
CANADA / JUDGMENT

Warlow v. Sadeghi

2021 BCCA 46

COURT

British Columbia Court of Appeal

DECIDED

3 February 2021

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

2021 BCCA 46 Warlow v. Sadeghi

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Warlow v. Sadeghi,

2021 BCCA 46

Date: 20210203

Docket: CA46057

Between:

Elaine Elizabeth Warlow

Appellant

(Plaintiff)

And

Dr. Ali Sadeghi and Dr. Ali Sadeghi Inc.

Respondents

(Defendants)

Before:

The Honourable Mr. Justice Harris

The Honourable Mr. Justice Goepel

The Honourable Mr. Justice Abrioux

On appeal from: An order of the Supreme Court of British Columbia, dated April 1, 2019 (Warlow v. Dr. Sadeghi, 2019 BCSC 463, Vancouver Docket S126901).

Counsel for the Appellant:

D.O. Shane

E. Kwa

Counsel for the Respondents:

T. C. Hinkson

J. Lauwers

Place and Date of Hearing:

Vancouver, British Columbia

November 3, 2020

Place and Date of Judgment:

Vancouver, British Columbia

February 3, 2021

Written Reasons by:

The Honourable Mr. Justice Goepel

Concurred in by:

The Honourable Mr. Justice Harris

The Honourable Mr. Justice Abrioux

Summary:

The appellant suffered permanent nerve damage from a wisdom tooth extraction. She sued the surgeon for having failed to adequately inform her of the risk of potentially permanent nerve pain. The trial judge found that the surgeon had not adequately informed the appellant of the risk of nerve pain; however, the judge went on to find a reasonable person in the appellant's position would have consented to the surgery even if properly informed and dismissed the claim. The appellant challenges the finding that she would have consented to the surgery even if properly informed.

Held: Appeal dismissed. The trial judge properly applied the modified objective test in concluding that the appellant would have consented to the surgery even if adequately informed of the risks. Absent a palpable and overriding error, the trial judge's conclusions were entitled to deference.

Reasons for Judgment of the Honourable Mr. Justice Goepel:

INTRODUCTION

- [1] The appellant, Elaine Warlow, appeals the dismissal of her claim for injuries suffered during a wisdom tooth extraction performed by the personal respondent, Dr. Ali Sadeghi. During the surgery, Dr. Sadeghi injured a nerve in Ms. Warlow's lower right jaw, resulting in permanent and debilitating nerve pain that has altered virtually every aspect of her life.
- [2] Ms. Warlow sued Dr. Sadeghi in negligence. By the time of the trial, the parties had agreed that Dr. Sadeghi had performed the wisdom tooth extraction to the required standard of care. The remaining issue regarding liability was whether he had obtained Ms. Warlow's informed consent before the surgery.
- [3] Justice Iyer found that Dr. Sadeghi did not adequately inform Ms. Warlow of the risk that having her wisdom tooth extracted could result in temporary or permanent nerve pain. Justice Iyer went on to find that Dr. Sadeghi was not required to expressly disclose the risk of permanent severe nerve pain because that risk was too remote. She further found that a reasonable person in Ms. Warlow's circumstances would have decided to go ahead with the surgery even if the risk had been fully disclosed.
- [4] Ms. Warlow submits that the trial judge erred in finding that Ms. Warlow would, if properly advised, have proceeded with the surgery. Dr. Sadeghi submits that Ms. Warlow has not identified any error of fact or law that would permit this Court to allow the appeal.

BACKGROUND

- [5] To put the legal issues in context, it is necessary to first review the events leading up to the surgery.
- [6] In 2010, Ms. Warlow was 41 years old and living in Vancouver. Since 2001, she had primarily been working as a full-time server at a busy restaurant. She enjoyed her work and was very good at it. She usually worked the busiest shifts, took extra shifts, and also worked part-time at other jobs. She had an active social life and enjoyed the outdoors, going to the gym, and dancing with friends. Ms. Warlow was generally healthy; although, she had previously undergone medical procedures, including two sinus surgeries and other dental work.

