SUPREME COURT OF NOVA SCOTIA
Citation: *Thorburn v. Grimshaw*, 2024 NSSC 15

Date: 20240115
Docket: 471263
Registry: Halifax

Between:

Daphne Thorburn

v.

Dr. Robert Grimshaw and The Nova Scotia Health Authority

DECISION ON MOTION FOR SUMMARY JUDGMENT

Judge:	The Honourable Justice Scott C. Norton
Heard:	December 14, 2023, in Halifax, Nova Scotia
Decision:	January 15, 2024
Counsel:	Daphne Thorburn, unrepresented Plaintiff/Respondent Colin Clarke KC, for the Defendant/Applicant

By the Court:

Introduction

[1] In this proceeding, Daphne Thorburn claims against the Defendant, Dr. Robert Grimshaw, for damages alleged to have been caused by his medical negligence and/or a failure to obtain her informed consent. Dr. Grimshaw brings this motion for dismissal of both causes of action against him on three separate and alternative grounds: (1) summary judgment on evidence, pursuant to *Civil Procedure Rule* 13.04; (2) failing to bring the matter to trial within a reasonable time pursuant to *Rule* 82.18; and (3) that the action is an abuse of process, pursuant to *Rule* 88.02.

[2] The underlying action is framed against Dr. Grimshaw in medical negligence and failing to obtain informed consent for a surgical procedure. The action is also taken against the Nova Scotia Health Authority ("NSHA") on the basis that NSHA operated the hospital where the surgery took place, employed staff, including resident doctors who assisted in the surgery, and contracted with Dr. Grimshaw to provide the surgical services performed on the Plaintiff. NSHA did not participate in the hearing.

[3] In support of the motion, Dr. Grimshaw filed two affidavits by Erin Mitchell, an associate lawyer at the firm representing him, filed on July 19, 2022 and June 30, 2023. He also relies on an expert report of Dr. Allan Covens, filed with the court on June 17, 2022. Ms. Thorburn filed an affidavit on July 27, 2022. Dr. Grimshaw filed a pre-hearing brief on June 30, 2023 and Ms. Thorburn filed a brief on January 27, 2023 and a supplemental brief on November 7, 2023.

[4] There was no cross-examination of witnesses at the hearing.

[5] I find that the motion for summary judgment on evidence should be granted for the reasons that follow. In light of this finding, it is not necessary to consider the motions for delay and abuse of process.

Background

[6] Dr. Grimshaw is a qualified medical practitioner trained in the specialties of gynecology and obstetrics. The Plaintiff saw Dr. Grimshaw in consultation on November 6, 2015 for a mass on her right ovary. He advised that in order to determine if the mass was malignant or benign it had to be removed and

recommended removal. The surgery was conducted on December 10, 2015 at the Victoria General Hospital site of the Queen Elizabeth II Health Sciences Centre ("QE II") in Halifax, Nova Scotia.

[7] Following the completion of the surgery, the Plaintiff had to be returned to the operating room to stop internal bleeding.

[8] The Plaintiff alleges that as a result of the surgery she was left with a scar that is essentially a surface cavity that she considers ugly and disfiguring and that she did not anticipate being disfigured to this extent by surgery.

[9] The Statement of Claim alleges two bases for liability against Dr. Grimshaw. The first is that he was negligent, in particular:

(a) He failed to uphold the proper standard of care owed to her as part of his professional responsibility by failing to exercise due care and skill before, during and after the surgery.

(b) He failed to exercise proper supervision of young resident doctors involved in her care.

(c) He failed to inform her of the role the young resident doctors were to play in the surgeries.

(d) He failed to maintain her health.

(e) He failed to inform her as to what surgical procedures she was undergoing.

(f) He failed to inform her of the risks associated with her choices.

(g) He failed to seek her informed consent for the medical procedures she was undergoing.

The second is that Dr. Grimshaw conducted the operation without informed consent constituting an "assault".

Relevant Procedural History

[10] The Plaintiff initiated this action by Notice of Action and Statement of Claim issued December 8, 2017. Dr. Grimshaw filed a Notice and Statement of Defence on December 10, 2019. The NSHA filed a Notice and Statement of Defence on December 17, 2019.

[11] On February 23, 2022, counsel for Dr. Grimshaw sent a letter to the Plaintiff enclosing a copy of their expert report from Dr. Alan Covens. On June 17, 2022, Dr. Grimshaw filed the expert report of Dr. Covens with the court.

[12] On May 17, 2022, Dr. Grimshaw filed a Notice of Motion for summary judgment on the evidence pursuant to *Civil Procedure Rule* 13.04 to be heard on August 3, 2022. On July 27, 2022, the Plaintiff filed the Affidavit of Daphne Thorburn in response to the motion.

[13] On August 3, 2022, the parties appeared in front of the Honourable Justice Gail Gatchalian for the summary judgment motion. Justice Gatchalian ordered that the motion be adjourned for six months in order to allow the Plaintiff time to secure and file a supportive expert opinion in compliance with *Civil Procedure Rule* 55.31. Justice Gatchalian advised the Plaintiff during the August 3 hearing that if she did not file expert evidence in support of her claim for negligence, there was a strong likelihood that the Defendants' motion for summary judgment would succeed.

