

# Recent Decisions

## Kelly v. Lundgard – Obligations of Physicians in Medical Legal Reports

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### **A. Introduction**

*Kelly v. Lundgard*<sup>1</sup> is a recent decision of the Alberta Court of Appeal which reestablishes, not without some confusion, the principles applicable to rare claims against physicians arising from alleged misstatements in medical legal reports concerning prognosis.

Ms. Kelly was a 37 year old single woman when she was injured in a motor vehicle accident in 1990. She sustained intestinal injuries from wearing a seatbelt. She was seen by a family physician who identified the severity of her injuries and had Ms. Kelly rushed to Edmonton by air ambulance for surgery. A general surgeon performed surgery and found that Ms. Kelly had severe peritonitis. He cleaned the infection and performed a resection and ileostomy. Ms. Kelly was discharged and made a fine recovery. She returned to the surgeon later in 1990 for a reconnection of the small intestine and closure of the ileostomy. It was agreed by all that the care she received was exemplary, and in fact, the physicians saved her life.

In late 1990, Ms. Kelly retained a lawyer to represent her in a claim against the driver of the car in the motor vehicle accident.

There were two requests made by Ms. Kelly's lawyer to the family physician, and two responses.

### **January 7, 1991 Request**

The Plaintiff's lawyer wrote a letter to the family physician dated January 7, 1991. The relevant parts read:

The information which we wish is a chronological history in brief form, the present situation and the prognosis.

It may be that a copy of the discharge summary with respect to the first hospitalization period plus a few notes from you concerning any visits prior to the first hospitalization and the following treatment from the second operation is all that is required.

The family physician's response was dated January 15, 1991. After describing the course of treatment and the discharge on September 12, 1990, the family physician said:

I have not seen Pacita since that time. I understand that she has had her ileostomy closed and is making a good recovery.

I do not expect any long term sequelae to this injury and her prognosis for full recovery is excellent.

### **June 17, 1991 Request**

The lawyer wrote a further letter to the family physician dated June 17, 1991. The relevant parts are:

... we had Pacita in to see us on June 14, 1991, with a view to seeing if the healing process was such that it was probably a good time for a final report. Pacita told us that she was unable to see you on this date and was complaining about pains in her stomach and diarrhea and was going to see Mr. [sic] Mayer about this problem.

We would request at this time that, in consultation with Dr. Mayer, you arrange to see Pacita and when you feel that you can make a realistic prediction about the future we would be obliged for your further report.

So long as Pacita has problems that are related to the original accident we will not approach the insurance with a view to settlement.

The family physician replied by letter of July 15, 1991. The relevant parts of this short letter are:

Pacita denies having any residual disability from her injuries. Her bowels are working normally and she does not seem to have any ongoing pain. ... Her abdomen is healed and was non tender.

Pacita seems to have made a full recovery from her perforated bowel and peritonitis and I do not foresee any long term sequelae.

At trial, the Plaintiff also alleged oral representations made by the surgeon while she was in hospital. Ms. Kelly told her lawyer that she had spoken to the surgeon about her ability to conceive a child and was given assurances. The trial Judge found as a fact that Ms. Kelly had not established her conversation with the surgeon as she recalled it.

A settlement in the motor vehicle case occurred, without accounting for infertility.

Prior to making that settlement, Ms. Kelly and her lawyer discussed Ms. Kelly's concerns about possible infertility. The lawyer made no specific inquiries of either doctor with respect to that issue. The lawyer was not joined as a third party in this litigation, and accordingly any question of the lawyer's negligence was not decided. Nonetheless, there is an interesting discussion of that question in the dissenting opinion of Justice Fruman. She raises the question, in this author's respectful view correctly, whether all of this might not have been avoided if the lawyer had been more specific in his inquiries, particularly in view of the evidence from the family physician and surgeon that had they been made aware of Ms. Kelly's concerns about infertility they would have arranged consultation with a gynecologist. The majority decision leaves open the prospect that in future cases, that issue may still be an important one for consideration.

## **B. The Trial Judgment**

### **1. Standard of care in providing medical legal reports dealing with prognosis**

Veit J. concluded that the informed consent standard applies to statements made by a physician in a medical legal report dealing with prognosis. This meant that when preparing a medical legal report including a prognosis, a physician must

inform a lawyer about the major known risks of the condition, operation, illness or disease, and must also inform the lawyer about those risks that are less common but are very grave if they do occur.