- [7] In August 2010, Ms. Warlow successfully applied for a position as a flight attendant with Sunwing Airlines. After completing medical, fitness, and security clearances, she commenced Sunwing's intensive flight attendant training program towards the end of September.
- [8] Also in September, Ms. Warlow began experiencing a painful toothache and facial swelling in her lower right jaw. She went to her regular dentist, Dr. Gardner, whose notes record that Ms. Warlow came in for an emergency appointment on September 17, and that he tested the vitality of her lower right first molar (tooth 46). She returned to his office on September 23. Dr. Gardner's notes for that visit state that he had planned to do restorative work on her lower right first and second molars (teeth 46 and 47) but did not proceed because he was unable to freeze the area adequately. Dr. Gardner placed some interim restorative material on those teeth as a temporary solution and told Ms. Warlow to call him if the pain worsened.
- [9] The pain did worsen, but when Ms. Warlow called Dr. Gardner later that day, she was told he had left the office. Ms. Warlow searched online for an emergency dentist and found Dr. Martin, who saw her that afternoon. Dr. Martin's notes record that Ms. Warlow had pain and swelling in the gum around tooth 47 and that she had seen her regular dentist earlier that day for restorative work. Dr. Martin recorded that he was unable to probe the area without significant pain and noted that Ms. Warlow appeared to have a gum infection, which he described as a "gingival abscess, possible impacted food." Unable to do anything else owing to the pain Ms. Warlow was in, he prescribed antibiotics for the infection and scheduled a follow-up appointment.
- [10] Ms. Warlow saw Dr. Martin for the follow-up appointment on September 29. He took a panoramic x-ray ("panorex") of her mouth. He recorded that the infection had improved but that the area still ached. He noted that Ms. Warlow had "8-9 mm pockets" on the distal side of tooth 47, which was concerning as deep gum pockets are prone to infection. Dr. Martin wrote that pericoronitis (inflammation and infection of the gum around a wisdom tooth) was likely. He recommended Ms. Warlow have her impacted lower right wisdom tooth (tooth 48) extracted. He referred her to Dr. David, an oral and maxillofacial surgeon, on October 4 for a possible extraction.
- [11] In the week prior to October 4, Ms. Warlow completed the first week of Sunwing's flight attendant training program.
- [12] On October 4, Ms. Warlow arrived at Dr. David's office and was told that Dr. Sadeghi, an oral and maxillofacial surgeon who practiced with Dr. David, would see her instead. Dr. Sadeghi recommended extracting tooth 48. He advised Ms. Warlow that a risk of the surgery was temporary or permanent nerve injury, which he described as altered sensation, pins and needles, and/or numbness. He also discussed Ms. Warlow's other options and their risks and benefits, including extracting tooth 47 or leaving both teeth in place. Ms. Warlow elected to proceed with the extraction of tooth 48 and signed a generic consent form for the surgery. The form stated that "the anticipated nature and effect of the proposed surgery" with

intravenous sedation had been explained to Ms. Warlow and continued:

I confirm that I have been informed that as a result of the surgery, I may experience some of the more common post operative symptoms such as: swelling, discomfort, dry socket, or infection. I am aware that in some situations there is a risk of temporary and/or permanent numbness or altered sensation of the lower lip, chin, gums or tongue. I am aware that the removal of some upper teeth can result in sinus problems that may require additional treatment. I am also aware that teeth and/or restorations adjacent to the surgical area may require replacement following surgery.

[Emphasis added.]

- [13] During the surgery, Dr. Sadeghi injured Ms. Warlow's inferior alveolar nerve ("IAN"). Injury to the IAN is a known risk associated with extraction of the lower wisdom teeth. As a result of the injury, Ms. Warlow has experienced chronic and severe facial pain. She has seen pain specialists, an oral science specialist, a neurosurgeon with expertise in neurosurgical treatment of neuropathic pain, and her family doctor for treatment of her pain, but none of the prescribed treatments have helped.
- [14] Ms. Warlow's chronic pain has significantly impacted her life. At the time of the surgery, she was in Sunwing's training program to become a flight attendant. Following surgery, she completed the program; however, her pain and the side effects of prescribed medications have made it impossible for her to work as a flight attendant. She resumed her previous employment as a server at a restaurant, but her pain limited her schedule to a maximum of two shifts per week, each of which needed to be during the day and limited to a few hours. The pain also adversely affected the quality of her work. As a result, her earning ability has decreased.
- [15] The pain has also affected other aspects of Ms. Warlow's life. Eating became difficult, resulting in weight loss. She stopped exercising, dancing, and socializing, all of which had been important parts of her life before the surgery. She has become socially isolated.
- [16] In 2018, Ms. Warlow relocated from Vancouver to Victoria as a result of financial problems. She has been unable to find steady work and supports herself by cleaning homes two or three mornings per week.
- [17] The trial judge found that Ms. Warlow's life had been devastated by the chronic and unresponsive neuropathic face pain from which she has suffered for over eight years. The judge held that there was nothing to suggest that Ms. Warlow's situation will ever change.