[14] On January 27, 2023, nearly six months after the original motion for summary judgment, the Plaintiff filed a legal Brief with the court. The Brief does not contain any expert opinion.

[15] On April 3, 2023, Dr. Grimshaw filed an amended Notice of Motion for the summary judgment and related motions to be heard on July 31, 2023. A supplementary affidavit of Erin Mitchell was filed by Dr. Grimshaw on June 30, 2023.

[16] Having determined that the Plaintiff did not receive those motion materials, Dr. Grimshaw withdrew the motion and on August 4, 2023, filed a Second Amended Notice of Motion setting the hearing for December 14, 2023.

[17] To date, the Plaintiff has not disclosed any expert opinion evidence supporting her allegations that Dr. Grimshaw breached the standard of care and that such breach caused or contributed to any injury to the Plaintiff.

Summary Judgment On Evidence – The Law

[18] Summary judgment on the evidence in an action is governed by *Civil Procedure Rule* 13.04. Under *Rule* 13.04(1), summary judgment must be granted when a judge is satisfied that, (1) there is no genuine issue of material fact for trial of the claim or defence, and (2) the claim or defence requires determination only of

a question of law and a judge exercises the discretion provided in *Rule* 13.04 to answer the question.

[19] The test on a motion for summary judgment on the evidence was articulated by Justice Fichaud in *Shannex Inc. v. Dora Construction Ltd*., 2016 NSCA 89 ("*Shannex*"). This framework was recently confirmed and applied in *Arguson Projects Inc. v. Gil-Son Construction Limited*, 2023 NSCA 72:

> [33] In *Shannex*, Justice Fichaud set out five sequential questions to be asked when summary judgment is sought pursuant to the then recently amended Rule 13.04 (paras. [34] through [42])[2]:
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> 1. Does the challenged pleading disclose a genuine issue of material fact, either pure or mixed with a question of law?
> 2. If the answer to above is No, then: does the challenged pleading require the determination of a question of law, either pure, or mixed with a question of fact?
> 3. If the answers to the above are No and Yes respectively, does the challenged pleading have a real chance of success?
> 4. If there is a real chance of success, should the judge exercise the discretion to finally determine the issue of law?
> 5. If the motion for summary judgment is dismissed, should the action be converted to an application, and if not, what directions should govern the conduct of the action?
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> [34] A motion judge who fails to ask the questions in the above order, or combines one or more of them, risks falling into error.
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> [35] The first question's focus is solely whether there is a dispute of material fact. A material fact can be one that stands on its own (*i.e.*, whether an email was sent and received) or it can be mixed with a question of law (*i.e.*, an email was sent, but does it constitute a "decision" pursuant to the notice provisions of the contract?). At the first stage, a motion judge looks only at whether the material fact – was an email sent and received – is in dispute. It is irrelevant at this stage whether there is a question of law mixed with the material fact (*i.e.*, the application of the contractual provisions in determining the legal significance of the email) – that consideration belongs in the second step.
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> [36] In *Shannex*, Justice Fichaud noted " a 'material fact' is one that would affect the result. A dispute about an incidental fact – *i.e.*, one that would not affect the outcome – will not derail a summary judgment motion" (para. [34]). And further:
>
> 6. The moving party has the onus to show by evidence there is no genuine issue of material fact. But the judge's assessment is based on all the evidence from any source. If the pleadings dispute the

> material facts, and the evidence on the motion fails to negate the existence of a genuine issue of material fact, then the onus bites and the judge answers the first question Yes.

[37] Identifying a material fact is anchored in what has been alleged in the pleadings. To identify a material fact, it is helpful to ask what needs to be proven to answer the allegations pled by a party. If a fact is necessary to prove the allegation, then it is material.

[38] To determine whether there is a dispute of material fact, Rule 13.04(4) makes clear that it is the evidence presented on the motion that must be considered. As noted recently by Justice Farrar in *Risley*, bald assertions in a responding affidavit, without more in terms of an evidentiary foundation, will not give rise to a dispute of material fact. It is critical to emphasize that a dispute of material fact cannot arise from the submissions of counsel, or a judge's speculation about legal issues not raised by the pleadings or what evidence could possibly be called at the time of trial.

[39] The second question requires a court to determine whether a question of law arises from the pleadings. If there is no dispute of material fact and no question of law, either pure or mixed with fact, then summary judgment must follow. For the purposes of this appeal, the interpretation of a contract is a question of law. As referenced above, the application of contractual provisions to the factual context, is a question of law mixed with fact.

