S.C.C. Court File No. 39049

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE ONTARIO COURT OF APPEAL)

B E T W E E N:

KAREN ARMSTRONG

APPELLANT
Respondent

A N D:

ROYAL VICTORIA HOSPITAL, DR. COLIN WARD, DR. SCOTT POWELL, DR. JESSIE-JEAN WEAVER AND DR. JOSEPH A. ZADRA

RESPONDENT
Appellant

FACTUM OF THE APPELLANT
(KAREN ARMSTRONG, APPELLANT)

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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PART I – OVERVIEW AND FACTS

A. Overview of the Appellant's Position

1. The issue for this Honourable Court to resolve is whether the Respondent, Dr. Colin Ward ("Dr. Ward") took reasonable care to prevent the injuries suffered by the Appellant, Karen Armstrong, and which resulted in the loss of her kidney. In these circumstances and on the evidence presented before him, the Trial Judge determined that Dr. Ward did not. In doing so, it is submitted that the Trial Judge made no error.

2. At its core, this appeal is about whether it was open to the Trial Judge to find that a reasonable and prudent surgeon could reasonably be expected to stay at least 2mm away from Ms. Armstrong's ureter when removing a benign colon. It is submitted that the Trial Judge's conclusion about the negligent cause of the damage to Ms. Armstrong's ureter was available and fully supported by the evidence, including expert opinion and Dr. Ward's own testimony at trial. On the other hand, the decision of the Majority below fundamentally ignores the record, mischaracterizes both the Trial Judge's description and application of the standard of care, and blurs the fundamental distinction between using an appropriate technique and executing it properly.

(a) Questions at Issue

3. Ms. Armstrong was injured as a result of a colectomy performed by the Respondent, Dr. Ward. She developed a blocked ureter, which led to serious complications. Of central importance at trial, was determining what caused the blocked ureter. The two key questions at trial were:

- whether Dr. Ward, while removing the mesentery, in fact came within 2mm of Ms. Armstrong's ureter, and
- whether that was the cause of the injury to the ureter.

4. Both questions were decided against Dr. Ward.

5. Ms. Armstrong's theory, which was accepted by the Trial Judge, was that a thermal injury resulted from Dr. Ward's use of a surgical instrument called a LigaSure within 2mm of her ureter during the surgery. By contrast, Dr. Ward's evidence was that he had not come too close to the ureter, and that was not how the injury occurred. He was confident that he had stayed 5-15cm away

from the ureter, but this had nonetheless resulted in scarring which travelled through her abdomen, ultimately blocking her ureter. Dr. Ward's expert witnesses, Dr. Hagen and Dr. Robinette, assumed that this was the case when they offered two alternative opinions about the cause of the ureter blockage.[1]

6. Simply put, the Trial Judge was asked whether Ms. Armstrong's ureter was blocked due to scarring resulting from the use of the LigaSure within 2mm, or whether it was the result of scarring which originated 5-15cm away (i.e., the non-negligent explanation submitted by Dr. Ward). The Trial Judge appropriately determined it was the former. It is submitted that he was entitled to do so, and that deference is owed to this decision.

(b) Divided Court of Appeal

7. A Majority of the Court of Appeal allowed Dr. Ward's appeal. The Majority held that the Trial Judge erred in his articulation and application of the standard of care, an issue not seriously in dispute before him. In particular, the Majority held that the Trial Judge erred by:

- imposing an improper standard of care by measuring the surgeon's "goal," rather than the means a prudent surgeon would use to achieve that goal;[2]
- failing to consider and rule out non-negligent causes of Armstrong's injury;[3] and
- failing to conclude, on the evidence, that Dr. Ward had met the standard of care.[4]

8. In dissent, van Rensburg J.A. concluded the Trial Judge made no error in his conclusion that Dr. Ward breached the standard of care by using the LigaSure device less than 2mm away from Ms. Armstrong's ureter. Further, she concluded that the Trial Judge's conclusions respecting standard of care were supported by the evidence at trial. For van Rensburg J.A., the Majority was