THE TRIAL REASONS

- [18] The central issue in the litigation was whether Dr. Sadeghi obtained Ms. Warlow's informed consent before the surgery. It was common ground at trial that the test to be applied in such circumstance was the modified objective test established by the Supreme Court of Canada in *Reibl v. Hughes*, [1980] 2 S.C.R. 880 and reaffirmed in *Arndt v. Smith*, [1997] 2 S.C.R. 539. The trial judge summarized the test as follows:
- [44] In summary, to establish a claim in negligence based on a lack of informed consent, a plaintiff must prove each of the following elements on a balance of probabilities:
- a) A risk that should have been disclosed to the plaintiff was not disclosed or not adequately disclosed in advance of the procedure; and
 - b) A reasonable person in the plaintiff's circumstances would not have consented to the procedure if properly advised of that risk.
- [19] The trial judge reviewed the evidence of Ms. Warlow and Dr. Sadeghi concerning their interactions before the surgery. Ms. Warlow and Dr. Sadeghi agreed that Dr. Sadeghi had reviewed with her the form she had completed; conducted a facial examination; showed her the panorex, pointing out how tooth 48 had rotated close to tooth 47; and indicating the location of her IAN canal. He recommended that she have tooth 48 extracted that day. Ms. Warlow read and signed the standard consent form.
- [20] Concerning risk disclosure, Ms. Warlow agreed that Dr. Sadeghi told her about the possibility of nerve damage but described it as "pins and needles" and "tingling" and that he did not tell her it could be permanent. Ms. Warlow recalled the conversation lasted only a few minutes. She testified that Dr. Sadeghi did not discuss with her any alternatives other than extraction of tooth 48.
- [21] Dr. Sadeghi testified that, following his standard practice, he would have discussed two alternatives to extracting tooth 48 with Ms. Warlow: extracting tooth 47 instead or leaving things as they were. He said he would have described to her the risks associated with both alternatives. He gave evidence of those risks.
- [22] Dr. Sadeghi testified he told Ms. Warlow that extracting tooth 47 would mean removing a functional molar, leaving the corresponding molar in her upper jaw without a complement and rendering it dysfunctional. Alternatively, leaving things as they were created the risk that acute infection, like the one that had originally sent Ms. Warlow to Dr. Gardner and Dr. Martin, could reoccur. Dr. Sadeghi said he told Ms. Warlow if the infection reoccurred, it would necessitate further antibiotic use and that there was a risk of the antibiotics becoming ineffective. He said he told her that a subsequent infection could also spread to the jaw and neck and might lead to hospitalization and death.

- [23] Dr. Sadeghi said he described to Ms. Warlow the consequences of injuring her IAN when extracting tooth 48 as altered sensation, including pins and needles and numbness, which could be temporary or permanent. He said he would have told Ms. Warlow that the chance of injuring her IAN was 1.5-2%. Dr. Sadeghi conceded that in describing the risk of nerve injury associated with the extraction of tooth 48, he did not tell Ms. Warlow there was a risk of "permanent nerve pain" or "permanent neuropathic pain." He said he does not inform patients of the risk of permanent neuropathic pain because it is very remote. He said he has not seen any studies that quantify this particular risk and that he has never encountered a case of permanent neuropathic pain resulting from an IAN injury.
- [24] The trial judge found that both Ms. Warlow and Dr. Sadeghi were credible witnesses. She found Dr. Sadeghi's evidence of what he discussed with Ms. Warlow before the surgery as more reliable than her account, and, to the extent that they conflicted, she preferred his evidence. She concluded that it was more likely than not that Dr. Sadeghi did discuss alternatives to the extraction of tooth 48 with Ms. Warlow, including the associated risks. She found he told her that extracting tooth 48 included a risk of "temporary or permanent nerve injury, but did not tell her there was any risk of neuropathic or nerve pain."
- [25] On whether Dr. Sadeghi should have disclosed that nerve pain was a possible consequence and that it could be permanent, the trial judge agreed with Ms. Warlow that telling a dental patient there's a risk of temporary or permanent "pins and needles" or "numbness" conveyed a qualitatively different meaning than telling a person that there was a risk of temporary or permanent nerve pain. This is because the sensation of pins and needles or numbness is strongly associated with the relatively benign and temporary effects of local anesthetic in the gums wearing off, whereas "pain" has more serious connotations to the ordinary patient. She found that in describing the consequence of the risk of nerve injury to Ms. Warlow, Dr. Sadeghi ought to have included the word "pain" along with other terms he used.
- [26] The trial judge rejected Ms. Warlow's submission that Dr. Sadeghi ought to have specifically mentioned there was a possibility of "severe debilitating chronic neuropathic pain." She found the evidence did not establish that this was a reasonable, foreseeable risk. In that regard, she relied on the evidence that Dr. Sadeghi and an expert called on his behalf, Dr. Aidelbaum, who both testified that they knew of no other cases of permanent severe nerve pain arising from an IAN injury.
- [27] Having found that Dr. Sadeghi ought to have included nerve pain as a possible consequence of an IAN injury, the trial judge turned to the question as to whether a reasonable person in Ms. Warlow's circumstances would have consented to the procedure if properly advised of that risk. In considering this question, the judge made two critical findings. She found that Ms. Warlow's evidence did not address whether she would have agreed to go ahead with the surgery if Dr. Sadeghi had included nerve pain in his description of a 1.5-2% risk of temporary or permanent nerve injury. She further held that a reasonable person in Ms. Warlow's circumstances would have consented to the surgery if the consequences of the nerve injury had been adequately described. After discussing the circumstances relevant to

