*Indexed as:*

# Smith v. Tweedale

**Between**
**Anne Patricia Smith, Plaintiff (Respondent), and**
**Dr. Peter G. Tweedale, Defendant (Applicant)**

[1995] B.C.J. No. 229

55 B.C.A.C. 52

4 B.C.L.R. (3d) 325

53 A.C.W.S. (3d) 204

Vancouver Registry No. CA018816

British Columbia Court of Appeal
Vancouver, British Columbia

**Macfarlane, Wood and Goldie JJ.A.**

January 6, 1995

(8 pp.)

Counsel for the Appellant: J. Lepp.
Counsel for the Respondent: D. Hobbs.

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The judgment of the Court was delivered by Wood J.A.

1 WOOD J.A. (orally):-- This is an appeal from a judgment for the plaintiff in a medical malpractice action.

2 The issue at trial was whether the defendant exercised the standard of care expected of a reasonably competent gynaecologist when he explained to the plaintiff that the tubal sterilization which he was about to perform upon her at her request was a permanent and irreversible procedure. The plaintiff alleged that the information given to her by the defendant did not convey that important consequence to her, and that had it done so she would not have consented to the procedure.

3 In April of 1990, in the course of the delivery of her second child, the plaintiff requested the defendant, who was her attending gynaecologist, to "tie her tubes". She had previously discussed such a procedure with her family doctor. She had by then had four pregnancies, and was obviously having difficulty with any form of birth control available to her. Her marriage was not going well, and she did not then want any more children. While the evidence does not go so far as to suggest that she explicitly considered the likelihood of having more children with someone else in the future, it is clear from the evidence, and the trial judge found, that her understanding of a tubal ligation or "having her tubes tied" was that the procedure was reversible with a 50 percent chance of a subsequent successful pregnancy.

4 At the time the plaintiff made her request of the defendant, she had been in labour for thirteen hours and was contemplating the birth of her child by Caesarian section. Indeed, she had already been administered the necessary anaesthetic for such a procedure, and it was about to be performed.

5 The defendant testified that while he could not remember what he actually told the plaintiff in those circumstances, it was his virtually invariable practice to explain that the tubal sterilization that he performed involved the removal of most or all of the patient's Fallopian tubes, and that she "should consider the procedure permanent". The trial judge accepted that the defendant probably gave the plaintiff his usual presentation, notwithstanding that the plaintiff testified that she did not recall anything other than the explanation that she "should consider the procedure permanent".

6 The trial judge's conclusions are to be found from the following passages taken from her oral reasons for judgment:

> "Early on the morning of April 18, she asked for a C-section, tired from 11 hours of labour with little apparent progress. She was given an epidural anaesthetic. Two hours later, about 9 a.m., Dr. Tweedale came to see her in the delivery room. After talking with her and examining her, he recommended a C-section. In accordance with her previous thinking, she asked him to tie her tubes. The request came as no surprise because he had heard from Dr. Grey that Mrs. Hawes was having problems in labour and that she had requested tubal sterilization in the event of a C-section.
>
> In the 27 years Dr. Tweedale has been sterilizing women from whom he has delivered a baby by C-section, he has used only one procedure, a bilateral tubal salpingectomy. He considers that method to be the only one guaranteeing no further pregnancies. During that procedure he removes all or part of the Fallopian tubes. He is sure that he gave his usual presentation about that procedure to Mrs. Hawes at least twice. He is sure he would have told her that all or most of both tubes would be removed and that she "should consider the procedure permanent". Mrs. Hawes says he did not tell her that he would be removing most or all of both tubes, but recalls the other words exactly. Thus she maintained her belief that the procedure might be permanent but had the potential to be reversed. I am persuaded that it is more likely than not that Dr. Tweedale gave his usual presentation but that the significance of his words did not register on Mrs. Hawes, about to have a C-section.
>
> Mrs. Hawes did not ask Dr. Tweedale any questions. A nurse prepared the consent form by which Mrs. Hawes was to authorize the C-section and "tubal sterilization". Mrs. Hawes signed that without asking her any questions. Devon was delivered. Then Dr. Tweedale asked her, in the presence of her husband, if she was sure she wanted "this". She assured him she did. He performed the tubal salpingectomy. He said if he had had any doubt about her desire to be sterilized so that she could not have more children, he would have refused to perform that procedure. Under no circumstances would he have performed a tubal ligation or any other sterilization because he is of the view that none but that he uses is certain to prevent further pregnancies.

