COURT OF APPEAL FOR ONTARIO

CITATION: Chasczewski v. 528089 Ontario Inc. (Whitby Ambulance Service), 2012 ONCA 97
DATE: 20120213
DOCKET: C53915

O'Connor A.C.J.O., Laskin and Cronk JJ.A.

BETWEEN

John E. Chasczewski, Executor of the Estate of Millie Chasczewski, Deceased, John E. Chasczewski, Tod Chasczewski and Gary Chasczewski

Plaintiffs (Appellants)

and

528089 Ontario Inc., operating as Whitby Ambulance Service, William Cocker, F. Webster and R. Werner

Defendants (Respondents)

Allan Rouben and Amani Oakley, for the appellants

Deborah Berlach and Renée A. Kopp, for the respondents

Heard: December 16, 2011

On appeal from the judgment of Justice Mark L. Edwards of the Superior Court of Justice, dated May 26, 2011 with reasons reported at 2011 ONSC 999.

Laskin J.A.:

A. OVERVIEW

[1] The plaintiffs appeal the summary judgment dismissing their action for medical malpractice.

[2] On December 22, 1996, Frank Webster and Robert Werner, two paramedics with the Whitby Ambulance Service, responded to a 9-1-1 call at the

home of Mr. and Mrs. John and Millie Chasczewski. They were told that a woman (Mrs. Chasczewski) was choking and was unresponsive.

[3] Webster and Werner arrived at the Chasczewski's home promptly, but remained there for at least 12 minutes before transporting Mrs. Chasczewski to the emergency department of the local Whitby hospital. Sadly, she went into cardiac arrest while in the back of the ambulance, could not be revived, and was pronounced dead at the hospital.

[4] The Chasczewski family sued the two paramedics, the ambulance service and its owner, William Cocker, for negligence. They alleged that the paramedics ought to have transported Mrs. Chasczewski to the hospital sooner. Had they done so, Mrs. Chasczewski could have been treated at the hospital while she still had a heart beat and would likely have survived.

[5] The defendants brought a motion for summary judgment to dismiss the claim. Edwards J. granted the motion. He held that whether the defendants met the standard of care was a genuine issue requiring a trial. However, he also held that even if the defendants breached the standard of care required of them, their breach did not cause Mrs. Chasczewski's death because she would have died anyway.

[6] In holding that the issue of causation did not require a trial, the motion judge relied on the opinion of the defendants' expert who said the survival rate

for a person with a complete heart block who suffers a pre-cardiac or cardiac arrest outside the hospital was only 2.4 per cent. The plaintiffs filed no response to this opinion. The motion judge concluded that their failure to do so was "determinative of this motion."

[7] The Chasczewski family's main argument on appeal is that the motion judge erred in relying on the opinion of the defendants' expert and in holding that the plaintiffs had an onus to respond to it. They submit that the opinion of the defendants' expert did not address the plaintiffs' theory of the case. I agree with this submission. A full appreciation of the evidence on the issue of causation requires a trial. I would set aside the motion judge's order and dismiss the motion for summary judgment.

B. THE RECORD

[8] The record before the motion judge was substantial. It included medical reports and the affidavit of John Chasczewski, who was a firefighter and administered partial CPR to his wife before the paramedics arrived.

[9] The record also included three affidavits from experts, two filed by the plaintiffs and one by the defendants. The plaintiffs filed the affidavits of Dr. Steven Shilling, a cardiologist from Irving, Texas, with 17 years experience, and the affidavit of Alex Stadthagen, a paramedic and paramedic instructor also from

Irving, Texas, with nearly 30 years experience. Each appended to his affidavit an expert report prepared in 2004.

[10] The defendants filed the affidavit of Dr. Douglas Munkley, a medical doctor specializing in emergency medicine, and, since 1986, the medical director of the base hospital paramedic program for the Niagara Region. Dr. Munkley appended to his affidavit two reports, one prepared in August 2007, and the second, a supplementary report prepared in April 2008. It was the supplementary report that the motion judge relied on to grant summary judgment.