the reasonable person analysis she summarized her conclusion as follows:

- [83] Considering all of these circumstances, I find that a reasonable person in Ms. Warlow's shoes would have consented to the extraction of tooth 48 by Dr. Sadeghi, even if properly advised that the consequences of nerve injury included temporary or permanent nerve pain as well as the other sensations Dr. Sadeghi described.
- [28] Having found that Ms. Warlow had not established the elements required to prove a lack of informed consent, the trial judge dismissed the action.

ON APPEAL

- [29] On appeal, Ms. Warlow submits that the trial judge erred in finding that the appellant would have proceeded with the surgery if she had been properly advised of the material risk of permanent nerve pain. She submits that the trial judge misapplied and misinterpreted evidence of the appellant on this point and misapplied or failed to apply the modified objective test.
- [30] Dr. Sadeghi submits that Ms. Warlow has not identified any error of fact or law that would permit this Court to allow the appeal. He says that the trial judge properly applied the modified objective test.

DISCUSSION

- [31] The modified objective test is a test of causation: Reibl at 898-900. It asks whether a reasonable person in the plaintiff's circumstances would have consented to the proposed treatment if all the risks, benefits, and alternatives had been disclosed. The test relies on a combination of objective and subjective factors to determine whether the failure to disclose actually caused the harm of which the plaintiff complains. Arndt at para. 17.
- [32] Causation is a question of fact, which attracts a deferential standard of review. Absent palpable and overriding error, deference must be given to the trial judge's findings: Ediger v. Johnston, 2013 SCC 18 at para. 29.
- [33] At trial, Ms. Warlow had the burden to prove each element of her cause of action in informed consent:
- a) a material, special, or unusual risk was not disclosed to her in advance of the surgery; and
 - b) a reasonable person in her position would not have agreed to the surgery if she had been sufficiently advised of such risk.
- [34] Ms. Warlow proved the first element of her cause of action. She should have been told in advance of the surgery that permanent nerve pain was a possible consequence.
- [35] The second element is a two-part test. The first part is subjective; the second part is objective. In Bollman v. Soenen, 2014 ONCA 36, the court set out the elements of the test:

[21] The subjective test is based on what the particular patient would have agreed to if the risks were known. It will of necessity vary from patient to patient and take into account factors unique to the individual. The objective test is based on what a reasonable person in the respondent's position would have done. Both the subjective and the objective criteria must be established for the respondent to prove on balance of probabilities that she is entitled to damages for the lack of informed consent.

[Emphasis added.]

[36] To meet the subjective part of the modified objective test, Ms. Warlow needed to testify that if the material risks or treatment alternatives had been adequately disclosed, she would not have consented to the surgery. There can be no finding on what she would have done if she is not asked what she would have done had she been properly advised: Bollman at paras. 25-26.

[37] Ms. Warlow contends that the trial judge erred in finding that she did not give evidence on what she would have done if properly informed of the risk of nerve pain. She argues the trial judge should have understood her testimony as including what she would have done if properly informed of the risk of "lesser pain" than "permanent, debilitating" nerve pain.

