

***Bronneke v. Rutherford*, 89 P.3d 40 (Nev. 2004)¹**

TORTS – CIVIL PROCEDURE

Summary

David Bronneke was a carpenter in his mid-forties. He had numerous chiropractic treatments over a nineteen year period.

On June 27, 2001, Bronneke saw Dr. Rutherford, a chiropractor, for chiropractic treatment. Dr. Rutherford performed a long axis traction technique by extending Bronneke's neck and tugging on the neck to realign Bronneke's spine. After the treatment, Bronneke became dizzy and nauseated, and vomited. Dr. Rutherford drove Bronneke to the hospital where he was admitted because he could not walk. Bronneke was discharged the next day after being diagnosed with an inner ear infection. Several months after the incident, Bronneke saw a neurologist who diagnosed him as having had a stroke.

Bronneke sued Dr. Rutherford for negligence and failing to inform him of the potential harm associated with the treatment could cause a stroke.

The district court held a pre-trial hearing regarding the informed consent claim. Dr. Rutherford argued that the applicable standard of care should be the same as for physicians in the medical field, requiring "an expert to testify that failing to obtain a patient's informed consent before performing a procedure falls below the standard of care."² Bronneke argued that the physician's standard should not apply because chiropractors are unregulated and "the practice of informing patients of the risks of treatment varies from chiropractor to chiropractor."³

Bronneke was not able to provide an expert who would testify that failure to inform him of the risk of stroke before treatment violated the chiropractic standard of care. As such, the District Court held that Bronneke's informed consent claim failed as a matter of law. The suit went to trial solely on the negligence claim.

The jury found for Dr. Rutherford, who was awarded \$21,000.00 in attorney fees, and \$13,400.91 in costs. Bronneke filed an appeal.

Issue and Disposition

Issue

Does the physician's professional standard of care regarding informed consent in the medical profession apply to the chiropractic field, or does the patient-oriented standard of care apply?

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² *Bronneke v. Rutherford*, 89 P.3d 40, 42 (Nev. 2004).

³ *Id.*

Disposition

The professional standard of care regarding informed consent is applicable to the chiropractic field in Nevada.

Commentary

State of the Law Before *Bronneke v. Rutherford*.

In *Beattie v. Thomas*⁴, the Nevada Supreme Court adopted the physician's professional standard for the medical field. This adoption was revisited and affirmed in *Brown v. Capanna*⁵, and reiterated in *Smith v. Cotter*⁶, which provided that "a doctor has a duty to disclose information that a reasonable practitioner in the same field of practice would disclose."⁷ This standard must be proven by "expert testimony regarding the custom and practice of the particular field of medicine."⁸

Effect of *Bronneke v. Rutherford* on Current Law

The Nevada Supreme Court looked to legislation for their analysis. NRS 634.090 regulates the chiropractic field and sets forth educational requirements which include science courses as well as continuing education requirements, and licensing requirements for practicing in Nevada. Further, "NRS 634.017 defines chiropractic malpractice as failure on the part of a chiropractor to exercise the degree of care, diligence and skill ordinarily exercised by chiropractors in good standing in the community in which he practices,"⁹ a definition similar to that in NRS 41A.009, which pertains to the medical profession. NRS 41A.009 defines medical malpractice as "failure of a physician . . . in rendering services, to use the reasonable care, skill or knowledge ordinarily used under similar circumstances."¹⁰

The Nevada Supreme Court found that under either statutory definition, expert testimony is required to provide the customary medical or chiropractic standard of care at issue.

Failure to obtain informed consent from a patient is a type of malpractice. As such, using the physician's professional standard of care, expert testimony is required to determine the customary chiropractic disclosure practice.

Summary of the law in other jurisdictions

The Nevada Supreme Court's conclusion is consistent with holdings in several other jurisdictions which recognize the applicability of medical malpractice statutes and law to chiropractors.¹¹

⁴ *Beattie v. Thomas*, 99 Nev. 579, 668 P.2d 351 (1983). *See also* *Smith v. Cotter*, 107 Nev. 267 (1991).

⁵ *Brown v. Capanna*, 105 Nev. 665, 782 P.2d 1299 (1989).

⁶ *Smith v. Cotter*, 107 Nev. 267, 810 P.2d 1204 (1991).

⁷ *Bronneke*, at 45, *quoting* *Smith v. Cotter*, 107 Nev. 267, 272, 810 P.2d 1204, 1207 (1991).

⁸ *Id.*

⁹ *Id.* at 45.

¹⁰ *Id.*

¹¹ *See* the following cases cited in *Bronneke*: *Roberson v. Counselman*, 235 Kan. 1006, 686 P.2d 149 (1984), *modified on other grounds by* *Delaney v. Cade*, 255 Kan. 199, 873 P.2d 175 (1994); *Tschirhart v. Pethel*, 61 Mich.App. 581, 233 N.W.2d 93 (1975); *Bakewell v. Kahle*, 125 Mont. 89, 232 P.2d 127 (1951); *Jones v. Malloy*, 226 Neb. 559, 412 N.W.2d 837 (1987).

Conclusion

The professional standard of care regarding informed consent is applicable to the chiropractic field in Nevada.