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[1] Judgment of the Superior Court below, at paras. 77-78 [Record of the Appellants "AR" Vol. 1, Tab 1]
[2] Judgment of the Court of Appeal below, at para. 33 [AR Vol 1, Tab 3]
[3] Judgment of the Court of Appeal below, at para. 56 [AR Vol 1, Tab 3]
[4] Judgment of the Court of Appeal below, at para. 58 [AR Vol 1, Tab 3]

obliged to give deference to the clear findings of the Trial Judge, which were fully supported by evidence. It failed to do so, choosing instead to ignore the actual issue between the parties and mischaracterize both the evidence at trial and the Trial Judge's reasons. It is submitted that van Rensburg J.A.'s dissenting opinion is correct and that the appeal should be allowed.

B. Statement of Facts

9. On February 5, 2010, Dr. Ward performed a laparoscopic colectomy on Ms. Armstrong. During the surgery, Dr. Ward used a device called a LigaSure to seal blood vessels. The LigaSure is widely used in surgery. It works by passing an electric current between two prongs, sealing and separating the tissue between the prongs. A side effect of this process is that the surrounding tissue for 1-2mm can be damaged by heat (the "thermal spread").

10. After her surgery, Ms. Armstrong developed a blocked ureter, which resulted in the loss of her kidney. The parties came to an agreement on damages and dismissed the case against all of the named defendants, save Dr. Ward.

11. The risk of damage due to thermal spread is well-recognized. There is no serious issue that the standard of care requires a surgeon to operate the LigaSure far enough away from important structures, like the ureter, in order to avoid unintended damage.

(a) Judicial History

(b) Trial Evidence & Decision

12. The case proceeded to trial before Mulligan J. Judgment was granted in favour of Ms. Armstrong.

13. A total of five physicians testified at trial: four experts and Dr. Ward himself. As noted by the Majority, all of the experts are highly experienced and celebrated physicians.[5]

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[5] Judgment of the Court of Appeal below, at para. 15 [AR Vol 1, Tab 3]

14. The witnesses generally agreed in their evidence concerning the standard of care. As noted by van Rensburg J.A., the experts agreed that, in order to avoid inadvertent injury, the surgeon was required to identify, protect and stay at least 2mm from the ureter.[6] This evidence is critical to understanding both the Trial Judge's decision, and the errors made by the Majority of the Court of Appeal.

(i) Evidence of Dr. Marcus Burnstein

15. Dr. Burnstein is a general surgeon who was called by the plaintiff and was qualified, on consent, to provide opinion evidence on both the standard of care and causation.[7] Dr. Burnstein testified in chief that:

- it is "very important" to identify and protect the ureter throughout the surgery;[8]
- there was a risk of injury to the ureter in cases where the patient's illness has made the operation more difficult, or where the patient has risk factors such as "large pelvic masses, malignant neoplasms, inflammatory disease, previous operation or radiation therapy" (all of which were absent in this case);[9]
- the rate of injury to the ureter in a case like Ms. Armstrong's – which had no abnormality or disease process increasing the risk of injury – should be zero, because surgeons are trained to identify and protect structures like the ureter, and "there should be no reason to be in the wrong place … and expose other organs to injury";[10]
- because the LigaSure has a risk of damage to surrounding tissues from thermal spread, it was necessary to stay at least 2mm away from the ureter; and[11]
- Dr. Ward had used the LigaSure "unacceptably close" – that is, within 2mm of Ms. Armstrong's ureter – causing her injury.[12]

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[6] Judgment of the Court of Appeal below, at para. 82 [AR Vol 1, Tab 3]
[7] Trial Transcript, Evidence of Dr. Burnstein, p. 10 [AR Vol 2, Tab 13]
[8] Trial Transcript, Evidence of Dr. Burnstein, p. 16-17 [AR Vol 2, Tab 13]; Judgment of the Court of Appeal Below, at para. 99 [AR Vol 1, Tab 3]
[9] Trial Transcript, Evidence of Dr. Burnstein chief p. 21-22 [AR Vol 2, Tab 13]; Judgment of the Court of Appeal Below, at para. 100 [AR Vol 1, Tab 3]
[10] Trial Transcript, Evidence of Dr. Burnstein chief p. 23[AR Vol 2, Tab 13]; Judgment of the Court of Appeal Below, at para. 101 [AR Vol 1, Tab 3]
[11] Trial Transcript, Evidence of Dr. Burnstein chief p. 30-31 [AR Vol 2, Tab 13]
[12] Trial Transcript, Evidence of Dr. Burnstein chief p. 33-35 [AR Vol 2, Tab 13]

