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ASSESSING DOCTORS AS REASONABLE DOCTORS AND AS REASONABLE PERSONS: A REMINDER IN THE CONTEXT OF NEGLIGENT TRANSMISSION OF HIV DURING ARTIFICIAL INSEMINATION

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I. ASSESSING DOCTORS AS REASONABLE DOCTORS AND AS REASONABLE PERSONS

In negligence law generally, whether a person was negligent is determined by assessing his or her conduct against that of the reasonable person.[1] The reasonable person test works well in most cases in which negligence is alleged. The judge or the jury, as the case may be, uses common sense to assess the conduct of the defendant.

However, the reasonable person (reasonable judge, reasonable juror) knows little or nothing about the practice of medicine and is incompetent to assess a doctor's acts or omissions. That is, the reasonable person test simply does not work in determining allegations of medical negligence. There-

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1. ALLEN M. LINDEN, CANADIAN TORT LAW 115-17 (4th ed. 1988). Justice Linden writes:

> The measuring rod used in negligence law to judge an actor's conduct is the reasonable person. . . .
>
> This is an objective standard, not a subjective one. An impersonal test is employed, which eliminates the personal equation and is independent of the idiosyncrasies of the particular person whose conduct is in question. If it were otherwise, negligence would be coextensive with the judgment of each individual, which would be as variable as the length of the foot of each individual leaving so vague a line as to afford no rule at all, the degree of judgment belonging to each individual being infinitely various.

Id. (footnotes omitted).

fore, of necessity the law defers to medical practice and expert medical opinion. Parachuted into the place of the "reasonable person" is the "reasonable doctor." As the Supreme Court of Canada has more elaborately stated: "What the [doctor] by his ordinary engagement undertakes with the patient is that he possesses the skill, knowledge and judgment of the generality or average of the special group or class of technicians to which he belongs and will faithfully exercise them."[2]

Of particular relevance to the case I will consider in the next section of this essay, the medical standard of reasonableness includes keeping informed about authoritative medical literature.[3] However, that obligation certainly does not require a doctor to read every medical journal article. As the English Court of Appeal put it: "[I]t would be putting too high a burden on a medical man to say that he must read every article in the medical press."[4]

In exception to the medical standard of reasonableness, if a non-medically trained person can understand the relevant facts of a medical case, the law need not defer to medical practice. In *Chasney v. Anderson*,[5] the facts were that a five-year-old child died after a tonsillectomy when he suffocated because a sponge had been left in his throat.[6] The defendant surgeon had used sponges without tapes attached, even though such sponges were available, and had not kept count of sponges used during the operation, even though such a count would have been kept by the operating room nurses upon his request.[7] Medical opinion evidence at trial indicated that the operation had been "performed in the same manner as other surgeons perform[ed] it" and that it was "not customary" to count sponges.[8] On this basis, the court dismissed the action of the deceased's father.[9]

On appeal, a majority of the Manitoba Court of Appeal reversed and held the surgeon liable in negligence.[10] Commenting on the expert medical evidence concerning customary practice, Coyne, J.A., one of the majority judges, stated:

> There is no question as to whether . . . the operation itself was conducted in a surgically skillful manner nor even whether or how

2. Wilson v. Swanson, 1956 S.C.R. 804, 811 (Can.).

3. *See, e.g.*, McLean v. Weir, [1980] 4 W.W.R. 330, 334-35 (B.C. Ct. App.).

4. Crawford v. Board of Governors of Charing Cross Hosp., LONDON TIMES, Dec. 8, 1953, at 5, 5.

5. [1948] 4 D.L.R. 458 (Man. K.B.), *rev'd in part*, [1949] 4 D.L.R. 71 (Man. Ct. App.), *aff'd*, [1950] 4 D.L.R. 223 (Can.).

6. [1948] 4 D.L.R. at 458-59.

7. *Id.* at 459.

8. *Id.* at 461.

9. *Id.*

10. [1949] 4 D.L.R. 71 (Man. Ct. App.), *aff'd*, [1950] 4 D.L.R. 223 (Can.).