[11] None of the experts was cross-examined on his affidavit. And neither of the two paramedics, Webster and Werner, filed affidavits on the motion.

C. THE STANDARD OF CARE

[12] In this case, as in most medical malpractice actions, the two main issues are standard of care and causation: did the defendants fall below the standard of care required of them; and if they did, did their failure to meet the standard of care cause Mrs. Chasczewski's death?

[13] The motion judge was presented with competing expert opinions on the standard of care, one from Mr. Stadthagen, who said that the paramedics breached the standard of care, and the other from Dr. Munkley, who said that they had met the standard. Faced with these contradictory opinions, neither of which was challenged on cross-examination, the motion judge sensibly

concluded that whether the defendants met the standard of care was a genuine issue requiring a trial.

[14] The motion judge did not, however, set out the plaintiffs' theory on how Webster and Werner breached the standard of care. His failure to do so likely contributed to his error in addressing the issue of causation.

[15] The question whether the standard of care was met should be decided before the question of factual causation: see *Bafaro v. Dowd*, 2010 ONCA 188, 260 O.A.C. 70; and *Randall v. Lakeridge Health*, 2010 ONCA 537, 270 O.A.C. 371. It must be resolved first for two reasons. First, without a finding that the defendant has breached the standard of care, the question of causation becomes moot. Second, and more important for this case, it is the defendant's particular substandard act or omission that must be shown to have caused the harm; therefore, it is necessary to identify that act or omission to determine what, if any, connection it has to the harm at issue. In other words, causation can only be assessed in the context of a breach of the standard of care.

[16] Because this was a summary judgment motion, the motion judge did not have to resolve whether the defendants breached the standard of care - indeed he correctly found that he could not do so on the record before him. However, he had to assume that the defendants breached the standard of care in the manner

alleged by the plaintiffs, in order to decide whether causation was also a genuine issue requiring a trial.

(a) The Timeline

[17] To properly assess whether causation raised an issue for trial, I will set out the basis for the plaintiffs' claim that Webster and Werner breached the standard of care. Important to this assessment is the timeline for what the paramedics did in relation to Mrs. Chasczewski's cardiac activity. As counsel for the plaintiffs aptly observed, this was a case in which minutes, if not seconds, were critical to Mrs. Chasczewski's chances of survival.

[18] The motion judge set out at para. 4 of his reasons the following timeline of events:

> Call received 12:53:22
>
> Crew notified 12:53:36
>
> En route to call 12:53:36
>
> Arrived scene 12:55:48
>
> Depart scene 13:13:32
>
> Arrived hospital 13:17:10

[19] From this timeline, he found that the paramedics remained on scene at the Chasczewski residence for just under eighteen minutes: see para. 5. However, because he did not deal with the plaintiffs' theory on the alleged breach of the

standard of care, he did not examine the timing of these events in relation to Mrs. Chasczewski's condition.

[20] Based on the record, a timeline including this vital information is as follows:

12:53:22	911 call received
12:53:36	Webster and Werner leave for the Chasczewski residence
12:55:48	Webster and Werner arrive at the Chasczewski residence
12:56:59	*Mrs. Chasczewski has a decreased level of consciousness and low cardiac activity, with a pulse rate of 8 to 10 beats per minute*
13:01:02	*Mrs. Chasczewski's heart rate is 36 beats per minute*
13:07:00	*Mrs. Chasczewski's cardiac activity stops*
13:11:06	*Mrs. Chasczewski suffers a cardiac arrest while in the ambulance*
13:13:32	The ambulance crew calls into dispatch to say that they have left the scene
13:17:10	The ambulance arrives at the Whitby hospital emergency department; Mrs. Chasczewski cannot be revived and is pronounced dead

[21] The evidence on what happened between 12:53 (when the paramedics arrived at the Chasczewski residence) and 13:07 (when Mrs. Chasczewski's cardiac activity stopped) is consistent throughout the record.