16. Dr. Burnstein did not put forward a standard of "perfection", as has been argued by Dr. Ward.[13] While Dr. Burnstein accepted the 0.15% to 0.66% risk of injury to the ureter during a colectomy reported in the literature (which included both open and laparoscopic surgery, and surgeries with various complicating features), Dr. Burnstein stated that there ought to have been "zero risk" of injury in the circumstances of *this* case, where the patient had normal anatomy and no risk factors.[14]

17. Dr. Burnstein was challenged during cross-examination, and affirmed his position with greater precision:

> Q. Now, turning to your, I'll call them, three opinions: the first one being, that injury to the ureter if there is no structural abnormality of the colon falls below the standard of care. And I take it, what you're saying and what you said in your report is that the injury implies a breach of the standard of care, correct?
>
> A. Yes, in this context.
>
> Q. Yes. The context being a normal structure of the colon.
>
> A. Right. My position is, just to be clear, that the average reasonable prudent practitioner, general surgical practitioner in terms of removing a structurally normal colon in a structurally normal abdomen and peritoneum should be able to achieve the goal of colon removal without injuring other structures in this case the ureter and that injury to the ureter in removal of a structurally normal colon and a structurally normal abdomen is a failure to conduct the operation with the appropriate degree of safety, prudence, judgment, and is below the standard of care.[15]

18. Lastly, in cross-examination Dr. Burnstein was taken through a series of "steps" which Dr. Ward claimed to have completed. Dr. Burnstein was invited to agree, and in fact agreed, that each hypothetical "step" Dr. Ward was to have taken was a reasonable step. [16] The final step suggested by Dr. Ward's counsel was that "when he is using the LigaSure to divide the colonic mesentry he

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[13] Judgment of the Court of Appeal below, at para. 149 [AR Vol 1, Tab 3]
[14] Judgment of the Court of Appeal below, at para. 153 [AR Vol 1, Tab 3]
[15] Trial Transcript, Evidence of Dr. Burnstein chief, p. 50-51 [AR Vol 2, Tab 13]; Judgment of the Court of Appeal Below, at para. 103 [AR Vol 1, Tab 3]
[16] Trial Transcript, Evidence of Dr. Burnstein chief, p. 76-78 [AR Vol 2, Tab 13]; Judgment of the Court of Appeal Below, at para. 104 [AR Vol 1, Tab 3]

stays away from the ureter towards the colon."[17] While Dr. Burnstein agreed that this *would* be reasonable, he testified that, unfortunately, Dr. Ward did not in fact take this step.[18] Had Dr. Ward done so, the injury simply could not have occurred. [19]

19. There was no objection to Dr. Burnstein's testimony at trial. As noted by van Rensburg J.A., Dr. Burnstein was properly qualified, having special knowledge and experience in using the LigaSure device, in performing colectomies, and in the risks of injury to other structures in the course of such surgery. His lack of specific experience with laparoscopic colectomies was a matter of weight, which was a determination for the trial judge to make.[20]

20. There is nothing that would suggest that the Trial Judge made a palpable and overriding error in accepting Dr. Burnstein's evidence as part of his overall determination of the issue of standard of care.[21]

(ii) Evidence of Dr. John Hagen

21. Dr. Hagen is a general surgeon called by Dr. Ward, who was qualified to give opinion evidence on both the standard of care and causation.[22] He testified:

- the standard of care was to "identify the left ureter and take necessary measures to protect it";[23] in order words, to "identify the ureter and then stay away from the area;"[24]

- the "step" of dividing the colonic mesentery by using the LigaSure "away from the ureter and near the colon" met the standard of care;[25]

