COURT OF APPEAL FOR ONTARIO

CITATION: Morin v. Korkola, 2012 ONCA 869
DATE: 20121211
DOCKET: C53541

Weiler, Juriansz and Hoy JJ.A.

BETWEEN

Andrew Morin, Jennifer Morin, John Grimmett and Christopher Morin

Plaintiffs (Respondents)

and

Michael Korkola, Michael Lingley, Gordon Crawford, Margaret Burghardt, Terence Porter, George Doherty and The Royal Victoria Hospital

Defendants (Appellants)

Ryan Breedon and Brendan Gray, for the Defendants (Appellants)

Kevin Wolf and Mark Johnston, for the Plaintiffs (Respondents)

Heard: November 6, 2012

On appeal from the judgment of Justice Gregory M. Mulligan of the Superior Court of Justice, dated March 7, 2011.

ENDORSEMENT

A. INTRODUCTION

[1] The appellant is an orthopaedic surgeon who was found to be negligent in his treatment of the respondent's femur fracture. He advances three grounds on appeal: 1) the trial judge erred in concluding that he failed to meet the standard of care; 2) the trial judge failed to address his position on causation; and 3) the

trial judge failed to make factual determinations necessary to justify the award for future loss of income.

[2] For the reasons that follow, we dismiss the appeal.

B. FACTS

[3] The respondent was a competitive dirt bike racer. On September 19, 2001, he was involved in an accident and fractured his right femur. He was then 15 years old.

[4] The appellant is an orthopaedic surgeon at Royal Victoria Hospital who treated the respondent. The appellant operated on the respondent on September 20 and stabilized his femur with three intramedullary nails. Following the operation, the appellant instructed the respondent to apply nothing more than “featherweight” to the leg.

[5] After some complications, another surgeon removed one of the intramedullary nails on November 25, 2001. The appellant removed the final two nails on December 30, 2001, and new x-rays were taken.

[6] On January 9, 2002, the respondent returned to the appellant for follow-up treatment. X-rays taken that day revealed some bowing in the respondent’s femur. The appellant prescribed physiotherapy and advised the respondent to return in six weeks.

[7] When the respondent returned on February 20, 2002, the femur had bent significantly, and had healed in a deformed position. On March 12, 2002 the appellant performed an osteotomy, realigning the femur and inserting a solid rod to stabilize it. The surgery was successful.

[8] Subsequently, the respondent's leg became infected and he refused further treatment by the appellant. On May 3, 2002, another orthopaedic surgeon replaced the rod in the femur and flushed out the infected area.

[9] On December 1, 2008, the respondent was diagnosed with osteomyelitis, an infection of the bone. He was treated by an orthopaedic surgeon at Sunnybrook Hospital and he has since followed up with that doctor periodically. The osteomyelitis has successfully been treated, although there is a 10-20% chance of reoccurrence, and a 5-10% chance that the leg will need to be amputated.

C. ANALYSIS

(1) Standard of care

[10] The trial judge found that the appellant's treatment of the respondent on January 9, 2002, fell below the standard of care of a reasonably competent orthopaedic surgeon. On January 9, 2002 after examining the respondent and reviewing his x-rays, the appellant scheduled the respondent to return in six weeks. The trial judge found that, had the appellant scheduled the respondent to

return earlier, the progressive bowing of the respondent's leg could have been arrested without surgical intervention. In making this finding, the trial judge relied on the expert evidence of Dr. Schatzker, who testified for the respondent. He said, at para. 67, "I accept the evidence of Dr. Schatzker that there were red flags apparent to any orthopaedic surgeon on January 9, 2002 which required Andrew to be monitored closely and to be returned for x-rays within a week or so of that event."

[11] The trial judge explained his conclusion in paragraph 66 of his reasons:

> On January 9, 2002 Dr. Korkola [the appellant] scheduled Andrew [the respondent] to return in six weeks. If Andrew had returned within a week or so, a further series of x-rays could have been taken to monitor any progressive bowing that may have appeared as compared to the x-rays of December 30, 2001 and January 9, 2002. I accept Dr. Schatzker's undisputed evidence that, at that point in time, the opportunity still existed to repair the fracture by non-invasive surgery by inserting a intramedullary rod through the medullar canal. After six weeks the fracture had healed in a deformed position. I accept Dr. Schatzker's undisputed evidence that the fracture could not be repaired using the previously described non-invasive method, and that the best option was the more invasive osteotomy.

[12] The trial judge was fully entitled to prefer the testimony of the respondent's expert over that of the plaintiff's expert and the plaintiff himself. The trial judge's conclusion that the appellant failed to meet the standard of care on January 9,

2002 by scheduling the respondent to return in six weeks rather than monitoring him closely was fully supported by the evidence.

(2) Causation

[13] The appellant submits that the trial judge erred by failing to address whether the bowing in his right femur was caused by the respondent placing too much weight on his leg, contrary to the appellant's instructions. We do not accept this argument. It is not clear that the argument advanced here was advanced at trial and, in any event, we were not persuaded that the evidence supported such a theory.

(3) Damages

[14] We see no merit in the attack on the trial judge's award for future loss of income. The appellant's expert estimated the respondent's future economic loss at $1,017,408, but as the trial judge pointed out, had not factored in any consequences of the original fracture. At trial the appellant took the position most, if not all, of the plaintiffs ongoing limitations were caused by the original fracture and submitted that his future loss should be quantified at $4,362. The respondent's position was that the future loss should be quantified at $350,000.

[15] The trial judge made an award of $60,000 and explained how he arrived at that figure. He took into consideration the evidence that the osteomyelitis could flare up in the future, requiring one or more surgeries. He noted that the

respondent planned to return to school and pursue a career as a wildlife technician. To allow for the respondent's absence from the work force to a flare up of osteomyelitis in the future, he assessed his future income loss at $120,000. Finally, as he was satisfied that the original femur fracture would have affected the respondent's ability to work throughout his lifetime, he reduced this amount by fixing the appellant's liability for the loss at 50%, to arrive at $60,000.

[16] The assessment of future loss involves guesswork in the best of circumstances. Here, on the record before him, the trial judge's reasons were fit for the purpose, given the appellant's evidence and position at trial.

D. CONCLUSION

[17] The appeal is dismissed. Costs in favour of the respondent are fixed in the amount of $20,000, all inclusive, in accordance with the agreement of counsel.

"K.M. Weiler J.A."
"R.G. Juriansz J.A."
"Alexandra Hoy J.A."