[22] Where discrepancies do exist is in the period between 13:07 and 13:17. Perhaps the most important discrepancy concerns how long the paramedics remained at the Chasczewski residence. The motion judge found that they stayed there for nearly 18 minutes. A Ministry of Health investigation report estimated that the paramedic crew was on scene at the Chasczewski residence for about 12 minutes before leaving for the hospital. Although it is not possible on this record to pinpoint the precise time of departure, likely, the paramedics left shortly before 13:13, the time found by the motion judge, and stopped at the side of the road to treat Mrs. Chasczewski. She went into cardiac arrest while in the back of the ambulance. And when Webster, who was driving, called in at 13:13, the ambulance was already en route to the hospital.

[23] These discrepancies may have to be sorted out at trial. On this appeal, we can safely accept three facts critical to the plaintiffs' case:

- Mrs. Chasczewski had a heart rate or cardiac activity for about 10 minutes after the paramedics arrived at the Chasczewski residence;

- The paramedics stayed at the Chasczewski residence for at least 12 minutes and perhaps longer;

- It took only about four minutes to drive from the Chasczewski residence to the Whitby hospital. This figure is used in the material and is supported by (a) the Chasczewski residence was about four to five kilometres from the hospital and (b) the dispatch record shows that the ambulance

> drove at an average speed of 80 kilometres per hour

(b) The Plaintiffs' Theory of How the Defendants Breached the Standard of Care

[24] In a nutshell, the plaintiffs' theory is that the paramedics were presented with a classic "load and go" situation. Mrs. Chasczewski's low cardiac activity made it imperative that she be transported to the hospital immediately. Instead, for reasons largely unexplained in the record because neither paramedic gave evidence, Webster and Werner waited at least 12 minutes before putting Mrs. Chasczewski in the ambulance and taking her to the hospital.

[25] In seeking to demonstrate a breach of the standard of care, the plaintiffs relied on the opinion of Mr. Stadthagen. Although he practises in Texas, he reviewed the Basic Life Support Patient Care Standards, published by the Ontario Ministry of Health. This publication set out the standards expected of paramedics at the time of the incident. Mr. Stadthagen gave the opinion that these standards are virtually identical to those used in Texas.

[26] Appendix 33 to the Ministry's publication deals with "load and go" patients. A "load and go" patient includes one with "unstable respiratory, circulatory and/or neurological status or in whom instability is imminent or highly likely on the basis of assessment findings." The appendix lists various medical and traumatic conditions characteristic of "load and go" patients. Condition 7 states:

> Decreased level of consciousness – serious underlying disorder suspect or cannot be ruled out and/or no definitive field treatment is available.

[27] The Ministry's standards stipulate that when dealing with a "load and go" patient, paramedics should first "perform appropriate primary survey interventions." This assessment should take approximately two minutes unless major problems are encountered. Then, the patient should be put in an ambulance and transported rapidly to the nearest hospital.

[28] On the basis of the general description of a "load and go" patient, and particularly condition 7, Mr. Stadthagen was able to say that Mrs. Chasczewski was such a patient. By 12:56:59, immediately after their arrival, the paramedics had determined that Mrs. Chasczewski had a decreased level of consciousness and vital signs consistent with low cardiac activity. She was obviously unstable and required immediate treatment. Mr. Stadhagen gave the opinion that had she been taken to the hospital right after the initial two-minute assessment, as required for "load and go" patients, she would have arrived at the emergency department no later than 13:03, that is, while she still had a heart beat. There, she could have been given an external pacemaker or the drug Atropine intravenously, either of which may have saved her life.

[29] Mr. Stadthagen recognized that these treatment options could not be given "in the field" (see condition 7) or at the scene, and therefore had to be administered at the hospital. That is because Webster and Werner, as "primary

care paramedics" were not trained to apply a pacemaker or administer drugs intravenously. Only advanced care paramedics are trained in these skills, and Ontario did not have advanced care paramedics until 1998, two years after Mrs. Chasczewski died.

