Focus

HEALTH LAW

Risks and consequences

Supreme Court shapes law on informed consent, scope of disclosure

Paul McGivern
Natalia Ivolgina

The Supreme Court of Canada earlier this year considered the law on informed consent in two landmark decisions: *Ediger v. Johnston* [2013] S.C.J. No. 18, and *Cojocaru v. British Columbia Women's Hospital and Health Centre* [2013] S.C.J. No. 30. In *Ediger*, the court discussed how the duty to inform relates to the standard of care. In *Cojocaru*, the court focused on the scope of disclosure which physicians must make in order to meet the standard of care for informed consent. The cases highlight two important but often overlooked aspects of the law of informed consent — the obligation on the part of the physician to bring home to the patient the real-world implications should the risks inherent in any medical procedure materialize, and the need on the part of the plaintiff to prove "double causation" in consent cases.

In *Ediger*, Cassidy Ediger suffered a severe brain injury at birth after the defendant physician attempted a mid-level forceps procedure which carries a risk of fetal bradycardia that, if not remedied, may result in brain damage. Because of the risk, the standard of care requires that access to an emergency Caesarean section be "immediately available." On the consent issue, the doctor conceded that he did not warn Ediger of this risk, and did not check on the availability of the operating room. During the procedure, a fetal bradycardia occurred and the OR was not available. The trial judge concluded that the doctor should have ensured that the OR was immediately available before attempting the procedure, and that since "minutes mattered," the trial judge found that both negligence and causation had been proven.

The SCC rejected the "immediately available" interpretation proposed by the defendant, stating that, "The problem with the standard of care, as interpreted by Dr. Johnston, is that it would be unresponsive to the risk in question and potential harm arising from it…we have no difficulty concluding that the trial judge contemplated a standard of care that would have been responsive to the recognized risk of fetal bradycardia associated with mid-level forceps deliveries."

In relation to the consent issue, the court stated that, "under Dr. Johnston's version of the 'immediately available' standard of care, it would not have been possible to deliver Cassidy in less than 18 to 20 minutes, thereby making severe brain damage a virtual certainty upon realization of the risk of bradycardia. If such injury were a virtual certainty, Dr. Johnston's duty to obtain informed consent would have included the duty to advise Mrs. Ediger that proceeding with the mid-level forceps delivery included the risk of bradycardia, and that in the event that that risk materialized, her baby would necessarily be born with severe and

Negligence, Page 16

Focus HEALTH LAW

Decision changes rules for discipline hearings

Marc Spector
Bernard LeBlanc

ASISEEIT / ISTOCKPHOTO.COM

A recent ruling by the Ontario Divisional Court makes everyone's job of policing professionals and protecting the public easier.

Regulated health care practitioners have always had to cooperate in an investigation and answer questions, but a 2010 ruling (*Liberman v. College of Physicians and Surgeons of Ontario* [2010] ONSC 337) raised concerns about the extent to which information obtained from them during investigations could be used. At the time, the court suggested it would be unfair to force the practitioner to answer questions during an investigation into their conduct, and later allow prosecutors to throw those statements back at them when it really counted at a discipline hearing.

In that case, before a discipline hearing could take place, a preliminary motion was held to determine if restrictions should be placed on the doctor's certificate of registration. During the preliminary motion, Dr. Bruce Liberman objected when the College of Physicians and Surgeons of Ontario tried to use against him statements he had made to their investigator, and the doctor appealed to Divisional Court. The judge agreed with him, pointing to the *Evidence Act* ("the answer so given shall not be used…in evidence against him or her in any civil proceeding or in any proceeding") and saying the discipline committee "ought not to refer to that evidence in the proceeding taken against Dr. Liberman."

Liberman changed the way that some regulators approached investigations, especially the extent to which they interviewed practitioners. Could they rely on those statements?

However, on Oct 16, the Divisional Court in *Yazdanfar v. College of Physicians and Surgeons of Ontario* [2013] ONSC 6420, changed things yet again. Dr. Behnaz Yazdanfar was appealing a Discipline Committee finding of professional misconduct against her. One of her reasons was that, as in *Liberman*, the committee had used against her statements she had provided to the college's investigator.

Both *Yazdanfar* and *Liberman* arose from the death of a real estate agent after undergoing liposuction surgery; Yazdanfar performed the surgery, while Liberman was the anesthetist. Both doctors had asked the Divisional Court to comment on the use that could be made of their statements to an investigator; the same facts were based on the same case, but we had two very different results with the decision in 2010 and, more recently, this fall.