### **2. Expert evidence of accepted standards**

Veit J. found that the evidence of the experts called, a general surgeon and family practitioner, was evidence of their own attitude and practice, but did not constitute evidence of general practice. She concluded however that even if their evidence was considered to be evidence of a general standard, she would reject that evidence and impose her own standard. She said this is not a technical issue on which the court needs guidance from experts. She said it is a question of common sense and fairness on which the court is competent to rule.

### **3. Application of the standard in this case**

Veit J. concluded the evidence showed the doctors knew the Plaintiff suffered from adhesions, that adhesions are a possible cause of infertility, and that infertility is a grave risk. On the informed consent standard, she found the physicians were bound to identify that risk, and failed to do so.

In concurrent reasons, Justice Veit found on the facts that the Plaintiff had failed to prove that the surgeon had made a negligent misrepresentation to her while she was in the hospital. She concluded however that the written statements made by the physicians that there were no long term problems constituted negligent misrepresentations on the evidence before her. She concluded that the Plaintiff relied on the misrepresentations to her detriment.

### **4. Limitation of Actions Defence**

Veit J. concluded that section 55 of the old Alberta *Limitation of Actions Act*<sup>2</sup> did not apply to actions for negligent misrepresentations arising out of the issuance of medical legal reports, and accordingly, did not accept the limitations defence.

### **5. Damages**

Veit J. concluded that:

- a. On the balance of probabilities the evidence established that the Plaintiff's infertility was caused by the motor vehicle accident;
- b. The Plaintiff was not contributorily negligent;

c. While the lawyer had not been third party, she nonetheless concluded the lawyer had acted reasonably. She found it was not up to the lawyer to suggest potential risks to the physicians even though there had been a discussion between the lawyer and the Plaintiff where the Plaintiff had expressed concern about fertility;

d. The correct measure of damages was \$100,000.00.

## 6. Interest

Veit J. found that the cause of action arose when the Plaintiff signed the motor vehicle accident settlement agreement on January 2, 1992. She concluded the Plaintiff might have expected a settlement or judgment of \$20,000.00 if the infertility issue had been brought to conclusion in 1992.

## C. The Court of Appeal Decision

### 1. The standard of disclosure for medical legal opinions about prognosis

The majority (Chief Justice Fraser and Justice Fruman) found that the informed consent standard of disclosure does not apply to medical legal reports. They said that in the case of medical legal opinions about prognosis, the appropriate standard is the disclosure that could be expected of a reasonable and diligent doctor in the same circumstances. Justice Fruman said this is fact dependent and will be based on the specific questions asked by the lawyer. She concluded the analysis generally would require:

a. an evaluation of the probability that the patient would develop the missed condition, and an interpretation of the precise questions posed by the lawyer, to determine whether a proper response required disclosure of the condition. For example, assuming the lawyer's questions would elicit information about conditions compensable in damages, the analysis would require a determination whether, at the time the opinion was given, development of the condition was a real and substantial possibility, and not merely speculative;

b. an objective assessment of the investigations and response which a reasonable and prudent doctor, in the same circumstances, might have undertaken; and

c. an examination of the unique knowledge and circumstances of the doctor who authored the report.

Chief Justice Fraser agreed, emphasizing that the appropriate standard of care is inextricably linked to the questions posed by the person requesting the report.

Chief Justice Fraser also agreed with Justice Fruman that no sound policy reasons exist justifying the application of a different standard for physicians than for other professionals.

Justice Conrad in dissent said the test for negligent misrepresentation is "whether the physician exercised that degree of care that could reasonably be expected of the hypothetical, similarly situated, prudent and skilled physician in all of the circumstances to ensure that the statements were accurate, true and not misleading." She said "the nature of the occasion, the questions asked, the purpose for which this statement is made, the foreseeable use of this statement, the damage that would occur, the status of the advisor and the general level of competence observed by others similarly situated are all relevant factors to be considered." She went on to say that while she would favor the approach of the trial judge in concluding that a physician must disclose all possible risks involving grave consequences every time there is a request for a prognosis, she found it unnecessary to go that far in this case, because the physicians represented Ms. Kelly's condition as one of full recovery when they knew and accepted the existence of a risk of infertility.

