Journal of Contemporary Health Law & Policy (1985-2015)

Volume 10 | Issue 1 Article 16

1994

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ASSESSING THE PHYSICIAN'S STANDARD OF CARE WHEN HIV IS TRANSMITTED 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. Therefore, 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 was more elaborately stated in the Supreme

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1. Allen M. Linden: *Canadian Tort Law (fourth edition)*, 1988: Toronto, pages 115-17: "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 co-extensive 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." [quotation marks omitted]

Court of Canada:[2]

> 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.

Of particular relevance to the case I will consider in the next section of this article, this 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: ". . . it would be putting much 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 nonmedically 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. The defendant surgeon had used sponges without tapes attached, even though such sponges were available, and had not kept a count of sponges used during the operation, even though such a count would have been kept by the operating room nurses upon his request. 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.[6] On this basis, the action of the deceased's father was dismissed. On appeal, a majority of the Manitoba Court of Appeal reversed and held the surgeon liable in negligence. Commenting on the expert medical evidence concerning customary practice, Coyne, J.A., one of the majority Judges, stated:[7]

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

2. *Wilson v. Swanson*, [1956] S.C.R. 804 *per* Rand, J. The most recent statement in the Supreme Court of Canada to the same effect is *Lapointe v. Hôpital Le Gardeur*, [1992] 1 S.C.R. 351 at 361-64 *per* L'Heureux-Dubé, J., for the Court.

3. See, for example, *McLean v. Weir*, [1980] 4 W.W.R. 330 (B.C.C.A.) at 335.

4. *Crawford v. Board of Governors of Charing Cross Hospital*, London Times, December 8, 1953, page 5 (Eng.C.A.).

5. [1948] 4 D.L.R. 458 (Man. K.B.), reversed in part [1949] 4 D.L.R. 71 (Man. C.A.), affirmed [1950] 4 D.L.R. 223 (S.C.C.).

6. [1948] 4 D.L.R. 461.

7. [1949] 4 D.L.R. 86-87.

> how 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-use, 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 competence 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.

In brief unanimous reasons, the Supreme Court of Canada subsequently agreed. 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:[8]

> 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.

II. A Reminder In The Context Of Negligent Transmission Of HIV During Artificial Insemination

In *Ter Neuzen v. Korn*[9] 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 de-

8. Ellen I. Picard: *Legal Liability of Doctors and Hospitals in Canada (second edition)*, 1984: Toronto, page 234.

9. No. C870065 (British Columbia Supreme Court, filed January 7, 1987). This action was commenced in the Vancouver Registry, but the trial venue was subsequently changed to Victoria. The Court of Appeal decision, not yet reported, is at [1993] B.C.J. No. 1362 (C.A.), Vancouver Registry CA014811. Alternatively, the plaintiff alleged that the defendant had breached sale of goods law by selling her HIV-infected semen.

fendant gynecologist who performed the procedure. Ter Neuzen submitted four bases for the allegation of negligence, namely:

> 1. Dr. Korn 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 case was tried by judge and jury in the British Columbia Supreme Court. Dr. Korn admitted as a fact that Ter Neuzen had become infected with HIV as a result of an artificial insemination procedure performed by him in January 1985.[10] Considerable evidence was led concerning AIDS, HIV and HIV transmission. Some facts were clearly established. For example, HIV testing, and in particular, HIV testing of semen donors, only became available in Canada in November 1985.[11] On the other hand, there was conflicting expert medical opinion evidence as to what a physician performing artificial insemination procedures ought to have known about AIDS, HIV and HIV transmission as of January 1985 and concerning how an artificial insemination practice ought to have been conducted, again as of January 1985, in particular with respect to semen donor screening and follow up interviewing.[12]

The trial judge included the following in his charge to the jury:[13]

> In deciding what risks should have been known to Dr. Korn, evidence of medical experts of custom or general practice is one factor to be considered, but it is not conclusive. It is open to you as triers of fact to find the custom or general practice negligent.

Dr. Korn submitted that a question should be put to the jury asking them,

10. [1993] B.C.J. No. 1362 (C.A.), para. 4.