[40] If there are no disputed material facts, but there is a question of law, the motion judge must proceed to the third question – does the challenged pleading have a "real chance of success"? In *Shannex*, Justice Fichaud wrote:

> 7. Nothing in the amended Rule 13.04 changes *Burton*'s test. It is difficult to envisage any other principled standard for a summary judgment. To dismiss summarily, without a full merits analysis, a claim or defence that has a real chance of success at a later trial or application hearing, would be a patently unjust exercise of discretion.
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> 8. It is for the responding party to show a real chance of success. If the answer is No, then summary judgment issues to dismiss the ill-fated pleading.

[41] In *Burton*, Justice Saunders explained how to ascertain if there is a "real chance of success":

> **9.** [42] . . .Instead, the judge's task is to decide whether the responding party has demonstrated on the evidence (from whatever source) whether its claim (or defence) has a real chance of success. This assessment, in the second stage, will necessarily involve a consideration of the relative merits of both parties' positions. For how else can the prospects for success of the respondent's position

> be gauged other than by examining it along with the strengths of the opposite party's position? It cannot be conducted as if it were some kind of pristine, sterile evaluation in an artificial lab with one side's merits isolated from the others. Rather, the judge is required to take a careful look at the whole of the evidence and answer the question: **has the responding party shown, on the undisputed facts, that its claim or defence has a real chance of success?**
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> 10. [43] In the context of summary judgment motions the words "real chance" do not mean proof to a civil standard. That is the burden to be met when the case is ultimately tried on its merits. If that were to be the approach on a summary judgment motion, one would never need a trial.
>
> 11. [44] The phrase "real chance" should be given its ordinary meaning – that is, a chance, a possibility that is reasonable in the sense that it is an arguable and realistic position that finds support in the record. **In other words, it is a prospect that is rooted in the evidence, and not based on hunch, hope or speculation**. A claim or a defence with a "real chance of success" is the kind of prospect that if the judge were to ask himself/herself the question:
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> 12. Is there a reasonable prospect for success on the undisputed facts?
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> 13. the answer would be yes.
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> 14. [Emphasis added – in original]
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> [42] From the above, it is clear that the second and third questions are anchored in the evidence presented on the motion. As reiterated in *Shannex,* it is expected that each party "put its best foot forward":
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> 15. [36] "**Best foot forward**": Under the amended Rule, as with the former Rule, the judge's assessment of issues of fact or mixed fact and law depends on evidence, not just pleaded allegations or speculation from the counsel table. Each party is expected to "put his best foot forward" with evidence and legal submissions on all these questions, including the "genuine issue of material fact", issue of law, and "real chance of success": Rules 13.04(4) and (5); *Burton,* para. 87.

This test must be applied to each of the two causes of action on which the Plaintiff's claim is based.

Medical Negligence

[20] The success of a claim for medical negligence depends on the existence of four conditions (*Cardin v. City of Montreal* (1961), 29 D.L.R. (2d) 492) (SCC); *Anderson v. Grace Maternity Hospital et al* (1989), 93 N.S.R. (2d) 141; *Locke v. Lea* [1997] N.S.J. No. 186; and *Anderson v. Queen Elizabeth II Sciences Centre*, 2012 NSSC 360 ("*Anderson v. QEII*"):

1. There must have been a legal duty on the part of the doctor towards his patient to exercise care. This duty arises as a matter of law when the doctor takes on the case, and as already stated, is independent of contract.
2. There must have been negligence on the part of the doctor, i.e. a breach of his legal duty to conform to the standards of proficiency and care required by law.
3. The patient must have suffered loss or injury. Negligence not resulting in loss or injury provides no ground for a civil action in damages.
4. The patient's loss or injury must have resulted directly from the doctor's negligence. In other words, the negligence must have been the determining (as distinct from the indirect or remote) cause of the damage.

[21] The standard of care required of doctors in the performance of their professional duties was described in *Anderson v. QEII* as follows, at para. 44:

> 44 With respect to the standard of care, both parties have cited the statement of Schroeder, J.A., in *Crits and Crits v. Sylvester et al*., (1956), 1 D.L.R. (2d) 502 (Ont. C.A.):
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> > 16. "Every medical practitioner must bring to his task a reasonable degree of skill and knowledge and must exercise a reasonable degree of care. He is bound to exercise that degree of care and skill which could reasonably be expected of a normal, prudent practitioner of the same experience and standing, and if he holds himself out as a specialist, a higher degree of skill is required of him than one who does not profess to be qualified by special training and ability."

[22] The trier of fact must determine the required standard of care to which the acts of the Defendants will be measured. It is well settled law that medical negligence typically cannot be established without an expert opinion supportive of the Plaintiff's position.

[23] The Plaintiff has not provided any expert evidence to support that Dr. Grimshaw's care failed to meet the required standard, nor that his care caused or contributed to any loss or injury of the Plaintiff.

[24] The seminal case on this issue is *ter Neuzen v. Korn*, [1995] S.C.J. No. 79 (SCC). In that case, Sopinka, J. held for a majority of the Supreme Court of Canada at para. 33 that: "It is well settled that physicians have a duty to conduct their practice in accordance with the conduct of a prudent and diligent doctor in the same circumstances". Generally speaking: "courts do not ordinarily have the expertise to tell professionals that they are not behaving appropriately in their field"(para 38).