With the *Yazdanfar* decision disallowing her appeal, it is "game on" again for prosecutors to use anything practitioners say, and in any way they want, at a discipline hearing. But then, we had always felt that way. We thought that the earlier *Liberman* decision was incorrect for several reasons:

1. The relevant provision in the *Evidence Act* (and similar ones in *Public Inquiries Act, 2009*) was meant to prohibit the use of compelled interviews in other proceedings. However, in the regulatory context, the discipline hearing should be viewed as a continuation of the investigation. It is all one proceeding.

2. Our courts have been expanding the scope of regulators to police themselves (such as *Gore v. College of Physicians and Surgeons of Ontario* [2009] O.J. No. 1400, and *Sazant v. College of Physicians and Surgeons of Ontario* [2012] O.J. No. 5076), while *Liberman* stood alone in bucking this trend.

3. The passages in *Liberman* that caused concern were not necessary for the judgment. The point was not fully argued.

We felt justified when, in *Yazdanfar*, the court said that "in this case, treating the [Discipline] Committee hearing as a separate or other proceeding would effectively undermine the purpose of the regulatory framework and the onerous obligation placed on self-regulating bodies to protect the public."

The *Yazdanfar* decision resets the stage and recognizes that cases involving professional discipline should not be treated like a criminal trial. In doing so, the court pointed to the Supreme Court decision in *R. v. Fitzpatrick* [1995] S.C.J. No. 94, which said that "the right against self-incrimination has a much more limited application in the regulatory context."

Yazdanfar reflects the law as it had always been, not only for health care practitioners, but also for securities regulators (*Alberta (Securities Commission) v. Brost* [2008] A.J. No. 1071), lawyers (*Nova Scotia Barristers' Society v. Romney* [2004] NSBS 7), and even racehorse trainers (*Ontario Racing Commission v. Hudon* [2008] O.J. No. 5313), as well as many other professions.

Once again, we are advising our clients — which consist of more than three dozen regulators — to continue speaking to practitioners (even when the practitioners may resist doing so) in order to get all the facts. As a result, we may very well, in turn, be relying on those interviews should there be a disciplinary hearing.

Marc Spector and Bernard LeBlanc are recognized by the Law Society of Upper Canada as specialists in health law, and partners with Steinecke Maciura LeBlanc, the only law firm in Canada acting exclusively on behalf of professional regulators. LeBlanc is also a specialist in civil litigation.

Negligence: The need of the plaintiff to prove double causation

Continued from page 14

permanent brain damage because of the time required to arrange for surgical back-up."

Ediger thus reinforces an obligation of the medical community to practise within such standards of care that are responsive to the risks that treatments carry and for which informed consent is sought. It reinforces a common-sense and intuitive notion that a patient needs to be advised not only on the risks of a proposed procedure, but also on the consequences if such risks were to materialize.

Cojocaru was another obstetrical case. The infant plaintiff's mother had previously given birth to a child by C-section. Cojocaru's obstetrician advised her to attempt a vaginal birth, which is commonly referred to as "vaginal delivery after Caesarean section," or VBAC. During her labor, Ms. Cojocaru experienced a uterine rupture (a recognized risk of VBAC) and the plaintiff was born with brain damage.

The SCC held that informed consent to VBAC had not been obtained. The court stated that even if the physician conveyed the 1-in-200 statistical probability of uterine rupture to her, there was "no indication that the significance of that statistic was brought home to Ms. Cojocaru." The court concluded that simply conveying the statistical probability of the risk to the patient is not in itself sufficient to meet the standard of care with respect to disclosure — the patient must be advised of not only the risk, but also of the consequences if the risk is to materialize.

> Ediger thus reinforces an obligation of the medical community to practise within such standards of care that are responsive to the risks that treatments carry and for which informed consent is sought.

Paul McGivern
& Natalia Ivolgina
Pacific Medical Law

Another significant point can be taken from these two judgments. While not discussing the point expressly, it is clear from a review of the judgments that the court accepted the proposition that merely satisfying the "modified objective" standard of causation, outlined in cases such as *Arndt* v. *Smith* [1997] 2 S.C.R. 539, is not sufficient to satisfy the causation requirement in a consent case. Rather, the patient must not only prove that:

1. A reasonable patient in his/her position, properly informed of the material risk, would not have undergone the procedure; and also that

2. On the balance of probabilities, the procedure caused the injury that the plaintiff complains of (*Clements* v *Clements* [2012] SCC 32).

This need to prove "regular" causation is often overlooked and has resulted in the dismissal of many cases (See, for example, *Seney* v. *Crooks*, 1998 ABCA 316, 166 DLR (4th) 337).

Paul McGivern is a partner at Pacific Medical Law, and an adjunct professor at the University of British Columbia. He was counsel in both Ediger and Cojocaru. Natalia Ivolgina is an associate at Pacific Medical Law.

We want to hear from you!
Send us your verdict:
comments@lawyersweekly.ca