* * *

Dr. Tweedale agrees that, faced with a patient who wanted a reversible form of sterilization, he would discuss the options or choices available and their ramifications. He did not understand Mrs. Hawes to be such a patient. He assumed from what he heard from her and Dr. Grey, and what he observed, that she wanted to be permanently sterilized. Mrs. Hawes did say or agree that she did not want children. She said nothing that might indicate any reservation or any desire for a reversible procedure.

However, I am persuaded that Dr. Tweedale could have been much clearer in his presentation. He could have said, "Are you sure you understand that this procedure is permanent?" or any number of other simple things that would make someone lying on a delivery table understand clearly that there was no turning back. He did not. By his choice of language, he left Mrs. Hawes open to whatever preconceived ideas she might have. He asked only if she was sure she wanted "this", sure that she did not want any more children, and he explained the procedure.

Because it would have been so simple to tell her that there was no turning back and that the consequences of the only procedure he was prepared to do were so final, I think it behooved Dr. Tweedale to do so in the circumstances of Mrs. Hawes early that April morning, not to leave room for doubt by his choice of language. To suggest that someone "should consider it permanent" is to invite the conclusion that it might not be, to leave a little room for a change of mind. The fact that Mrs. Hawes sought that reversal before she met Mr. Hawes, for purposes other than possible pregnancy, persuades me that she had that doubt before she requested the tubal ligation and that she maintained it because of the language Dr. Tweedale used and her belief that she would be undergoing a tubal ligation. In my view, Dr. Tweedale was negligent in failing to properly inform Mrs. Hawes about the procedure he was about to undertake, which was only one of the possible procedures included in the term used in the authorization.

In fact, a tubal ligation, the simply tying of tubes, may sometimes be reversed and a pregnancy may be possible. Dr. Tweedale's negligence took away any possibility of Mrs. Hawes' becoming pregnant naturally and turned what might have been her last chance into her only chance: three attempts in the IVF programme."

7 Before us, it was argued that having found that the defendant gave his "usual presentation", which included the information that he would remove the entirety of her Fallopian tubes and that she should consider the procedure permanent, the trial judge set too high a standard of care to be met by the defendant when she concluded that he ought to have gone further and explained the other options that were open to her in such a way as to make it more clear to her that the procedure he intended to perform was irreversible.

8 I do not agree. Implicit in the trial judge's reasons, which were given orally after a very short trial in which she heard from both the plaintiff and the defendant, are two conclusions which in my view justify the ultimate verdict reached in this case.

9 The first was that by requesting to have her "tubes tied", the plaintiff essentially conveyed to the defendant her own preconceived notion that the procedure in question was reversible and thus the defendant was placed on notice that more than his usual presentation was required. The evidence established that the expression "tubal ligation" is a general term which covers a number of different procedures which have different consequences ranging all the way from complete

irreversibility to reversibility with a 50 percent chance of future pregnancy. The second conclusion was that in the circumstances in which the plaintiff found herself, after thirteen hours of difficult labour and lying on the delivery table, more than just a routine explanation of the procedure was needed.

10 The plaintiff's action was pleaded and presented on the footing that, in the circumstances in which she found herself, the defendant had a duty to explain the options which she then had together with their different consequences, and that had he done so, the irreversibility of the procedure which he invariably performed would have become apparent to her. The trial judge concluded that on all of the evidence the plaintiff had established her case, and I am not persuaded that she made any error of law or fact which would justify this Court interfering with her judgment.