[25] Since *ter Neuzen*, courts have consistently held that, "where liability issues are technical, such as in a medical malpractice case, … a finding of negligence must be based on supporting expert opinion": *Richmond v. Balakrishnan*, 2010 ONSC 5888 at para. 22, aff'd, 2011 ONCA 316, leave to appeal to SCC denied, [2011] SCCA No 249; *Kurdina v. Dief*, 2010 ONCA 288 at para. 2; *McNeil v. Easterbrook*, [2004] O.J. No. 3976 (ONSC) at para. 16; *Cassibo v. Bacso*, 2010 ONSC 6435 at para. 14.

[26] The principles in *ter Neuzen* are relevant to a summary judgment motion. In the absence of supporting expert opinion put forward by the Plaintiff on a summary judgment motion, a genuine issue has not been raised with respect to a material fact and summary judgment should be granted.

[27] The requirement for the plaintiff to disclose expert evidence in order to defeat a summary judgment motion in medical negligence cases has been applied in a number of Nova Scotia cases.

[28] In *Vaughn v. Hayden*, 2009 NSSC 235, the plaintiff sued a surgeon alleging negligent operative and post-operative care. The defendant moved for summary judgment. The plaintiff did not disclose any expert evidence. The defendant had previously disclosed two supportive expert reports in the proceedings. On the motion, the plaintiff relied only on his own affidavit, in which he simply re-asserted the facts alleged in the Statement of Claim. Justice McDougall granted summary judgment, stating at paras. 30 to 32:

> 30 The plaintiff's failure to present any evidence, leaving aside the need for expert evidence for the moment, can hardly be considered putting his best foot forward.
>
> 31 Furthermore, it would be a rare medical malpractice case that would have any real chance of success without some kind of supporting expert evidence establishing the breach of a standard of care and the causal connection between the negligent treatment and the resulting harm suffered.

> 32 Based on the evidence before me I am not persuaded that the plaintiff's cause of action has a real chance of success. At the risk of appearing unsympathetic to the plaintiff's situation, the result is game, set and match for the defendant.
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> [Emphasis added]

[29] In *Robert v. Brooks*, 2014 NSSC 49, the plaintiff brought an action against a psychiatrist, alleging that Dr. Brooks was negligent in not prescribing certain anti-depressants. The plaintiff did not disclose any expert evidence. The defendants moved for summary judgment. The Court granted summary judgment. Justice Coughlan stated, at para. 15:

> 15 It is clear from his affidavit Mr. Robert has no expert medical or scientific evidence to support his claim. There is no genuine issue of fact for trial. If Mr. Robert's claim was permitted to go to trial, it would have no chance of success as he has no evidence Dr. Brooks breached the requisite standard of care and no evidence the damages, if any, he suffered were caused by or contributed to by any act or omission of Dr. Brooks.

[30] In *Chan v. White*, 2014 NSSC 383, the Court found that a failure to offer expert evidence is a failure to show a real chance of success. That action arose as a result of the death of Michael Chan. The plaintiffs were members of Mr. Chan's family. The plaintiffs alleged that the defendant physician breached the standard of care. Justice Coady held that the plaintiffs were required to disclose supporting expert evidence in order to avoid summary judgment. No such evidence was disclosed. Summary judgment was granted. The plaintiffs' claims were dismissed.

[31] *McFarlane v. MacDonald*, 2015 NSSC 107, was a case which involved an allegation of negligent prescribing against a general practitioner. The plaintiff had not produced an expert report. The defendant moved for summary judgment. Justice Hood, in allowing the motion, relied on the decision of the Ontario Superior Court of Justice in *Diler v. Heath*, 2012 ONSC 3017. She stated, at para 28:

> 28 Because Dr. MacDonald is a general practitioner, it is a general practitioner who can give expert opinion evidence about the standard of care to be provided by a general practitioner. As Justice Broad said in [*Diler*] *v. Heath*, 2012 ONSC 3017 (Ont. S.C.J.), at para 18:
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> > 17. [18] It appears to be well settled in the authorities that, to establish a breach of the standard of care to support a claim for medical negligence, a plaintiff is required to lead expert evidence of a physician, practicing in the same field as the defendant, attesting to the defendant's negligence. [see *Kurdina v. Gratzer*, [2010] ONCA 288 at para. 2.] In *Kurdina* the Court of Appeal made it clear

> that to avoid summary judgment, the [plaintiff] is required to adduce some expert opinion evidence from a qualified practitioner in the same field as the defendant supporting her claim that the care she received fell below the applicable standard of care...

The plaintiff had not adduced expert evidence from a qualified practitioner in the same field as the defendant. Summary judgment was granted.

