encountered two or three instances of moderate to severe chronic nerve pain following a root canal, and Dr. Nielsen testified that he had never personally encountered such a case.

Analysis

- [24] This ground of appeal challenges the judge's finding that the risk of chronic nerve-related pain was not a material, special, or unusual risk that required disclosure. "The materiality of non-disclosure of certain risks to an informed decision is a matter for the trier of fact": Reibl at 895. This finding of fact is owed deference on appeal. In such a fact-based appeal, this Court cannot interfere unless the trial judge made a palpable and overriding error or there

was no evidence to support the finding of fact: see *Chen v. Ross*, 2015 BCCA 250 at para. 20; *Housen v. Nikolaisen*, 2002 SCC 33 at paras. 10-15 [*Housen*].

[25] In his factum Mr. Parhar submits (at para. 16):

The first alleged error (failure to disclose a material risk) is a mixed decision of fact and law. Accordingly, the standard of review is somewhere between correctness and palpable and overriding error. Given that the facts here are not significantly in dispute, and the issue in dispute is the applicability of those facts to the law, it is submitted that this court's review of this issue is closer to that of correctness.

[26] This is incorrect, even in a case involving a question of mixed fact and law, the standard of review, absent an extricable error of law, is palpable and overriding error: *Housen* at para. 36.

[27] In this case, three experts presented evidence relevant to the estimation of the incidence of chronic nerve-related pain following a root canal: Dr. Mehta, Dr. Nielsen, and Dr. Coil.

[28] The relevant portion of Dr. Mehta's expert report is at pages 327-328 of the Appeal Book. Dr. Mehta discussed four academic articles, two of which provided quantitative incidence estimates. Dr. Mehta noted that authors of one meta-analysis "estimated the frequency of non-odontogenic pain following root canal therapy at 3.4%." Dr. Mehta noted that another review article reported a "range of persistent pain after endodontics ranging from 3% to 13% of cases." Dr. Mehta concluded: "In my opinion the estimated percentage risk of developing chronic nerve pain following endodontics would fall somewhere between 3% and 13%."

[29] Dr. Nielsen testified that he has never seen trigeminal neuralgia associated with a tooth that has had a root canal or has had a filling.

[30] Dr. Coil noted that the literature referred to by Dr. Mehta did not differentiate pre-existing symptoms from symptoms caused by a root canal procedure. That being the case, the 3.4% figure from Dr. Mehta's report would "not be an accurate representation of chronic pain that was caused by having root canal treatment." Dr. Coil was of the opinion that 1.5% to 2% of patients experience non-odontogenic pain following root canal treatment. He also said that only a small portion of those have "pain which is moderate to severe" and that many instead have "altered sensation" or report that the tooth "feels different." Dr. Coil was of the opinion that there was a lack of a consistent classification system in the literature to assess the incidence of pain or sensory loss risks conflating pain with altered sensation. As for how Dr. Coil came to the opinion that 1.5% to 2% of patients experience non-odontogenic pain following root canal, he testified this came from annual discussions of the American Association of Endodontics. He also said that he has only seen "two or maybe three cases" in his 27 years of practice in which there was moderate to severe pain following a root canal.

[31] The foregoing is summarized in the trial judgment at paras. 99-105. The judge's conclusions regarding the materiality of risk are at para. 106:

- a) I find the reference in Dr. Mehta's addendum report to a "review article" stating that the incidence of non-odontic pain following an endodontic procedure ranges from 3.0 and 13.0% to be unhelpful, in light of two limitations identified by Dr. Coil. The first is Dr. Coil's point that many reported instances of non-odontic symptoms following endodontic procedures are cases of mere "altered sensation" as opposed to moderate to severe pain. The second is Dr. Coil's observation that the underlying data does not distinguish between the incidence of pre-existing and the incidence of resultant pain.
- b) I agree with Dr. Mehta that the most persuasive source of data is the Nixdorf meta-analysis, which puts the incidence of chronic pain following root canal treatment at 3.4%. However, I also accept Dr. Coil's point that the 3.4% figure identified in the Nixdorf article includes cases of pre-existing non-odontic pain. The authors of the article expressly acknowledge that due to a lack of information about "baseline" conditions in the underlying data, their study could "not differentiate between patients whose non-odontic pain arose from pre-existing pathosis and patients whose pain arose from the procedure". Accordingly, the authors present the 3.4% figure as "a frequency of occurrence".
- c) I do not accept Dr. Coil's assertion that the incidence of adverse non-odontic symptoms following endodontic procedures is actually 1.5 to 2.0%. That figure appears to me to be an estimate based principally if not entirely on Dr. Coil's experience without any reliable statistical data. Dr. Coil asserted in cross-examination that his figures were supported by the American Association of Orthodontics, but did not specify the basis for that assertion.
- d) I place some weight on the expert evidence of Dr. Coil that in the course of his practice and experience he has encountered no more than two or three instances of moderate to severe chronic nerve pain following a root canal. I also attach some weight to the evidence of Dr. Nielson that he has never personally encountered such a case in his many years of practice. This evidence must be treated with caution because it is largely anecdotal, although to be fair, it is evidence given by experts with considerable experience in the field who are also involved in the continuing education of other dental practitioners. In this context, it is fair to say that the expertise of these witnesses includes, but is not limited to, their accumulated knowledge based on practical experience.
- e) Taking into account all of the aforementioned evidence, I find that the incidence of nerve-related symptoms following a root canal is something in excess of 3.0%. However, a significant proportion of such cases involve what Dr. Coil would characterize as altered sensation as opposed to chronic pain. I further find that the incidence of moderate to severe chronic nerve-related pain following a root canal is extremely low, to the point that the risk cannot be meaningfully quantified.

- [32] The respondent is correct that Mr. Parhar has misunderstood the judge's finding at para. 106(e). The judge finds that "the incidence of moderate to severe chronic nerve-related pain following a root canal is extremely low, to the point that the risk cannot be meaningfully quantified." This finding was open to the judge on the evidence, and Mr. Parhar has not demonstrated a palpable and overriding error in the judge's analysis.
- [33] I would not overturn the judge's finding that Dr. Weaver did not fail to inform Mr. Parhar of a material, special, or unusual risk.

Issue #2: Is a claim in contract law available for the failure to inform a patient of a material risk?

- [34] It is only necessary for the Court to address this second issue if it finds that the judge erred on the first issue. Again, Mr. Parhar has embarked on a path on appeal through contract law, not negligence.
- [35] As I have concluded that there is no reviewable error in the judge's conclusion that there was not a risk of chronic nerve pain that legally required disclosure, it is not necessary to further discuss this issue.
- [36] I say this recognizing Mr. Shane's forceful and articulate submissions on this aspect of the litigation.

Disposition

- [37] I would dismiss the appeal.
- [38] SAUNDERS J.A.: I agree.
- [39] STROMBERG-STEIN J.A.: I agree.
- [40] BAUMAN C.J.B.C.: The appeal is dismissed.

"The Honourable Chief Justice Bauman"

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://www.bccourts.ca/jdb-txt/ca/22/01/2022BCCA0134.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/parhar-v-weaver-2022>

Prepared on 27 October 2026 · Esheria