[30] Mr. Stadthagen's overall opinion was that by not treating Mrs. Chasczewski as a "load and go" patient and immediately transporting her to the nearest hospital emergency department, the two attending paramedics, Webster and Werner, fell below the required standard of care.

[31] This outline of the plaintiffs' theory on the standard of care provides the necessary context for the issue of factual causation. However, before turning to that issue, I will briefly address an alternative argument on the standard of care put forward by the defendants. They contend that the plaintiffs filed no admissible evidence on the standard of care because Mr. Stadthagen neither worked nor was trained in Ontario. He therefore had no direct knowledge of Ontario standards and could not be qualified as an expert.

[32] This argument has no merit. The bar for qualifying an expert is not high. The only requirement is that the expert must "have acquired special or peculiar knowledge through study or experience in respect of the matters on which he or she undertakes to testify": *R. v. Mohan*, [1994] 2 S.C.R. 9, at p. 25. This special knowledge must go "beyond that of the trier of fact": see *R. v. Marquard*, [1993] 4

S.C.R. 223, at p. 243; *McLean (Litigation Guardian of) v. Seisel* (2004), 182 O.A.C. 122, at paras. 105-106.

[33] Mr. Stadthagen had the requisite knowledge and expertise regarding paramedical standards of care in Texas. He reviewed the Ontario standards and said under oath that they were nearly identical to those used in Texas, where he practises. His expertise on the standard of care in Ontario went "beyond that of the trier of fact". Moreover, he was not cross-examined on his opinion or on his qualifications generally. His expert opinion was therefore admissible. Its weight was a matter for the motion judge.

D. CAUSATION

(a) Dr. Shilling's Opinion

[34] In seeking to show that the defendants' breach of the standard of care caused Mrs. Chasczewski's death, the plaintiffs relied on the expert opinion of Dr. Shilling. From the medical records, Dr. Shilling noted that Mrs. Chasczewski did not have a heart attack, but instead had a complete heart block. As she did not have any heart damage, in his opinion her condition was quite treatable as long as the paramedics transferred her immediately to an advanced life support service. The use of an external cardiac pacemaker or the administration of Atropine intravenously *while Mrs. Chasczewski still had a pulse* would likely have saved her life.

[35] Dr. Shilling considered the timeline and emphasized that after the paramedics arrived at the Chasczewski residence, there was a "10 minute window" when Mrs. Chasczewski had cardiac activity. If she had been given Atropine or an external pacemaker in this window of opportunity, she likely would have survived. He put it this way in the body of his report:

> 3. Complete heart block is truly an extremely treatable condition. An external pacemaker almost uniformly allows one to temporarily but adequately treat this disturbance if it is instituted in an appropriate amount of time. I definitely feel than an external pacemaker would have allowed this patient to survive if instituted immediately [f]or very shortly after paramedic arrival, which appeared to have been at 12:56 p.m. It is definitely more difficult to state whether or not she would have survived if it would have been placed at 13:07, but nevertheless, there is a 10 minute window at that particular time frame when she clearly had cardiac activity and thus, in all reasonable medical probability, I do feel she likely would have survived.
>
> 4. *I do feel that the patient would have survived if she would have arrived with a pulse* and received *external cardiac pacing at the time that she did experience a palpable pulse.* Again, it is somewhat more difficult when you get out into the 13:05 to 13:06 time frame, but nevertheless, patient[']s can certainly be salvageable with an external pacemaker. [Emphasis added.]

[36] In the concluding paragraph of his report, Dr. Shilling summed up his opinion on Mrs. Chasczewski's chances of survival:

> Basically, this patient died from compete heart block and while the paramedics arrived in an extremely rapid amount of time, there is certainly a near 10 minute

> "gap," in which there was an adequate window of opportunity to give Atropine or apply an external pacemaker. I think that in all reasonable medical probability, the patient was salvageable up until the time she had no obvious pulse. I do believe that the medical record supports that this was the case up until the 13:06 time frame.