[32] The Plaintiff bears the burden of proving her case. Consistent with that overall burden, she is obligated on this motion to put her best foot forward by producing evidence that there is a genuine material issue of fact for trial. As noted by the Supreme Court of Canada in *Canada (Attorney General) v. Lameman*, 2008 SCC 14, at para. 19:

> [19] ... In the Court of Appeal and here, the case for the plaintiffs was put forward, not only on the basis of evidence actually adduced on the summary judgment motion, but on suggestions of evidence that might be adduced, or amendments that might be made, if the matter were to go to trial. A summary judgment motion cannot be defeated by vague references to what may be adduced in the future, if the matter is allowed to proceed. To accept that proposition would be to undermine the rationale of the rule. A motion for summary judgment must be judged on the basis of the pleadings and materials actually before the judge, not on suppositions about what might be pleaded or proved in the future. ...
>
> [Emphasis added]

[33] The Plaintiff cannot rely on the pleadings, anecdotal evidence, or on a vague promise to obtain or adduce evidence in the future.

[34] In the medical negligence context, it is the Plaintiff – and not the Defendant – who must produce expert evidence in order to put their "best foot forward" and defeat a summary judgment motion. The Defendant is not required to provide any evidence to succeed on a motion for summary judgment. It is the Plaintiff's lack of expert evidence that carries the day.

[35] In *Szubielski v. Price*, 2013 NSCA 151, a plaintiff brought an action against a dentist. The defendants successfully brought a motion regarding Dr. Price's alleged use of a "hazardous device" on the plaintiff. The plaintiff failed to present expert evidence to establish existence or use of the "hazardous device" during her treatments or which would link such device to lesions and other afflictions for which she blamed Dr. Price. The plaintiff appealed this finding. On appeal, the Nova Scotia Court of Appeal held that a defendant does not require supportive expert

opinion evidence; rather, he can simply point to the lack of expert evidence of the plaintiff in support of a summary judgment finding:

> [13] Summary judgment motions in cases alleging medical or dental malpractice are typically brought (or opposed) by respondents (as defendants in the underlying action) who point to a lack of expert evidence in support of the plaintiff's position on the standard of care and/or causation. See for example, *MacNeil v. Bethune*, 2006 NSCA 21, and *Cherney v. GlaxoSmithKline Inc*., 2009 NSCA 68, leave to appeal ref'd [2010] S.C.C.A. No. 17. Although there is no burden on a defendant to do so, a defendant may – in order to provide greater comfort to the Court – offer expert evidence establishing that the standard of care was not breached, and/or that the plaintiff's injuries were not caused by the defendant's acts or omissions. In such circumstances, if the plaintiff is able to present supportive expert evidence in answer to the defendants' motion, then she will have established a genuine issue of material fact requiring a trial, and the defendants' motion for summary judgment will be denied; whereas if she fails to offer such evidence, the defendants' motion will often succeed: *Johansson v. General Motors of Canada Ltd.*, 2012 NSCA 120, paras. 112-115 and the authorities cited therein.
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> [Emphasis added]

[36] Dr. Grimshaw is not required to provide any evidence. Nevertheless, I note that the expert report of Dr. Covens on behalf of Dr. Grimshaw has been filed with the Court and disclosed to the other parties. It has not been necessary to rely upon that report in coming to my decision on this motion.

[37] I find that the Plaintiff's case in negligence has no chance of success at trial. I find that summary judgment should be granted on the claim in negligence.

Informed Consent

[38] At para. 7 of her Statement of Claim, the Plaintiff alleges that Dr. Grimshaw "conducted this operation without the informed consent of the Plaintiff, constituting an assault".

[39] The leading case on informed consent in Canada is *Reibl v. Hughes*, [1980] 2 SCR 880. That case involved a 44-year-old man who suffered a stroke during a major surgery which left him paralyzed on the right side of his body. The plaintiff had formally consented to the operation but alleged that his consent was vitiated by the fact that he was not properly informed of the risks.

[40] Lack of informed consent does not constitute an assault in tort. It may constitute either a battery or negligence.

[41] In *Reibl*, the Supreme Court of Canada effectively divided the informed consent analysis between a cause of action in battery and a cause of action in negligence. The Court held at paras. 11 and 12 that:

> 11 … actions of battery in respect of surgical or other medical treatment should be confined to cases where surgery or treatment has been performed or given to which there has been no consent at all or where, emergency situations aside, surgery or treatment has been performed or given beyond that to which there was consent.
>
> 12 This standard would comprehend cases where there was misrepresentation of the surgery or treatment for which consent was elicited and a different surgical procedure or treatment was carried out. …
>
> [Emphasis added]

[42] In contrast, the Court held that "a failure to disclose the attendant risks, however serious, should go to negligence rather than to battery" (at para. 13).

[43] Despite having had more than twelve months to do so, the Plaintiff has failed to present any evidence to support a claim for battery. The Thorburn Affidavit, filed in July 2022, does not contain evidence that the Plaintiff received a treatment to which no consent was given. The Plaintiff does not dispute in her Affidavit that she received the surgery that she expected to receive. The evidence in the Thorburn Affidavit supports a conclusion that consent was given, but the Plaintiff appears to argue that the consent was vitiated.

[44] Based on the analytical approach recommended in *Reibl*, the Plaintiff's informed consent allegations are properly considered in negligence.