### 2. Expert evidence of the accepted standard

Justice Fruman concluded, in accordance with *ter Neuzen v. Korn*,<sup>3</sup> that a court is permitted to reject a standard practice in limited circumstances only. She quoted, with approval, Justice Picard and Robertson's text, *Legal Liability of Doctors and Hospitals in Canada*,<sup>4</sup> to the effect that when a plaintiff alleges that a doctor has breached a standard of care, the doctor may call evidence to show that his or her actions were consistent with approved practice. Justice Fruman found that while a defence of standard practice is more compelling in a treatment situation, the same principles apply to the preparation of professional opinions. Deference is to be shown to professional standards although a court is entitled to reject the standard practice if it fails to adopt obvious and reasonable precautions.

Chief Justice Fraser agreed with Justice Fruman's analysis generally, adding that "while evidence that a doctor's actions in response to a request for a medical legal report were consistent with approved practice is a relevant consideration, that approved practice may not necessarily be determinative of the issue: *ter Neuzen*." She then went on to say that on these facts, quite apart from what the family physician was obliged to disclose when asked to provide a medical legal report, she agreed with Justice Conrad that the statements made by the family physician constituted negligent misrepresentation.



In dissent, Justice Conrad went further and concluded that “an ordinary trier of fact can make the decision without proof of the professional standard of care relating to medical legal reports.” She agreed with the trial judge’s view. She was prepared to say that “while an established practice of physicians would be a factor to consider, it is not determinative.”

Justice Conrad said:

If the ordinary trier of fact can determine this question in a treatment case without expert evidence (per *ter Neuzen*), it follows that in non-treatment cases, where the communication of the information is crucial (as opposed to the possession of the knowledge to communicate), the ordinary trier of fact can readily determine whether reasonable care was taken in the making of this statement in the circumstances, even without expert evidence of a general standard.

### 3. Limitations

The majority (Chief Justice Fraser and Justice Fruman) found that a claim for negligent misrepresentation in a medical legal report by a treating physician is included in “negligence or malpractice” referred to in section 55 of Alberta’s old *Limitation of Actions Act*, and the provision of a medical legal report by a treating physician is a “professional service” within the context of that section. Accordingly, the action against the surgeon was dismissed as it was statute barred.

With respect to the family physician, Justice Fruman concluded that because infertility was found to be the result of the injuries the Plaintiff suffered in the motor vehicle accident, her subsequent visits to the family physician in September 1992 related to the same original ailment and therefore extended the limitation period. She accordingly found the claim was not statute barred.

The Chief Justice agreed with Justice Fruman’s analysis of the limitation issue.

Justice Conrad was in dissent. She agreed with the trial judge that the provision of medical legal reports did not fall within the wording of the old section 55 of the *Limitation of Actions Act*.

### 4. Were damages correctly assessed?

The majority (Chief Justice Fraser and Justice Conrad) found that the trial judge erred in her approach to general damages. Justice Conrad found that damages are properly

assessed as at the date the Plaintiff’s action for damages for infertility against the driver of the motor vehicle might, with reasonable diligence, have been tried or settled. She noted there may be circumstances where it would be appropriate to consider the date of settlement. She found however that evidence that a settlement would likely have occurred would be required.

In her view, there was no evidentiary basis to support that conclusion in this case. Justice Conrad accordingly concluded that this case with reasonable diligence would have proceeded to trial in late 1994 or early 1995, and an award at that time of \$65,000.00 for infertility would have been appropriate. She noted that had the case proceeded to trial in that way, the Plaintiff would have been entitled to pre-judgment interest from the date of the loss. Accordingly, Justice Conrad assessed damages for loss of fertility at \$65,000.00 together with interest from August 14, 1990, the date of the motor vehicle accident.

### 5. The claim against the family physician’s professional corporation

The majority (Chief Justice Fraser and Justice Fruman) found that medical legal reports can only be prepared by a registered practitioner under Alberta’s *Medical Profession Act*<sup>5</sup> and not by a professional corporation. Justice Fruman concluded that if a claim against a doctor is statute barred, there can be no vicarious liability upon the doctor’s employer, a professional corporation. Accordingly, she found the protection given to a physician in section 55(a) of the old *Limitation of Actions Act* extends to the doctor’s professional corporation.

### D. Comments

A proper analysis of this area of the law starts by looking at the elements of negligent misrepresentation set by the Supreme Court of Canada in *Queen v. Cognos Inc.*<sup>6</sup> and accepted by all three Justices in this case.

1. There must be a duty of care based on a “special relationship” between the representor and the representee;
2. The representation in question must be untrue, inaccurate, or misleading;
3. The representor must have acted negligently in making the misrepresentations;
4. The representee must have relied, in a reasonable manner, on the misrepresentations; and
5. The reliance must have been detrimental to the representee in the sense that damages resulted.