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[17] Trial Transcript, Evidence of Dr. Burnstein, p. 77-78 [AR Vol 2, Tab 13]
[18] Judgment of the Court of Appeal Below, at para. 105 [AR Vol 1, Tab 3]
[19] Trial Transcript, Evidence of Dr. Burnstein chief Burnstein, p. 80 [AR Vol 2, Tab 13]
[20] Judgment of the Court of Appeal Below, at para. 149 [AR Vol 1, Tab 3]
[21] Judgment of the Court of Appeal Below, at paras. 146-157 [AR Vol 1, Tab 3]
[22] Trial Transcript, Evidence of Dr. Hagen, p. 7 [AR Vol 2, Tab 16]
[23] Trial Transcript, Evidence of Dr. Hagen, p. 16, 1. 24-25 [AR Vol 2, Tab 16]
[24] Trial Transcript, Evidence of Dr. Hagen, p. 33, l. 13 [AR Vol 2, Tab 16]; Judgment of the Court of Appeal Below, at para. 108 [AR Vol 1, Tab 3]
[25] Trial Transcript, Evidence of Dr. Hagen, p. 13 [AR Vol 2, Tab 16]

- he would only use the LigaSure more than 2mm away from the ureter, to avoid damaging it inadvertently;[26] and

- if the ureter is properly identified and protected, then the LigaSure will not be used within 2mm, because "you're going to stay away from it."[27]

22. Like Dr. Burnstein's "zero risk" of coming too close to the ureter evidence, Dr. Hagen stated that it was not possible to cause collateral damage using the LigaSure because "you're really nowhere near the ureter, you're centimetres away…it's not possible to damage the ureter if you've identified it and…you've taken the vessels."[28]

23. Despite this evidence, Dr. Hagen refused to concede that using the LigaSure within 2mm of the ureter was a breach of the standard of care:

> Q. So if Dr. Ward is mistaken in his identification and protection of the ureter and as a result of that mistake, uses the LigaSure within two millimeters of the ureter, thereby causing damage to the ureter, your opinion is that would meet the standard of care, it that what you're saying?
>
> A. Yes.[29]

24. This resulted in a very unusual re-examination in which, rather than asking Dr. Hagen to explain how a surgeon could meet the standard of care and nevertheless operate the LigaSure in the wrong place, Dr. Ward's counsel had Dr. Hagen reverse this position, and testify that this would be a breach of the standard of care:

> Q. And my friend asked you if you know – no criticism – somewhat of a compounded question following that, and assume, even though it has not been suggested, that Dr. Ward

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[26] Trial Transcript, Evidence of Dr. Hagen, p. 33-34 [AR Vol 2, Tab 16]; Judgment of the Court of Appeal Below, at para. 108 [AR Vol 1, Tab 3]
[27] Trial Transcript, Evidence of Dr. Hagen, p. 35-36 [AR Vol 2, Tab 16]; Judgment of the Court of Appeal Below, at para. 109 [AR Vol 1, Tab 3]
[28] Trial Transcript, Evidence of Dr. Hagen, p. 11, l. 14 [AR Vol 2, Tab 16]
[29] Trial Transcript, Evidence of Dr. Hagen, p. 36 [AR Vol 2, Tab 16]; Judgment of the Court of Appeal Below, at para. 109 [AR Vol 1, Tab 3]

> wrongly identified, thought that the vena cava was the ureter and proceeded after that, I assumed that that would be a breach of the standard of care.
>
> A. Yes, the standard involves identifying the ureter.[30]

25. Importantly, Dr. Hagen never testified that there could be any circumstance in which a surgeon took appropriate steps to identify and protect the ureter, but nevertheless operate the LigaSure within 2mm. His opinion that Dr. Ward met the standard of care was premised on his assumption that Dr. Ward used the LigaSure several centimeters from the ureter.