11. [1993] B.C.J. No. 1362 (C.A.), para. 7, 16.

12. [1993] B.C.J. No. 1362 (C.A.), para. 20-83. Indeed, as of 1991, despite recommended guidelines now in place concerning artificial insemination procedures, very different and sometimes disturbing approaches still existed in fertility treatment in Canada. For example, Royal Commission on New Reproductive Technologies: *Survey of Canadian Fertility Programs*, Ottawa: April 1993, page 28, reports that "some [fertility program] practitioners and even one teaching hospital do not test sperm donors for HIV, as guidelines recommend"!

13. [1993] B.C.J. No. 1362 (C.A.), para. 134.

in the event they found negligence, to specify the basis for such a finding. However, the trial judge declined to put such a question to the jury. The jury was simply asked to answer the following question: "Was there negligence on the part of the defendant which led to the infection suffered by the plaintiff?" On November 20, 1991, the jury answered, "Yes", and assessed damages of almost $900,000.

While the jury found Dr. Korn negligent, it is impossible to know the precise basis for that finding since they were not asked that question. 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 New England Journal of Medicine on October 27, 1983.[14] 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. My purpose in this article is to examine the reasonableness of the speculation that the jury must have given weight to Dr. Korn'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 Maté, and published in *The Vancouver Sun*, on February 15, 1992:[15]

> 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 of its authors, Dr. Laurene Mascola, said at the trial, Korn could not be blamed for not having seen it.
>
> It is frightening to think that the jury believed doctors must be familiar with every letter in every publication.
>
> I subscribe to the Journal: it is one of many publications to land

14. At page 1058 of *Journal.*

15. At page E9, under the title "Medical Letter: *When lawyers and doctors spar, justice often suffers*".

> 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.

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 article. 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. Maté was entirely correct. However, as the Supreme Court of Canada indicated in *Chasney v. Anderson*, Dr. Korn's conduct may also be assessed against the standard of care required of the reasonable person. As of January 1985, ought the reasonable person to have at least suspected that HIV might be transmitted during an artificial insemination procedure in which fresh semen was used?[16]

In order to comment on what the reasonable person ought to have suspected 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, whatever — that is accessible to, and indeed unavoidable by, all of us. I considered the coverage of AIDS, HIV and HIV transmission in the popular Canadian media up to January 1985. It is crucial to bear in mind that Dr. Korn's acts or omissions must not be assessed against what the reasonable person now ought to suspect about AIDS, HIV and HIV transmission, but rather against what the reasonable person ought to have suspected 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.[17] 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 at the British Columbia Legislature Library (for the years

16. Dr. Korn used only fresh, not frozen, sperm in the artificial insemination procedures performed for the plaintiff: [1993] B.C.J. No. 1362 (C.A.), para. 84.

17. 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 article.

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. While this precise evidence was not before the jury, expert medical witnesses did testify concerning the "explosion of scientific research and media coverage . . . in 1983-84" concerning AIDS, HIV and HIV transmission.[18] The number of relevant articles is summarized in the following Table:

Year	Number of articles concerning AIDS, HIV, and HIV transmission	Number of articles concerning AIDS, HIV, mentioning possibility that semen or sexual contact were means of AIDS transmission
1981	0	0
1982	1	0
1983	389	24
1984	382	32
1985 (January 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 necessarily 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*. Rather, I submit that by January 1985 the reasonable person ought to have known that AIDS might be transmitted by semen or sexual contact and therefore ought to have at least suspected that AIDS might be transmitted during an artificial insemination procedure in which fresh semen was used. In particular, this conclusion applies to a person who happens to be a gynecologist. Indeed, during hte proceedings, Dr. Korn admitted that as of January 1985 he considered AIDS to be a sexually transmitted disease. If

18. [1993] B.C.J. No. 1362 (C.A.), para. 12.

the jury considered the source of Dr. Korn's awareness of 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, it is interesting to mention that Dr. Korn testified at trial that in addition to reading medical literature, he learned about AIDS where everybody else did, namely, in "magazine articles, . . . newspaper cuttings, probably television . . . [a]ll of the media reports."[19]