[45] The Court in *Reibl* characterized the issue of informed consent in medical negligence cases as follows, at para. 4:

> 4 It is now undoubted that the relationship between surgeon and patient gives rise to a duty of the surgeon to make disclosure to the patient of what I would call all material risks attending the surgery which is recommended. The scope of the duty of disclosure was considered in *Hopp v. Lepp*, a judgment of this Court, delivered on May 20, 1980, and as yet unreported [now reported at 13 C.C.L.T. 66, [1980] 4 W.W.R. 645, 32 N.R. 145, 22 A.R. 361], where it was generalized as follows [C.C.L.T., p. 87]:
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> > 18. In summary, the decided cases appear to indicate that, in obtaining the consent of a patient for the performance upon him of a surgical operation, a surgeon, generally, should answer any specific questions posed by the patient as to the risks involved and should,

> without being questioned, disclose to him the nature of the proposed operation, its gravity, any **material** risks and any **special** or **unusual** risks attendant upon the performance of the operation. However, having said that, it should be added that the scope of the duty of disclosure and whether or not it has been breached are matters which must be decided in relation to the circumstances of each particular case.
>
> [Emphasis added]

[46] To succeed in an argument that Dr. Grimshaw was negligent for not obtaining informed consent, the Plaintiff must satisfy the court that the alleged risks that were not consented to were material, special, or unusual.

[47] Rather, in the Thorburn Affidavit, the Plaintiff provided additional information which assists the Defendant in considering the allegation of failure to obtain informed consent. At para. 11 of the Thorburn Affidavit, the Plaintiff alleges that she was not informed that there would be surgical residents participating in her procedure and states she did not give consent for the residents to participate. At para. 6 of the Thorburn Affidavit, the Plaintiff alleges that she believes there were "other options available" to her for treating her ovarian mass and that she was not made aware of these options.

[48] The Plaintiff offers no evidence in her Affidavit of what the "other options available" were. She has not filed any other affidavit evidence.

[49] In the Plaintiff's Brief, filed January 27, 2023, nearly six months after the original motion for summary judgment, the Plaintiff, for the first time, claims that she was not properly informed of the risks of the procedure. At para. 19, the Plaintiff writes: "I was not advised that severe internal bleeding was a risk of this procedure, and I did not anticipate this as being within the realm of potential outcomes".

[50] Therefore, the Plaintiff's claim of lack of informed consent can be distilled into three allegations:

1. Failure to inform her of alternative options to surgery;
2. Lack of consent to have medical Residents participate in her surgery; and
3. Failure to inform her of severe internal bleeding.

[51] All of these allegations go to negligence, not battery.

[52] Although the Plaintiff did not specifically plead the lack of informed consent constituted negligence; given she is unrepresented by legal counsel, I consider that it is equitable to consider the issue of informed consent in negligence. The issue is whether the Plaintiff has offered any evidence to establish a genuine issue of material fact of any of her claims.

[53] In providing the evidence contemplated in *Rule* 13.04(5), the Plaintiff must put her best foot forward. As reviewed in relation to the medical negligence claim, *supra*, this usually requires that the Plaintiff provide supportive expert opinion.

[54] Jurisprudence on lack of informed consent typically addresses the physician's failure to inform the Plaintiff of material risks of surgery prior to obtaining consent. The jurisprudence recognizes that there are some cases where a plaintiff need not adduce expert evidence to succeed in an informed consent case: *Brown v. Baum*, 2015 ONSC 849 at para. 66.

[55] However, the cases where expert evidence is not helpful to the court are limited to those where the Plaintiff can demonstrate, on a modified objective test, that they were not provided information which would have impacted their decision to consent. That is, the Plaintiff must successfully argue that a reasonable person in their position would have declined the procedure or treatment had they been informed of the material risks (*Anderson v. QEII*, at para. 54, citing *Reibl*).

[56] The first two allegations being made against Dr. Grimshaw with respect to informed consent are not centered on material risks of surgery. Neither the question of whether reasonable alternative treatments were available, nor the involvement of surgical residents, are relevant to the material risks of the surgery consented to.

[57] The Ontario Superior Court recognized in *Brown, supra*, that there are some circumstances wherein issues involving informed consent must be addressed with expert evidence. At paras. 69-70, the court held:

> 69 To answer the question "did the doctor fulfill his duty of disclosure, that is, did the doctor disclose the material, special or unusual risks that a reasonable person in the patient's position would want to know", the court must be able to determine what the applicable standard of care was. I have concluded that it can be said with confidence that when discussing breast reduction surgery with the plaintiff, the defendant's duty included advising the plaintiff of the risks associated with obesity and smoking. However, I cannot, in the absence of expert evidence, reach a similar conclusion in respect of the plaintiff's assertion that Dr. Baum should have

> discussed with her the "possibility that she would have to do further surgeries [and] the probability of the surgery being successful."
>
> 70 Without further evidence I also cannot gauge what would amount to "success" in respect of this surgery. Ms. Brown's motivation for considering breast reduction surgery was to reduce the weight of her breasts and, hence, the strain that was being placed on her back. That is not to suggest that the appearance of her breasts was unimportant to Ms. Brown. Clearly on the evidence it was important to her. But when she complains that Dr. Baum should have informed her about the probability of the surgery being successful, it is important to understand what that means. Ms. Brown bears the onus of showing what, in the circumstances, Dr. Brown should have told her and that, in fact, he failed to do so.
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> [Emphasis added]

[58] Dr. Grimshaw submits that the Plaintiff requires expert evidence to support that any of the three allegations made on informed consent are material issues warranting a trial. She has not done so, despite ample time and opportunity.