(iii) Evidence of Dr. Colin Ward

26. Dr. Ward testified that he did not use the LigaSure within 2mm of Ms. Armstrong's ureter.[31] Rather, he estimated that he used the LigaSure between 5-15 cm (or a "long way") from the ureter.[32]

27. When asked to describe what "steps" he took duing the operation of the LigaSure to protect the ureter, Dr. Ward answered:

> It's the distance ensuring you're several centimeters away from the obstruction before deploying the device.[33]

28. With respect to the standard of care, Dr. Ward testified:

- identifying and protecting the ureter is "the most important part of any sort of colostomy";[34]
- the standard of care is, when using the LigaSure, to dissect far enough away from important structures to avoid damaging them by collateral thermal damage;[35]

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[30] Trial Transcript, Evidence of Dr. Hagen, p. 41 [AR Vol 2, Tab 16]
[31] Trial Transcript, Evidence of Dr Ward, p. 21 [AR Vol 2, Tab 14]
[32] Trial Transcript, Evidence of Dr Ward, p. 20 [AR Vol 2, Tab 14]
[33] Trial Transcript, Evidence of Dr Ward, p. 22, l. 8-10 [AR Vol 2, Tab 14]; Judgment of the Court of Appeal Below, at para. 111 [AR Vol 1, Tab 3]
[34] Trial Transcript, Evidence of Dr Ward, p. 47 [AR Vol 2, Tab 14]; Exhibit 4 – Read Ins, Q 88 & 92 [AR Vol 2, Tab 19]
[35] Trial Transcript, Evidence of Dr Ward, p. 46 [AR Vol 2, Tab 14]; Judgment of the Court of Appeal Below, at para. 123 [AR Vol 1, Tab 3]

- it is not enough to identify the ureter, but the surgeon must also avoid injuring it;[36]
- he intended to use the LigaSure far away from the ureter, to avoid damaging it;[37] and,
- if he did use the LigaSure within 2mm of the ureter, this was an error on this part.[38]

29. Despite these admissions, Dr. Ward did not agree that using the LigaSure within 2mm of Ms. Armstrong's ureter – which he repeatedly denied having done – would be a breach of the standard of care. He did not explain how it could be possible to maintain the standard of care and nevertheless operate the LigaSure that closely to the ureter.

(iv) Evidence of Dr. Michael Robinette

30. Dr. Michael Robinette is a urologist called by Dr. Ward as a causation expert. Notwithstanding this, he had delivered reports on both standard of care and causation. In cross-examination, he gave evidence with respect to the standard of care.

31. Dr. Robinette testified that the standard of care was to find the ureter, and stay far enough away from it that instruments (like the LigaSure) do not inadvertently damage it.[39]

32. Dr. Robinette went on to concede that if Dr. Ward had used the LigaSure within 2mm of the ureter, this was a breach of the standard of care.[40]

(v) Position of Dr. Ward With Respect to the Standard of Care

33. As noted above, Dr. Ward's position at trial was that he used the LigaSure more than 2mm – indeed, several centimeters – from Ms. Armstrong's ureter.

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[36] Trial Transcript, Evidence of Dr. Ward, p. 47,l. 14-16 [AR Vol 2, Tab 14]
[37] Trial Transcript, Evidence of Dr. Ward, p. 48, l. 22-23 [AR Vol 2, Tab 14]
[38] Trial Transcript, Evidence of Dr. Ward, p. 49, l. 10-13[AR Vol 2, Tab 14]; Judgment of the Court of Appeal Below, at para. 114 [AR Vol 1, Tab 3]
[39] Trial Transcript, Evidene of Dr. Robinette, p. 29, l. 1-7 [AR Vol 2, Tab 15]
[40] Trial Transcript, Evidene of Dr. Robinette, p. 30, l. 23-25 [AR Vol 2, Tab 15]; Judgment of the Court of Appeal Below, at para. 116 [AR Vol 1, Tab 3]

34. No witness testified that it would be acceptable to use the LigaSure within 2mm of the ureter. No witness testified that there might be non-negligent reasons – such as the surgeon's dexterity or unexpected movement of anatomic structures – that might bring the LigaSure within 2mm of the ureter. This suggestion was never made to any witness, or even to the Trial Judge in closing argument.