11 Accordingly, I would dismiss the appeal.

12 MACFARLANE J.A.:-- I agree that the appeal should be dismissed, and I agree with the reasons of Mr. Justice Wood for disposing of the matter in that way. We are asked to overrule the findings of fact below. I am not prepared to say that the trial judge was clearly wrong in the facts she found, or in the conclusions she reached.

13 In my view the judgment below may be sustained on the basis that in the circumstances it was incumbent on the defendant to discuss with the plaintiff the different procedures available and the consequences of each.

14 GOLDIE J.A.:-- While I agree on the result, my reasons for doing so are somewhat more confined that my colleagues', and I propose to state them very briefly.

15 In this case we have findings of fact which establish that the surgeon addressed the consequences of the procedure he intended to use. His negligence is said to consist of his failure to make himself understood. It is accepted by the respondent that he said "you should consider this procedure as permanent". This was said in order to ensure her consent was informed. She wanted no more children. She didn't say no more children by her present husband, or perhaps more children by someone else in the future. She was silent when the procedure proposed was described in layman's terms and her subsequent consent as communicated to the appellant was unqualified.

16 In my view, the findings below virtually compel the conclusion that the respondent had made up her mind about the result of the procedure that she had requested, and that she paid very little attention to what was being said to her The finding of negligence in these circumstances can only be supported on the ground that the surgeon failed to perceive that in her condition she was owed a greater duty of care than would normally suffice.

17 In this circumstance, the stigma of negligence should rest very lightly on the appellant, and it is with some concern that I agree that this appeal should be dismissed.

WOOD J.A.

MACFARLANE J.A.:-- The appeal is dismissed.
GOLDIE J.A.

cp/d/cmi

*Case Name:*

# British Columbia Ferry Services Inc. v. Vancouver Drydock Co.

**Between**
**British Columbia Ferry Services Inc., Plaintiff, and**
**Vancouver Drydock Company Ltd. and Prime Mover Controls Inc.,**
**Defendants, and**
**Prime Mover Controls Inc., Third Party**

[2010] B.C.J. No. 2839

2010 BCSC 1967

Docket: S065905

Registry: Vancouver

British Columbia Supreme Court
Vancouver, British Columbia

**S.A. Griffin J.**

Oral judgment: September 22, 2010.

(55 paras.)

**Counsel:**

Counsel for Plaintiff: W.G. Wharton, D.K. Jones.

Counsel for Defendant, Vancouver Drydock Company:
J.W. Bromley, C. Purcell, C. Mitchner (A/S).

Counsel for Defendant/Third Party, Prime Mover Controls Inc.: D.A. Hobbs.

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**Ruling - Division of Trial Issues**

1 **S.A. GRIFFIN J.** (orally):-- The parties have asked the Court to divide the trial of this action into two stages. Pursuant to Rule 12-5(67) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 [*Rules of Court*], the court may order

that one or more questions of fact or law arising in an action be tried and determined before the others.

2 What is sought by the parties in stage one of the trial is to have the Court reach conclusions of fact or law as to the interpretation of two separate contracts. In essence, the Court will be asked to reach conclusions akin to granting declaratory relief as to the interpretation of the two contracts before moving on to the next issues.

3 At the second stage of trial, if it is necessary, which it may not be according to the submissions, the Court would determine other issues relating to liability and damages.

4 It is necessary to put this proposal in context. This action is brought by British Columbia Ferry Services Inc. ("BCF") arising out of a ferry accident that occurred on June 30, 2005. In that accident the BCF vessel, *Queen of Oak Bay*, lost propulsive power, and it is alleged that it grounded and collided into a marina and struck a number of smaller boats, causing damage.