> sponges should be used in such an operation. The case involves no difficult or uncertain questions of medical or surgical treatment nor any of an abstruse or scientific or highly technical character. It is the ordinary question of whether, as a matter of reasonable care, certain obvious and simple precautions are required to be taken, something easily understood by ordinary individuals. . . .
>
> Ordinary common sense dictates that when simple methods to avoid danger have been devised, are known, and are available, non-user, with fatal results, cannot be justified by saying that others also have been following the same old, less-careful practice; and that when such methods are readily comprehensible by the ordinary person, . . . it is quite within the competency of Court or jury, quite as much as of experts to deal with the issues; and that the existence of a practice which neglects them, even if the practice were general, cannot protect the defendant surgeon.[11]

In brief and unanimous reasons, the Supreme Court of Canada subsequently agreed.[12] In short, one need not be medically trained to know that a sponge in the throat increases the risk of suffocation and death, that counting sponges reduces the risk that a sponge is left in a patient's throat, and that using sponges with tapes attached reduces the risk that a sponge is left in a patient's throat. In her leading textbook on Canadian medical law, Madam Justice Ellen Picard states the matter as follows:

> The Supreme Court of Canada [held] . . . that expert evidence as to approved practice is not conclusive, especially where the conduct being questioned is not technical but relates to taking precautions. The [Court] decided that, as far as non-technical matters are concerned, an ordinary person is competent to determine what is a safe practice and held the defendant negligent.[13]

II. A Reminder in the Context of Negligent Transmission of HIV During Artificial Insemination

In *Ter Neuzen v. Korn*,[14] the plaintiff patient alleged that she had been infected with HIV during an artificial insemination procedure in January 1985 and that the infection was due to negligence on the part of the defendant gynecologist who performed the procedure. On November 20, 1991, a

11. *Id.* at 86-87.

12. [1950] 4 D.L.R. 223 (Can.).

13. Ellen I. Picard, Legal Liability of Doctors and Hospitals in Canada 234 (2d ed. 1984).

14. No. C870065 (B.C. Sup. Ct. filed Jan. 7, 1987) (Can.). This case was initially commenced in the Vancouver Registry, but trial venue was then changed from Vancouver to Victoria. The jury rendered its verdict on Nov. 20, 1991.

British Columbia Supreme Court jury found the gynecologist liable and assessed damages of almost $900,000.[15]

The patient submitted four bases for the allegation of negligence, namely:

1. The gynecologist failed to screen the semen used in the artificial insemination procedure for HIV;
2. He failed to make reasonable inquiries about the background of the semen donor;
3. He failed to obtain the patient's informed consent in that he failed to warn her of the possibility of HIV infection during the artificial insemination program; and
4. He failed to discontinue the artificial insemination program when he knew or ought to have known that continuing the program entailed a risk of supplying HIV-infected semen to the patient.

The jury was asked to answer the following question: "Was there negligence on the part of the defendant which led to the infection suffered by the plaintiff?" The jury answered "Yes." While the jury found the gynecologist negligent, it is impossible to know the precise basis for that finding since they were not asked to identify the conduct that constituted negligence.[16] Further, in Canadian practice it is not permitted to question jurors out of court concerning the reasons for their verdict. However, following the verdict it was widely speculated in the media that the basis for the jury's finding of negligence, or at least part of the basis for that finding, must have been Dr. Korn's admission at trial that he was not aware in early 1985 of a letter to the editor published in the October 27, 1983, issue of *The New England Journal of Medicine*.[17] That letter was written by Dr. Laurene Mascola of the Centers for Disease Control in Atlanta, Georgia, Bryan Colwell of Harvard University, and Janet A. Couch of the University of Georgia. The letter, published under the title, *Should Sperm Donors Be Screened for Sexually Transmitted Diseases?*, suggested that "the agent responsible for the acquired immunodeficiency syndrome" might "possibly" be transmitted in semen.[18] My purpose in this essay is to examine the reasonableness of the

15. Gabor Mate, *When Lawyers and Doctors Spar, Justice Often Suffers*, VANCOUVER SUN, Feb. 15, 1992, at E9, E9. An appeal to the British Columbia Court of Appeal has been commenced. *See* Ter Neuzen v. Korn, *appeal docketed*, No. CA014811 (B.C. Ct. App.). The appeal was argued on Nov. 16-17, 1992.

16. The defendant had submitted that a question be put to the jury asking for the basis of a finding of negligence. The trial judge declined the submission.

17. Laurene Mascola et al., *Should Sperm Donors be Screened for Sexually Transmitted Diseases?*, 309 NEW ENG. J. MED. 1058, 1058 (1983).

18. *Id.*

speculation that the jury must have given weight to the defendant's ignorance of this letter.

As an example of the reaction to the jury's verdict, consider the following written by a Vancouver family physician, Dr. Gabor Mate, and published in *The Vancouver Sun* on February 15, 1992:

> The jury decision that a Vancouver gynecologist was negligent in the case of a patient who became infected with the AIDS virus illustrates the irrationality of negligence litigation. . . .
>
> As for the New England Journal letter, it presented only a theory. . . .
>
> It should have given pause to anyone who read it, but as one if its authors, Dr. Laurene Mascola, said at the trial, Korn could not be blamed for not having seen it.
>
> I subscribe to the Journal: it is one of many publications to land on my desk every week. I consider myself lucky when I can read some of the major articles of specific interest to me, let alone absorb all the arguments in the letters section.[19]