1. The Plaintiff has not provided evidence of any alternative treatment options

[59] The Plaintiff attests at para. 5 of the Thorburn Affidavit that after the mass in her right ovary was discovered, she was told by Dr. Grimshaw that the only way to prove that it was benign was "it would need to be removed".

[60] The Plaintiff attests at para. 6 of the Thorburn Affidavit that "I believe the information provided to me by Dr. Grimshaw on 6 November 2015 was incomplete, and I believe that there were other options available to me that I was not made aware of at the time".

[61] Aside from this being in the nature of inadmissible opinion evidence, the Plaintiff gives no evidence of what the "other options available" were. She has not filed any other affidavit evidence.

[62] Respectfully, evidence as to whether there were other medically viable and available options could only be properly substantiated by expert opinion. Ms. Thorburn is not a qualified medical expert and cannot give evidence as to whether there were other reasonable medical options available to her beyond the surgery that Dr. Grimshaw proposed.

[63] The possibility of alternative treatments is not an issue that comes down to a modified objective test. It is incumbent on the Plaintiff by virtue of *Rule* 13.04 to

adduce evidence that such alternative treatments existed and the failure to disclose constitutes a failure to evidence a genuine issue of material fact.

[64] As already stated, the Plaintiff has not provided any expert opinion to support her claim that other treatment options were available. She was given six months to secure a supportive expert opinion at the August 3, 2022, motion. At the time this motion was heard, more than one year had passed since the Plaintiff was given an opportunity to secure the evidence necessary to support her claim.

2. Consent for medical residents assisting in surgery

[65] At para. 11 of her Affidavit, the Plaintiff claims that "I was not informed that residents Dr. Randle and Dr. Stone would be participating in my surgery in [*sic*] 10 December 2015, nor was I asked to give consent for those residents to actively participate in performing surgery on me".

[66] As previously stated, the Plaintiff must satisfy the court that the alleged risks that were not consented to were material, special, or unusual. She has tendered no evidence to support an argument that the involvement of surgical residents was a material, special, or unusual risk.

[67] The participation of medical assistants in the determination of whether informed consent was obtained was addressed in *Markowa v. Adamson Cosmetic Facial Surgery Inc.*, 2012 ONSC 1012. In that case, the plaintiff brought a medical malpractice action against a surgeon following her facial reconstruction surgery. She claimed that the surgeon had fraudulently failed to disclose that his clinic was a teaching facility, and falsely represented that other medical staff would not participate in her surgery.

[68] The defendant physician tendered an expert opinion which spoke to both the nature of the procedure as it was described on the consent form and as it was performed, as well as the involvement of a surgical assistant. The following paragraphs demonstrate how the court considered the defendant's expert physicians against the plaintiff's lack of expert opinion with respect to the involvement of the surgical assistant:

> 118 It is the uncontradicted expert evidence of Dr. Carman that assistance at surgery is a common practice and is required in order to facilitate the actions of the surgeon and to allow for the procedure to be completed in a safe and efficient manner. This is consistent with Dr. Adamson's [Defendant] evidence that it is

> simply physically impossible for him to perform these procedures without assistance.
>
> 119 The fact that Dr. Adamson had Dr. Litner and others assist him during the Surgery does not change the fact that he was the primary surgeon in this case and that his use of their assistance falls within the standard of care.
>
> …
>
> 123 At all times, Dr. Adamson was the lead surgeon and was responsible for all aspects of the Surgery.
>
> …
>
> 125 The Plaintiff has tendered no evidence beyond her own unsupported belief that contradicts the evidence of Dr. Adamson, Dr. Litner and Dr. Carman so there is no evidentiary basis for the claim about improper participation by Dr. Litner or Dr. Meier.
>
> …
>
> 132 The Plaintiff has not provided any admissible expert evidence that the facelift performed by Dr. Adamson was of a substantially different nature and character than the procedure she consented to. By contrast, Dr. Carman's expert evidence is that the deep plane facelift itemized in the consent form was the procedure which was undertaken by Dr. Adamson.
>
> 133 For the above reasons, the Plaintiff's evidence is not of sufficient weight to overcome the evidentiary basis provided by the Defendants.