[38] The judge did review Ms. Warlow's evidence concerning what she would have done if properly informed:

[79] Ms. Warlow was asked in her direct examination whether she would have consented to the surgery if she had known that it would turn out as it did. She said that she would not have gone ahead if she had known she would "end up like this." As Dr. Sadeghi points out in his submission, that evidence is not particularly helpful. No one who undergoes a medical procedure that leaves them worse off than before would consent to the procedure if they knew for certain that would happen. Rather, it is useful to ask whether a plaintiff would have gone ahead if he or she had been fully informed about the risks of material adverse consequences.

[80] That question was not put clearly to Ms. Warlow. After stating that she would not have consented to the surgery if she had known the outcome, the questioning continued as follows:

Q. And what about the possibility of complications?

A. No

Q. Well, what do you mean by that "no"?

A. As far as a possibility of how I'd end up now?

Q. yes

A. No.

Q. if that was explained to you what would your reaction be?

A. I would have left. I wouldn't have - I would have asked for a second opinion or I - if it was told to me then I would have known. I would have had options.

[81] For the reasons given in the preceding section, I have found that the possibility of permanent debilitating nerve pain was so remote that it was not required to be disclosed. It is clear that Ms. Warlow understood "complications" to mean "the possibility of how I'd end up now". Having found that this was not a reasonably foreseeable outcome, Ms. Warlow's evidence does not address whether she would have agreed to go ahead with the surgery if Dr. Sadeghi had included nerve pain in his description of a 1.5-2% risk of temporary or permanent nerve injury.

[39] Ms. Warlow had the burden to prove what she would have done if she had been properly warned. In this case, as set out in the above excerpt, Ms. Warlow was not asked what she would have done if properly warned. She did not provide the testimony necessary to meet her burden on the subjective aspect of the modified objective test. Faced with this dearth of evidence, the trial judge could not infer what Ms. Warlow would have done. The insufficiency of the evidence means the plaintiff failed to meet her burden, and the trial judge did not err in dismissing her action.

[40] Even if it could be said that the trial judge erred in her handling of the subjective aspect of the modified objective test, Ms. Warlow still faces an insurmountable hurdle. The trial judge found an adequately informed reasonable person in Ms. Warlow's shoes would have proceeded with the surgery. Ms. Warlow contends the trial judge failed to consider the two alternatives to treatment when determining what a reasonable person in the appellant's position would have done. It is clear, however, from the trial judge's reasons that she was alive to the two alternatives. In that regard, she outlined the evidence concerning the two alternatives and their consequences:

[51] Dr. Sadeghi said that he told Ms. Warlow that extracting tooth 47 would mean removing a functional molar, leaving the corresponding molar in her upper jaw without a complement and rendering it dysfunctional. Alternatively, leaving things as they were created the risk that acute infection, like the one that had originally sent Ms. Warlow to Dr. Gardner and Dr. Martin, could recur. Dr. Sadeghi said he told Ms. Warlow that if the infection recurred, it would necessitate further antibiotic use and a risk of antibiotics becoming ineffective. He said that a subsequent infection could also spread to the jaw and neck, and might lead to hospitalization and death.

[41] The trial judge carefully reviewed the circumstances relevant to the reasonable person analysis:

[82] In summary, the circumstances relevant to the reasonable person analysis are:

- Ms. Warlow had recently experienced an acute gum infection and understandably would have been concerned to avoid a recurrence, especially because she was embarking on an exciting new career;
- Both Dr. Martin and Dr. Sadeghi advised Ms. Warlow that extraction of her wisdom tooth was the best option for her and Ms. Warlow generally trusted and relied upon the advice of health professionals;
- Wisdom tooth removal is a common procedure;
- Ms. Warlow had had various kinds of dental work previously; and
- Ms. Warlow consented to the surgery knowing that there was a 1.5-2% risk of temporary or permanent nerve injury that could result in altered sensation, numbness and/or pins and needles.

[42] Ms. Warlow has not identified any palpable and overriding error in the trial judge's findings relevant to the modified objective test. Instead, she simply says the findings should have led the judge to a different conclusion. It is not this Court's role to reweigh the evidence; the trial judge's findings are entitled to deference.

[43] In the result, I would dismiss the appeal.

"The Honourable Mr. Justice Goepel"

I AGREE:

"The Honourable Mr. Justice Harris"

I AGREE:

"The Honourable Mr. Justice Abrioux"

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/21/00/2021BCCA0046.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/warlow-v-sadeghi-2021>

Prepared on 29 October 2026 · Esheria