(vi) Findings of the Trial Judge Regarding the Standard of Care

35. The trial judge's findings with respect to the applicable standard of care are set out succinctly at paras. 81 – 84 of the trial decision:

> [81] I am satisfied that the standard of care for a general surgeon is to identify, protect, and avoid direct contact with or close proximity to the ureter when using an energy emitting device like the LigaSure.
>
> [82] Based on the experts' testimony, "close proximity to" means within one to two millimetres of the ureter. Dr. Ward testified about the steps he took to identify and protect the ureter. The experts pointed to the need to identify and protect the ureter during a colectomy. The general surgeons who testified as experts indicated that it was important for a surgeon to identify and protect a ureter when a LigaSure is being used for laparoscopic surgery.
>
> [83] Both urologists indicated that the LigaSure's heat energy could damage the ureter. There is a risk of injury if the LigaSure touched or came within one or two millimetres of the ureter…
>
> [84] I am satisfied that, under these circumstances, it would be a breach of the standard of care for a general surgeon to touch the ureter or come within one or two millimetres of it during a routine colectomy on a benign colon. Dr. Hagen agreed that colectomies involving benign colons could be considered basic surgery for a general surgeon.[41]

36. Based on the foregoing review, it is clear that there was ample evidence to support this finding. There was full evidentiary support for the Trial Judge's conclusion that the standard of care required the surgeon not only to identify and protect the structures, but to stay a safe distance

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[41] Judgment of the Superior Court below, at paras. 81-84 [Record of the Appellants "AR" Vol. 1, Tab 1]

(in this case, 2mm) away from the ureter while using the LigaSure device. As noted by van Rensburg J.A., "[t]here is little difference between the standard of care evidence of Dr. Burnstein, Dr. Hagen and Dr. Ward, except in the refusal of the latter two witnesses to admit that, if Dr. Ward had in fact come too close to the ureter, this would have been a breach of the standard."[42]

37. As such, the Trial Judge was entitled to accept the "firm and reasoned opinion of Dr. Burnstein that a competent surgeon would have had no reason to be in the wrong place to expose other organs to injury, and ought to have been able to stay at least two millimetres away from the ureter".[43]

(vii) Did Dr. Ward Breach the Standard of Care?

38. Having determined the appropriate standard of care, the Trial Judge then considered whether Dr. Ward had breached that standard. This required him to determine factual causation – that is, what had actually happened.

39. As described above, Dr. Ward's position was that he had maintained a safe distance from the ureter. The live issue in this case was whether he had actually done so, or whether he had inadvertently but negligently used the LigaSure within 2mm of Ms. Armstrong's ureter. A significant amount of evidence at trial concerned the causes and manifestations of ureteric injury in general, and of Ms. Armstrong's injury in particular.

40. Ms. Armstrong's theory, supported by the evidence of Dr. Burnstein and Dr. Lawrence Klotz, a urologist qualified to give opinion evidence on causation, was that the LigaSure had been used within 2mm of her ureter. Dr. Ward's theory, supported by Dr. Hagen and Dr. Robinette, was that he had used the LigaSure several centimeters away, but that this caused scarring which travelled through the retroperitoneum and ultimately damaged the ureter.

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[42] Judgment of the Court of Appeal below, at para. 117 [AR Vol 1, Tab 3]
[43] Judgment of the Court of Appeal below, at para. 118 [AR Vol 1, Tab 3]

41. The Trial Judge reviewed the evidence tendered on this issue in detail, at paras. 92-108 of his decision. He explicitly rejected Dr. Robinette's theory, noting that it had no support in the academic literature, and that the theorized complication was simply unknown, despite the fact that the LigaSure is widely used world-wide.[44]

42. The Trial Judge went on to make his central finding as to the factual cause of Ms. Armstrong's injury:

> I accept Drs. Klotz and Burstein's evidence that Dr. Ward came within one or two millimetres of the ureter, causing damage leading to scar tissue and eventual ureter blockage. Upon surgical investigation several weeks later, this blockage extended eight to ten centimetres along the ureter's centre. This damage led to the ureter's complete shutdown. The ureter was unable to transfer urine from the kidney to the bladder. As a result, Armstrong's kidney had to be removed by a subsequent surgical procedure.[45]