[69] The court applied *ter Neuzen*, *supra*, with respect to summary judgment on the evidence in medical negligence cases. The judge found that the plaintiff had not tendered any admissible expert evidence, which was on its own demonstrative of the absence of any genuine issue requiring trial with respect to the standard of care claims. With respect to the "informed consent claim", namely, who performed the surgery, the medications used during the procedure and the nature of the surgery performed, the court found as follows, at para. 196:

> The Plaintiff has not tendered any admissible evidence that Dr. Adamson refused or failed to answer any of her questions, or that he somehow misrepresented his qualifications or the clinical fellowship program to her, in such a way that any genuine issue requiring a trial is raised as to the informed consent of the Plaintiff.

The court found that the plaintiff had not put her best foot forward and summary judgment was granted.

[70] In *Bezusko v. Waterfall*, [1997] OJ No. 4693, a very similar argument was made by a plaintiff who sustained a bleed during a laparoscopic procedure to

alleviate the symptoms of acid reflux. A fifth-year resident assisted on the surgery. The plaintiff claimed that after speaking to the defendant attending surgeon, he had been under the impression at the time of signing the consent form that the defendant would be the only surgeon performing the procedure.

[71] On the issue of both the resident's participation and the risk of bleeding, the court held, at para. 33, as follows:

> In the case before me the plaintiff executed a consent in the standard form in which he agreed that Dr. Waterfall "may make use of assistance of other surgeons, physicians and Hospital Medical Staff and trainees, may permit them to order or perform all or part of the treatment or operative procedure". The wording of the Consent itself would serve to inform the plaintiff of the involvement of others in the procedure. While the Consent is not conclusive of the issue, when taken together with the fact that the procedure involved at least two surgeons and an anaesthetist, and the fact that the usual risks of the procedure were outlined to the plaintiff prior to the surgery, I cannot find that there was not an informed consent to the procedure or that the consent was viciated [*sic*] by failure to specifically inform the plaintiff of Dr. Liebman's involvement. This is particularly so when one takes into account that Dr. Waterfall was not only present throughout the procedure but in control at all times. It is clear from the evidence that any steps taken by Dr. Liebman were subject to the review, guidance and direction of Dr. Waterfall. I am supported in this view by the decision in *Casey v. Provan* (1984), 11 D.L.R. (4th) 708, at page 711 (Ont. H.C.J.).

As discussed below, Ms. Thorburn signed a similar standard form consent which included consent not only to the attending surgeon, but also "those whom he/she may designate as associates or assistants".

[72] Ms. Thorburn has not offered any expert opinion that the involvement of surgical residents was a material, special, or unusual risk. She has failed to show that this is a genuine issue of material fact warranting a trial.

3. The Plaintiff was informed of the material risks and consented to the surgery

[73] The Plaintiff's third allegation on informed consent is not contained in the Statement of Claim. It was raised approximately six months after this motion was adjourned, and, despite another twelve months passing, the Plaintiff has not tendered any evidence whatsoever to support it.

[74] Dr. Grimshaw, putting his best foot forward, placed into evidence a "Consent for Investigation, Treatment or Operative Procedure" on Capital Health printed form

signed by the Plaintiff. Following the description of "treatment" as (handwritten): "Total Abd Hysterectomy Bilat. Salpingo-oophorectomy Poss. Staging", the form contains the following print:

> 2. The proposed treatment has been explained to me by _____ in terms that I can understand, including:
>
> …
>
> - the common, foreseeable risks or potentially serious consequences of the treatment, which may include:
>
> (handwritten) Bleeding, infection, Bowel injury.

[75] The Plaintiff's assertion that she "was not advised that severe internal bleeding was a risk of this procedure" and that she "did not anticipate this as being within the realm of potential outcomes" is not in evidence. Rather, it is an unsubstantiated argument included in the Plaintiff's motion brief. Nowhere in the Plaintiff's affidavit evidence does she indicate that her claim of assault due to lack of informed consent is predicated on Dr. Grimshaw's alleged failure to inform her of the risks of internal bleeding. Knowing the consent form existed, the Plaintiff was compelled to provide some evidence that would establish that there was a genuine issue of fact about consent.

[76] In *Markowa, supra,* the court addressed the argument that the procedure conducted was substantially different than the procedure consented to at para. 132:

> 132 The Plaintiff has not provided any admissible expert evidence that the facelift performed by Dr. Adamson was of a substantially different nature and character than the procedure she consented to.

The court found that the plaintiff had not put her best foot forward and summary judgment was granted. Similarly, Ms. Thorburn has failed to put her best foot forward by providing any evidence on this bald allegation.

[77] Dr. Grimshaw has established that he is entitled to summary judgment on the claim of lack of informed consent.

Conclusion

[78] In conclusion, Dr. Grimshaw has established that he is entitled to summary judgment on evidence pursuant to *Rule* 13.04 on both causes of action as pleaded: medical negligence; and, informed consent. Accordingly, the Plaintiff's action

against Dr. Grimshaw is dismissed. It is, accordingly, not necessary for me to consider the motions for dismissal based on delay and abuse of process.

[79] Dr. Grimshaw has advised that in the event he was successful on the motion he would not be seeking costs. Accordingly, there is no order for costs.

[80] Order accordingly.

Norton, J.