(b) Dr. Munkley's Response and the Motion Judge's Reliance on it

[37] In an attempt to respond to Dr. Shilling's opinion, the defendants filed Dr. Munkley's supplementary report. In that report Dr. Munkley said that Mrs. Chasczewski's condition was not treatable, and that even if she had been given a cardiac pacemaker or a drug intravenously, her chances of survival were "very slim." In giving this opinion, he relied on a New England Journal of Medicine article, which put the survival rate at 2.4 per cent. The critical part of Dr. Munkley's opinion, which the motion judge relied on, is as follows:

> Complete heart block in the setting of prehospital cardiac arrest or prearrest as treated by paramedics outside of hospital has been well researched. Unfortunately, it is <u>not</u> extremely treatable. The survival rate in Ontario for this condition when treated by "Advanced Care Paramedics" using IV medications and external cardiac pacing was found to be only 2.4% (New England Journal of Medicine 351; 7 August 2004). The paramedics treating Mrs. Chasczewski on December 22nd, 1996 were not trained in these skills and practiced as "Primary Care Paramedics". Even if they had been able to apply external pacing the chance of survival of Mrs. Chasczewski was very slim. [Emphasis in original.]

[38] The motion judge held that the plaintiffs' failure to respond to "Dr. Munkley's causation opinion of a survival rate of 2.4 per cent" was a "glaring admission" and fatal to their claim:

> It is a glaring omission on the part of the plaintiffs that they have not addressed the opinion of Dr. Munkley as expressed in his affidavit on August 24, 2010, to the effect that the survival rate in the Province of Ontario, for someone presenting with Mrs. Chasczewski's condition was 2.4 percent. This omission is particularly troubling given the fact that Dr. Munkley in his affidavit, specifically responded to the opinions of Dr. Shilling and Mr. Stadthagen. In my opinion there was a heavy onus on the part of the plaintiffs to respond to Dr. Munkley's opinion. This is especially so, given the fact that Dr. Shilling, in his report of June 10, 2004, specifically addressed the issue of causation as it related to the timelines in this matter. The failure to respond to Dr. Munkley's causation opinion of a survival rate of 2.4 percent is, in my opinion, determinative of this motion. While I accept that the plaintiffs and their counsel may have experienced delays in responding to the defendants' motion, there can be no doubt that the affidavit of Dr. Munkley was in the possession of plaintiffs' counsel, and could, and should have been responded to, particularly as it relates to the causation issue. I infer from the fact that Dr. Shilling does not respond to Dr. Munkley's causation opinion that Dr. Shilling can offer no expert evidence to contradict Dr. Munkley's opinion: at para. 17.

(c) The Motion Judge's Error

[39] There are two reasons why it was an error for the motion judge to dismiss the plaintiffs' claim on the basis that they did not respond to Dr. Munkley's opinion.

[40] The main reason is that Dr. Munkley's opinion does not address the plaintiffs' theory of the case. Dr. Munkley's opinion of a 2.4 per cent survival rate rests on two important assumptions:

- The patient suffered a cardiac arrest or a pre-cardiac arrest (which Dr. Munkley did not define but I take it to mean the absence of a heart beat) *outside* of the hospital.

- An external pacemaker or Atropine was administered *by paramedics after* the patient went into cardiac or pre-cardiac arrest.

[41]

[42] The plaintiffs' theory on causation does not rest on either of these assumptions. Rather, the plaintiffs' theory assumes that the defendants failed to comply with the standard of care as set out in Mr. Stadthagen's opinion. It assumes that but for that failure, Mrs. Chasczewski would have been immediately transferred to the hospital emergency department after the paramedics arrived at her residence, and therefore that she would not have suffered a cardiac or pre-cardiac arrest *outside* of the hospital. She would have been treated at the hospital with an external pacemaker and or Atropine, and likely would have survived. Indeed, on the plaintiffs' theory, Mrs. Chasczewski would not even have been in the cohort studied in the New England Journal of Medicine article that yielded the figure of a 2.4 per cent survival rate.