5 BCF alleges that the accident was caused by the fact that a split pin was missing from a castellated nut in a piece of equipment that links the number one main engine fuel racks to the governor. The characterization of this equipment is at issue, and for now I will simply describe it as the "governor linkage."

6 BCF claims that the missing split pin led to the nut becoming disconnected, the governor then becoming disconnected, and the resulting chain of events led to the loss of propulsive power.

7 The accident with the *Queen of Oak Bay* occurred soon after it had undergone extensive work known as a "mid-life upgrade". The defendant Vancouver Drydock Company Ltd. ("VDD") had a contract with BCF to perform certain of the work in relation to the mid-life upgrade. This contract is described by the parties as the "MLU" contract.

8 VDD subcontracted some of that work to the other defendant, Prime Mover Controls Inc. ("PMC"). As well, PMC had its own separate contract for work for BCF.

9 One of the key issues in this case is: was one of the defendants contractually responsible for inspecting the governor linkage? The implication is that if one of the defendants had this contractual responsibility, BCF has a claim against that defendant that the defendant did not do its job as it should have seen that the split pin on the nut on the governor linkage was missing. Conversely, if one of the defendants did not have this contractual responsibility, that defendant cannot be found to be in breach of contract for failing to detect the missing split pin.

10 The contractual theory of liability advanced by BCF against VDD is based on item 7300 of its MLU contract. BCF says that under item 7300 VDD was responsible to conduct a survey, or inspection, and that if it had been performed properly, it would have detected the problem with the nut at issue on the governor linkage. VDD denies that it had such a scope of responsibility under item 7300 of the MLU contract.

11 VDD has a third party claim against PMC alleging that if VDD did not have the contractual responsibility alleged by BCF, which is denied, then VDD subcontracted this responsibility to PMC. VDD's subcontract with PMC was evidenced by an estimate from PMC dated August 18, 2004, and VDD's purchase order 94019 dated November 10, 2004.

12 Item 7300 of the MLU reads as follows:

7300.0

**Propulsion Control**

Pneumatic Controls Survey and Service

> Survey all propulsion equipment pneumatic controls for the vessel's main engines, as well as the control units, etc., in the engine room, wheelhouse and all P.M.C. related systems of the subject vessel, as per annual contract with technicians from PMC Controls Ltd.

13 The parties have set out the issues on stage one of the trial as follows:

1. Does the scope of item 7300 of the MLU contract between BCF and VDD include a survey of the castellated nut and locking split pin comprising components of the linkage between the governor lever and the immediate point of connection to the fuel racks for the MaK number one engine?
2. Did the terms of the contract between VDD and PMC, evidenced by PMC's estimate dated August 18, 2004, and VDD's purchase order 94019, dated November 10, 2004, include a survey of the mechanical linkage between the governor lever for MaK number one engine to the fuel racks?

14 Essentially what the parties seek to have determined in phase one of the trial is an interpretation of the relevant contracts to determine: (1) did the scope of the survey referenced in item 7300 of the MLU contract include a survey of the governor linkage; and (2) did the scope of VDD's subcontract to PMC require a survey of the governor linkage?

15 The parties agree that if question one is answered in the negative, then the action against VDD will be dismissed, as will the third party claim by VDD against PMC and any claim by BCF against PMC alleging that PMC negligently performed its subcontract with VDD.

16 The parties also agree that if question one is answered in the affirmative but question two is answered in the negative, then the third party claim by VDD against PMC will be dismissed.

17 Furthermore, to ensure efficiency of the proceedings, the parties agree that if an appeal is taken from the Court's decision at stage one of the trial, they will together seek and consent to an order in the Court of Appeal that would have the effect of staying that appeal until the whole of the trial has been determined. This is so as to avoid appealing the trial determination of issues in slices; however, this agreement would be subject to all parties agreeing to the contrary.