Dr. Korn appealed to the British Columbia Court of Appeal. In its decision released on June 21, 1993, the Court of Appeal concluded that the reasonable person standard did not apply in assessing Dr. Korn's awareness of AIDS, HIV and HIV transmission. The Court stated:[20]

> [T]he evidence established that [as of January 1985] the state of medical knowledge about AIDS and HIV was highly variable even between highly qualified scientists. There were differences of opinion between public health authorities and practitioners in different medical communities. In our judgment, this was not the kind of case where a judge could properly instruct the jury that it could decide that a practice that conformed to what other practitioners similarly situated were following was negligent. The only proper instruction to be given on at least [this] part of the case was that the jury should decide whether the defendant conducted himself as a reasonable physician would in similar circumstances. In our judgment, that required the jury to confine itself to prevailing standards of practice.

With respect, I submit that the logic of the Court of Appeal's reasoning is flawed. The Court stated in effect that because there was conflicting medical opinion as to what Dr. Korn's awareness of AIDS as of January 1985 ought to have been, the jury could not be invited to apply the reasonable person standard to that issue. But this is an "apples and oranges" error. The only inference which the existence of this conflicting evidence invites is that Dr. Korn was entitled to a verdict that he was not negligent if the jury accepted any one of the conflicting medical opinions (or, in this rather complicated case, some weaving together of two or more of the offered opinions), concluded that the practice represented by that opinion (or combination of opinions) was not itself negligent as determined by applying the reasonable person standard, and found that Dr. Korn's practice conformed to that practice. That is, the conflict in the medical opinion evidence does not render the reasonable person standard irrele-

19. [1993] B.C.J. No. 1362 (C.A.), para. 88.
20. [1993] B.C.J. No. 1362 (C.A.), para. 144.

vant. Rather, the applicability of the reasonable person standard depends entirely on the answer to the question: can a nonmedically trained person understand the facts of the case so that the usual trier of fact (a jury or a judge) can determine the issue of negligence without deferring that determination to the profession whose member is alleged to have been negligent? I submit that the facts in this case, and the conflicting medical opinions concerning what ought to have been Dr. Korn's awareness of AIDS as of January 1985, are matters which a non-medically trained person can understand. I submit that the trial judge was, therefore, correct in leaving with the jury the possibility that they might determine, on the reasonable person standard, that any of the doctor witnesses' standards of AIDS awareness could be rejected as itself negligent. In particular, it is possible that the jury, in determining the content of the reasonable person standard on this aspect of the case, concluded that the explosion in media coverage of AIDS, HIV and HIV transmission, including coverage linking semen or sexual contact with the spread of AIDS, warranted their finding that Dr. Korn had not met the reasonable person standard of AIDS awareness.

I submit that the Court of Appeal's rejection of the relevance of the reasonable person standard on the issue of Dr. Korn's awareness of AIDS, HIV and HIV transmission may have been in part due to a misapplication by it of a recent Supreme Court of Canada decision, *Lapointe v. Hôpital Le Gardeur* (*Lapointe*).[21] The essential facts in this case were as follows. A five year old girl suffered a serious cut to her elbow which resulted in extensive blood loss. She was taken to a local hospital where some treatment was applied. She was then transferred to a pediatric hospital in Montreal. There she suffered cardio-respiratory arrest which resulted in permanent brain damage. The plaintiff patient alleged that the defendant doctor at the first hospital had been negligent in deciding to transfer her to the second hospital when he did, in not proceeding to a blood analysis for typing for transfusion purposes and not transfusing her before transfer to the second hospital, and in not transmitting sufficient information to the second hospital.

The patient's action was dismissed at trial. She appealed to the Court of Appeal for Quebec, which by a majority allowed her appeal. The doctor appealed to the Supreme Court of Canada, which unanimously al-

21. [1992] 1 S.C.R. 351. The Court of Appeal stated: "While [*Lapointe*] was decided under the Civil Code of Quebec, we do not understand the law there stated to be different from the rest of Canada." See [1993] B.C.J. No. 1362 (C.A.), para. 98. That assertion is not contentious.

lowed his appeal and restored the trial judgment dismissing the patient's action.