Is it, however, reasonable to conclude that the jury held Dr. Korn negligent for not being familiar with one letter to the editor in one medical journal? I submit that it is not. I apply to the fact situation in *Ter Neuzen v. Korn* the reasonable doctor and reasonable person analyses I introduced in the first section of this essay. Since Ter Neuzen alleged negligence against a medical professional, Dr. Korn, the standard used to assess his conduct is the reasonable doctor test. Certainly, accepted medical practice does not require Dr. Korn to be aware of every letter to the editor published in every medical journal, even *The New England Journal of Medicine*. In this regard, Dr. mate was entirely correct. However, as the Supreme Court of Canada indicated in *Chasney v. Anderson*,[20] Dr. Korn's conduct must also be assessed against the standard of care required of the reasonable person. Ought the reasonable person to have been aware, in January 1985, of the risk of HIV transmission during an artificial insemination procedure in which fresh semen is used?[21]

In order to comment on what the reasonable person ought to have known about AIDS, HIV and HIV transmission as of January 1985, I move beyond medical literature and approach the larger world of media—newspapers, magazines, television, etc.—that is accessible to, and indeed unavoidable by, all of us. I considered the coverage of AIDS, HIV, and HIV transmission,

19. Mate, *supra* note 15, at E9.

20. Chasney v. Anderson, [1950] 4 D.L.R. 223, 223 (Can.).

21. Dr. Korn used only fresh, not frozen, sperm in the artificial insemination procedures performed for the plaintiff.

but rather against what the reasonable person knew or ought to have known as of January 1985. To try to determine this, I investigated how frequently AIDS, HIV, and HIV transmission were considered in the popular media up to January 1985.[22] In particular, I was interested in finding out whether newspaper articles mentioned semen or sexual contact as a means of HIV transmission and, if so, how frequently. My principal sources of information were the newspaper index and the British Columbia Legislature Library (for the years 1981 and 1982) and the Canadian Wire Service computer database for the years 1983, 1984, and 1985, January only. Up to and including January 1985, there were at least 784 articles in Canadian newspapers dealing with AIDS of which at least 60 raised the possibility that semen or sexual contact were means of AIDS transmission. The number of relevant articles is summarized in the following Table:

Year	Number of articles	Number of articles mentioning possibility that semen or sexual contact were means of AIDS transmission
1981	0	0
1982	1	0
1983	398	24
1984	382	32
1985 (Jan. only)	12	4
Total	784	60

Based on this information, I submit that it is misleading to represent the jury's verdict in *Ter Neuzen v. Korn* as indicating that they must have thought that Dr. Korn ought to have been aware of the letter to the editor published in *The New England Journal of Medicine*.[23] Rather, I submit that by January 1985 the reasonable person knew or ought to have known that AIDS might be transmitted by semen or sexual contact. In particular, this conclusion applies to a person who happens to be a gynecologist. Indeed, Dr. Korn's knowledge about AIDS was no longer in issue at trial since he admitted during pre-trial discovery that as of January 1985 he considered AIDS to be a sexually transmitted disease. If the jury considered the source of Dr. Korn's knowledge about AIDS at all, I submit that it is more reasonable to speculate that they may have thought of their own awareness, as reasonable people, of the general media coverage of AIDS. In this regard,

22. I was able to obtain quite comprehensive information concerning newspaper coverage. I obtained some information concerning magazine coverage. I did not even attempt to determine television or radio coverage. However, the information obtained concerning newspaper coverage is, I submit, sufficient for the position I argue in this essay.

23. *See* Mascola, *supra* note 17, at 1058.

it is interesting to mention that Dr. Korn testified at trial that he read about AIDS where everybody else did, namely, in *Time* magazine.[24]

III. CONCLUSION

The novel fact situation in *Ter Neuzen v. Korn* provided a vehicle for reminding those confronting medical negligence issues that a doctor's conduct may be assessed against both the reasonable doctor standard and the reasonable person standard.

24. I mention that I searched for decisions in common law jurisdictions other than British Columbia in which an allegation against a doctor of negligent HIV transmission during an artificial insemination procedure had been tried. I located only one such case, namely, *Brown v. Shapiro*, 472 N.W.2d 247 (Wis. Ct. App. 1991) (Table, text in WESTLAW). In this case, the plaintiff was administered semen from the same donor twice a month between August 1986 and April 1987, alternating fresh and frozen semen monthly. Shortly after the final administration of semen, the donor tested HIV-seropositive. The plaintiff commenced her action in September 1990. While she had not seroconverted, evidence indicated that she would continue to be tested for HIV. After a jury trial, the defendant doctor was held not negligent in his treatment of the plaintiff. The brief reasons of the Wisconsin Court of Appeals do not touch upon the matter considered in this essay.