18 The parties' plan of proceeding is as follows:

1. the parties propose to call all evidence that relates to the interpretation of the two contractual provisions at issue as part of stage one of the trial;
2. once this Court determines the stage one issues, whatever issues are remaining would then be tried by me in stage two of the trial, and the parties expect to and would be free to call additional evidence on the remaining issues;
3. all evidence heard in the first part of the trial would be evidence admissible on the remaining issues in stage two of the trial; and
4. the findings made by the Court in stage one of the trial would bind the parties in the remainder of the trial.

19 I pressed the parties on the question of whether or not such a split in the issues could give rise to the situation where on stage two of the trial the Court could hear evidence that might have influenced different findings of fact in stage one. The parties assure me that they are confident that this problem will not arise. The parties all agree that the evidence to be called at stage two of the trial, subsequent to the determination of the preliminary issues, will not be evidence that might have influenced a determination of the preliminary issues in stage one.

**20** The parties say that the evidence at stage two of the trial will be evidence relevant only to the secondary issues. They submit that the secondary issues are distinct and separate from the preliminary issues to be determined. They also assure the Court that there will be no prejudice to the hearing of those secondary issues due to the Court making binding conclusions of fact or law that determine the preliminary issues.

**21** Likewise, the parties assure me that if the Court makes findings in stage one of the trial with respect to credibility issues, this will not adversely affect the determinations to be made at stage two of the trial.

**22** The reason for the parties' suggestion to proceed in two stages is that determination of the stage one issues may, depending on the outcome, render it unnecessary to determine some of the issues in stage two of the trial, thereby shortening the total length of the trial significantly.

**23** I have already mentioned how if the stage one issues were determined in one way it could result in dismissal of some of the claims. Stage one may only take one to two weeks of trial, whereas if the whole trial was to proceed at once, it may take considerably longer than six weeks, involving many more witnesses.

**24** Furthermore, determination of the stage one issues will greatly assist the parties in reaching a negotiated resolution of the remaining issues. I am advised that there is a very high probability that determination of the stage one issues will lead the parties to a place where they are able to negotiate a settlement of the entire case, saving all parties expense and risk and minimizing the use of the court's resources as well.

**25** These are factors that weigh in favour of trying the two issues first: see *Nguyen v. Bains*, 2001 BCSC 1130 at para. 11.

**26** I give considerable weight to the parties' submissions that proceeding in the way they describe will not prejudice the proper determination of all the issues and will be more efficient. In a recent article on professional judgment, the Honourable Mr. Justice Thomas Cromwell of the Supreme Court of Canada noted:

> . . that judges at first instance have a responsibility to manage the cases before them and to support rather than second-guess the sound and reasonable exercise of discretion [by counsel].
>
> [Thomas A. Cromwell "Professional Judgment" (2010) 68 The Advocate 665 at 668.]

**27** Here the parties are sophisticated and the issues they seek to have determined on the first stage of the trial are discrete issues involving interpretation of commercial contracts. The parties have provided me with detailed submissions and trial briefs that set out their plan for the trial if it was to proceed in two stages, with witnesses and identifiable issues. They are all agreed that this method of proceeding will save the parties time and expense in accordance with the object of the *Rules of Court*. They assure me that the division of the hearing of evidence and of the determination of issues will not prejudice the Court's ability to determine the issues in stages. I am therefore prepared to grant the order sought

**28** In terms of the form of the order, let me repeat some of the points I just made in the ruling. I do not consider myself bound narrowly by the words chosen by the parties to describe the issues, but I order as follows:

> 1. The Court will divide the trial into two stages. ...

And I can hand out notes to you on this so that you can turn this into a formal order.