It is worth emphasizing that the only issue in the Supreme Court of Canada was whether the Court of Appeal had erred in substituting its findings of fact for those of the trial judge. The Supreme Court held that it had. The trial judge had not proceeded on the basis of any error of law and had not made any finding of fact inconsistent with the evidence.

In its reasons in *Ter Neuzen v. Korn*, the British Columbia Court of Appeal quoted extensively from *Lapointe v. Hôpital Le Gardeur*[22] and then stated:[23]

> There are cases where it has been decided that a trial judge or jury is at liberty to find a practice or standard of practice negligent. It is arguable that the passages we have already quoted from *Lapointe* seriously weaken the force of these authorities, particularly where medical science is concerned . . . .

I submit that it is difficult to know why the Court of Appeal placed such emphasis on *Lapointe* (other than that it was the "latest word" from the Supreme Court on medical negligence) or why it asserted that *Lapointe* may have weakened the authority of decisions such as *Chasney v. Anderson*. First, *Lapointe* said nothing new concerning how to deal with a case in which there is conflicting medical opinion evidence (which is definitely not to suggest that something new needed to be said!). L'Heureux-Dubé, J.'s reasons, for the Court, rely exclusively on previous decisions. Second and more pertinently to the subject of this article, however, *Lapointe* said nothing whatsoever about a case such as *Chasney v. Anderson* in which the trier of fact can apply the reasonable person test in determining whether there was negligence on the part of a doctor. This is not surprising, since the reasonable person (reasonable juror, reasonable judge) is incompetent to assess when a seriously injured patient such as the plaintiff in *Lapointe* should be transfused, when blood typing for transfusion purposes should be done, when she should be transferred from a local hospital to a pediatric hospital or what information should be transmitted with her to the receiving hospital. On the other hand, I submit that a reasonable person (reasonable juror, reasonable judge) is competent, given the extensiveness and the particular content of the media coverage of AIDS, HIV and HIV transmission, to conclude that the reasonable person (including a gynecologist) ought to have suspected that using fresh

22. [1993] B.C.J. No. 1362 (C.A.), para. 98.
23. [1993] B.C.J. No. 1362 (C.A.), para. 136.

semen during an artificial insemination procedure involved the risk of HIV infection. In short, I submit that on its facts *Lapointe* is readily distinguished from *Ter Neuzen v. Korn.*

The inadequacy of Dr. Korn's awareness of AIDS, HIV and HIV transmission was of course not the only allegation of negligence which Ter Neuzen made. With respect to Ter Neuzen's other allegations of negligence, the Court of Appeal did hold that the jury could on the evidence have properly found Dr. Korn negligent in not adequately screening semen donors or conducting follow up interviews with them. In this regard, the Court indicated both that there was expert medical opinion evidence upon which to base such a finding and also that, perhaps, "the jury could be given greater latitude in determining the standard of care required on [these] parts of the case".[24] That is, the reasonable person standard might be applicable to those aspects of the case concerning donor screening and follow up interviewing.

Of course, the Court of Appeal was in the same position as Dr. Maté was and I am, concerning the basis for the jury's finding of negligence against Dr. Korn: we simply do not know what the basis of that finding was. However, the Court of Appeal specifically recognized the possibility that the jury may have rejected the reasonable doctor standard in assessing Dr. Korn's knowledge about AIDS, HIV and HIV transmission and applied instead the reasonable person standard.[25] Given its holding that this would not have been correct, the Court of Appeal ordered a new trial.[26]

The plaintiff is currently seeking leave to appeal to the Supreme Court of Canada.

24. [1993] B.C.J. No. 1362 (C.A.), para. 152.
25. [1993] B.C.J. No. 1362 (C.A.), para. 153.
26. [1993] B.C.J. No. 1362 (C.A.), para. 156.

III. CONCLUSION

Regardless of the ultimate outcome in *Ter Neuzen v. Korn*, its novel fact situation provides 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.[27]

27. 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 (1991, Court of Appeal of Wisconsin). In that 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 article.