[43] More significant, Dr. Munkley's opinion does not give effect to the 10 minute window of opportunity on which Dr. Shilling relied. Webster and Werner arrived at the Chasczewski residence at 12:55:48; Mrs. Chasczewski had a heart beat until approximately 13:07 at which time she was presumably in pre-cardiac arrest; she went into cardiac arrest at 13:11. In Dr. Shilling's opinion if she had been treated *before* 13:07, that is before she went in to pre-cardiac or cardiac arrest, she likely would have survived.

[44] Dr. Shilling's opinion does not rest on advanced care treatment by the paramedics, only that Mrs. Chasczewski be given advanced care treatment before 13:07. If effect is given to Mr. Stadthagen's opinion on the standard of care, Mrs. Chasczewski should have been at the emergency department of the Whitby hospital no later than 13:03. Inferentially, once there, she could have been given advanced care treatment – either an external pacemaker or Atropine – in a hospital setting, by a doctor - before 13:07.

[45] Thus, Dr. Munkley's opinion, and his reliance on a 2.4 per cent survival rate, does not respond at all to the plaintiffs' theory of the case. Indeed, Dr. Munkley did not give any opinion on Mrs. Chasczewski's chance of survival if she had arrived at the hospital with a heartbeat. And he gave no opinion on her probability of survival had the cardiac arrest occurred at the hospital.

[46] There is a second reason why the motion judge ought not to have accepted Dr. Munkley's opinion as determinative of the motion. Dr. Munkley's opinion was based on a statistic from a study reported in an article in a scholarly journal. Dr. Munkley did not even append the article to his affidavit, and therefore we do not know the details of the parameters or assumptions underlying the study. Denying the plaintiffs their day in court on the basis of a statistic in a single study, which is not even in the record, is unsatisfactory.

[47] Moreover, the courts have cautioned against the use of statistics to decide causation in a given case. Gonthier J. expressed this caution in *Laferrière v. Lawson*, [1991] 1 S.C.R. 541, at pp. 606-607, where he noted the difference between scientific and legal standards of proof and emphasized that legal causation need not be determined by scientific precision. A judge's duty is to assess the evidence of causation on the whole, "not to remain paralysed by statistical abstraction." The motion judge's reliance on the statistic used by Dr. Munkley is precisely the type of fixation the court warned against.

[48] Causation is a very difficult issue in this case. It is, as I have said, an issue where minutes, even seconds, may have mattered. The expert evidence on the issue was conflicting; the evidence on the timing of key events was unclear; and the evidence of key witnesses was absent. On the record before him, the motion judge could not have had a full appreciation of the issue of causation. Causation is a genuine issue requiring a trial. I would therefore set aside the summary

judgment granted by the motion judge and dismiss the defendants' motion. Both the standard of care and causation are genuine issues requiring a trial.

E. CONCLUSION

[49] This is an old case. Mrs. Chasczewski died over 15 years ago. Shortly after her death, Mrs. Chasczewski's family filed a complaint about the treatment she received both with the Ministry of Health and the Coroner's Office. The Ministry and the Coroner investigated the complaint, and each concluded that the care Mrs. Chasczewski received was appropriate.

[50] Nonetheless, the Chasczewski family is entitled to a trial of their allegations against the defendants. The evidence bearing on both the issues of the standard of care and causation cannot be fully appreciated on the record before the motion judge. I would allow the appeal, set aside the summary judgment granted by the motion judge and substitute an order dismissing the defendants' motion for summary judgment. The parties may make brief submissions in writing on the costs of the appeal and the motion within two weeks of the release of the court's reasons.

Released: Feb. 13, 2012
"DOC"

"John Laskin J.A."
"I agree Dennis O'Connor A.C.J.O."
"I agree E.A. Cronk J.A."