**29** MR. WHARTON: I guess while we're looking at that, I'm not sure if I misheard or -- or if you actually misspoke, but the one point I thought you said that if -- if Vancouver Drydock did not have the responsibility under 7300 it would

then look to PMC as a third party. I think it's the other way around: If they -- if they do have the responsibility, they would then look to PMC through the third party claim. I'm not sure if I just misheard that or -

30 THE COURT: Yes. Make sure that it's edited properly if anyone orders the transcript. But the point is, --

31 MR. WHARTON: Yes.

32 THE COURT: -- as you said, that if -

33 MR. WHARTON: I may simply have misheard it.

34 THE COURT: If question one is answered in the negative, then the action against VDD will be dismissed as will be VDD's third party notice. But if question one is answered in the affirmative, but question two is answered in the negative, then the third party claim will still be dismissed.

35 All right. So in terms of the order:

1. The Court will divide the trial into two stages.
2. The first stage of the trial will be to determine two contractual issues:

    (i) did the scope of the survey referenced in item 7300 of the MLU contract include a survey of the governor linkage, and;
    (ii) did the scope of VDD's subcontract with PMC require a survey of the governor linkage?

3. The terms referred to in the above two issues are defined as follows:

    (a) "governor linkage" is the material part at issue in the plaintiff's claim, that links the number one main engine fuel racks to the governor, and that was alleged to have been missing a split pin from a castellated nut;
    (b) the MLU contract is the mid-life upgrade contract entered into between BCF and VDD, dated December 6, 2004, relating to the *Queen of Oak Bay* vessel; and
    (c) VDD's subcontract with PMC is evidenced by PMC's estimate dated August 18, 2004, and VDD's purchase order 94019 dated November 10, 2004.

4. The parties will call all evidence that relates to the interpretation of the two contractual issues as part of stage one of the trial.
5. Following the completion of evidence and submissions on the stage one issues, the Court will determine the issues. Once this Court determines the stage one issues, whatever issues are remaining would then be tried in stage two of the trial subject to any dismissals of claims arising from the determinations of the issues in stage one and subject to any settlement of the action. I will be seized of both stages of the trial.
6. The parties will be free to call additional evidence on the remaining issues during stage two of the trial, and;
7. All evidence heard in the first part of the trial will be evidence admissible on the remaining issues in stage two of the trial.

36 I have not set out the terms of the parties' agreement. I think that is in the record and doesn't need to be part of the

court order unless someone submits otherwise.

37 MR. BROMLEY: I don't have a submission on that, My Lady. My only concern is paragraph 3(e).

38 THE COURT: Yes?

39 MR. BROMLEY: "The VDD subcontract with PMC is evidenced by ..."

40 THE COURT: Yes.

41 MR. BROMLEY: I don't have any problem with -- with that with respect to the 1.1 portion of the August 18th letter, but there is also a reference there with respect to the governor service, the overhaul, and the evidence would be that that is an error and -- and -- in the purchase order.

42 THE COURT: Well, I'm only relying on what the parties submitted. So when you fellows submitted your question it was the contract evidenced by those two things. So if that's not your position -

43 MR. BROMLEY: I just -- it is, but not with respect to the 2115 item. I don't have Mr. Hobbs's referral -

44 THE COURT: I'm looking at the -- looking at both documents handed up, and one by counsel for the plaintiff and the one by Mr Hobbs on that point.

45 I'm content for you to work out what your issue is on that if you think you can work it out. But, I mean, it's -

46 MR. WHARTON: I actually don't see the issue. It's "evidenced by," but it's not "determinative of."

47 MR. HOBBS: Yes, I was just going to say it's evidenced.

48 MR. BROMLEY: As long as it's -- as long as it's not "determinative of" then I'm content.

49 MR. HOBBS: I don't think -

50 THE COURT: No.

51 MR. HOBBS: -- it forecloses my friend in a way he's concerned.

52 THE COURT: Yes. It should be just evidenced by him.

53 MR. HOBBS: Yeah.

54 THE COURT: I thought that was deliberate. All right.

55 So I will ask the plaintiff to prepare an actual formal order that can be entered. Thank you.

S.A. GRIFFIN J.

cp/e/qllxr/qlvxw

1 The word "not" was said in error, corrected later in the ruling.