The majority of the Court of Appeal concluded that there was no proper basis for applying a different standard for physicians than for other professionals. As a statement of law, the Court of Appeal majority has restored the proper legal approach in actions alleging misrepresentation.

As to whether a doctor has acted negligently (the third element in the test), the Court of Appeal by its majority has properly characterized the legal test, saying the following.

1. It rejects the trial judge's application of the informed consent standard, and instead, finds that in the case of medical legal opinions about a patient's prognosis, the appropriate standard is the disclosure that could be expected of a reasonable and diligent doctor in the same circumstances. They concluded that this is fact dependent and will be based on the specific questions asked by the lawyer requesting the medical legal report.
2. The majority also said the analysis will generally require:
  - a. an evaluation of the probability that the patient would develop the missed condition, and an interpretation of the precise questions posed by the lawyer, to determine whether a proper response required disclosure of the condition;
  - b. an objective assessment of the investigations and responses which a reasonable and prudent doctor, in the same circumstances, might have undertaken; and
  - c. an examination of the unique knowledge and circumstances of the doctor who authored the report.
3. Expert evidence as to whether a particular response to a request for a medical legal report is consistent with approved practice is a relevant consideration, though in keeping with the principles set out in *ter Neuzen*, may not necessarily be determinative of the issue. That represents a rejection of the trial judge's finding that she was free to reject the expert evidence and set her own standard as a matter of "common sense and fairness."

On the facts, altogether apart from the standard of disclosure, the majority concluded the family physician, given her trial evidence, had in fact made an inaccurate or misleading statement (the second element in the test). The family physician's unqualified statements that she did not foresee "any long term sequelae" [emphasis added] and that the Plaintiff's prognosis for full recovery was excellent, remembering that the family physician conceded at trial that at the time she was fully aware that adhesions such as this can lead to infertility, makes this an unfortunate set of facts. The caution to be offered to physicians here is that care

should be taken in making broad statements if their care and treatment (as usually will be the case) is more focused on particular problems.

On the limitation findings, the Court of Appeal has properly stated the principles. It is the application of those principles in this case which is problematic, but largely fact driven. The Court of Appeal was prepared to extend the termination of professional service dates in the case of the family physician to the subsequent period when she consulted with the Plaintiff about infertility problems. In Alberta, this is really no longer a material issue under our new *Limitations Act*,<sup>7</sup> though there still may be similar wording in some of the other common law provinces.

On the question of damages, Justice Conrad, this time in the majority, did say as a matter of principle that the trial judge was wrong in her approach to general damages. She concluded that damages are properly assessed as at the date the Plaintiff's original action for damages for infertility against the driver of the motor vehicle might, with reasonable diligence, had been tried or settled. She was correct to that extent. While Justice Conrad, speaking in the majority on this point, said the trial judge was right in rejecting the argument for discounting damages for risk of losing the lawsuit, she did leave that possibility open for another case. I would respectfully suggest she has wrongly placed the burden on the Defendants rather than the Plaintiff, where it belongs. However, here again, the conclusion is largely driven by the Court of Appeal's view of these particular facts.

## **E. Conclusion**

The Alberta Court of Appeal has restored the proper test in its rejection of the informed consent standard set by the trial judge. Moreover, the majority affirmed the need for and relevance of expert evidence on accepted practice in determining whether the physician acted negligently on the facts of the case, which was also a reversal of the trial judge's views. The Court has recognized the potential "*ter Neuzen*" exception, but that is not, as a statement of principle, an extension of existing case law. The majority's conclusion that the family physician was responsible for negligent misrepresentation in this case is not based on a rejection of the evidence on the accepted standard, but rather on the particular evidence in this case at trial which led the majority to conclude that altogether apart from standard issues, the family physician made an inaccurate or misleading statement in her medical legal report. As with almost all medical malpractice cases, this decision underlines the importance of marshalling facts and expert evidence as a crucial phase in developing a case, either from the plaintiff or defence perspective.

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1. 2001 ABCA 185.
2. R.S.A. 1980, c. L-15, as rep. by *Limitations Act*, R.S.A. 2000, c. L-12.
3. (1995), 127 DLR (4<sup>th</sup>) 577 (S.C.C.).
4. E.I. Picard & G.B. Robertson, *Legal Liability of Doctors and Hospitals in Canada*, 3rd ed. (Scarborough: Carswell, 1996).
5. R.S.A. 2000, c. M-11.
6. [1993] 1 S.C.R. 87.
7. R.S.A. 2000, c. L-12.