43. There was ample evidence to support this finding of fact.[46] It is not in issue on this appeal.

44. Having determined that Dr. Ward had, in fact, operated the LigaSure within 2mm of Ms. Armstrong's ureter, the Trial Judge went on to determine that this was a breach of the standard of care, and that the breach was the cause of Ms. Armstrong's injury:

> In a colectomy procedure, identification and protection of the ureter is paramount. Using a LigaSure can cause damage by heat transmission if it touches the ureter or comes within one to two millimetres. I am satisfied that on the facts of this case, the plaintiff has established that Dr. Ward breached the standard of care. Further, the breach caused damage to the ureter leading to a stricture of the ureter. This damage required the removal of Armstrong's left kidney.[47]

45. The Trial Judge explicitly rejected Dr. Ward's evidence that he had stayed far from the ureter. In so finding, he found that Dr. Ward had not completed the final reasonable "step" put to Dr. Burnstein by his counsel.

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[44] Judgment of the Superior Court below, at paras. 110-111 [AR Vol. 1, Tab 1]
[45] Judgment of the Superior Court below, at para. 112 [AR Vol. 1, Tab 1]
[46] Trial Transcript, Evidence of Dr. Burnstein, p. 40-41 [AR Vol 2, Tab 13]; Trial Transcript, Evidence of Dr. Klotz, p. 9-10 [AR Vol 2, Tab 12]
[47] Judgment of the Superior Court below, at para. 113 [AR Vol. 1, Tab 1]

(c) Appeal

(i) Majority Decision on Appeal

46. The Majority concluded that the Trial Judge erred by framing the standard of care in terms of the "goal," rather than the "means" or "steps":

> The trial judge imposed an improper standard of care when measuring Dr. Ward's liability. Put simply, he measured Dr. Ward's liability according to the goal a prudent surgeon would have when conducting the operation, rather than the means a prudent surgeon would use to attain that goal. In the circumstances of this case, this was an error of law. On the evidence before him, and given his own factual findings, he should have found that it was not proved that Dr. Ward had breached the requisite standard of care.[48]

47. For the Majority, the "controversial component" of the Trial Judge's standard of care analysis was "...his finding that a normal, prudent surgeon would avoid direct contact or close proximity (within two millimetres) between the ureter and the LigaSure."[49] This finding was determined to be 'goal oriented' and therefore improper. For the Majority, a reasonably prudent surgeon need only "try" to avoid the ureter.[50] In dissent on this point, van Rensburg J.A. noted there was "no reference" to evidence from Dr. Ward's expert witnesses to support this argument.[51]

48. As a matter of judicial policy, the Majority found that the standard of care can be target-oriented, but only in certain kinds of cases:

> I have described the bar on defining standards of care according to goals or results as a general rule because I would not rule out that there are cases where negligence alone could prevent a goal from being achieved or a positive result from being attained. Leaving a surgical tool inside a patient or removing the wrong limb during surgery might be examples. In such cases, it would be harmless in defining the standard of care as outcomes or goals instead of prudent means or behaviours; for example, by finding that it is a breach

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[48] Judgment of the Court of Appeal below, at para. 33 [AR Vol 1, Tab 3]
[49] Judgment of the Court of Appeal below, at para. 38 [AR Vol 1, Tab 3]
[50] Judgment of the Court of Appeal below, at para. 48 [AR Vol 1, Tab 3]
[51] Judgment of the Court of Appeal below, at para. 131 [AR Vol 1, Tab 3]

> of the standard of care of a prudent surgeon to leave surgical tools inside a patient or to remove the wrong limb.

49. The Majority of the Court of Appeal held that the Trial Judge erred in defining the standard of care that Dr. Ward had to meet, improperly establishing a "standard of perfection". For the Majority, Paciocco J.A. held that, given the Trial Judge's determination that Dr. Ward took steps to identify and protect the ureter, the action should have been dismissed.

50. With respect to factual findings, the Trial Judge accepted that Dr. Ward had taken "steps" to identify and protect the ureter. However, it is significant to note that he did not accept Dr. Ward had in fact stayed away from the ureter with the LigaSure while performing the operation. As such, the Trial Judge did not err. The standard of care is not simply to take steps to identify and to protect the ureter – as noted by van Rensburg J.A. "all of the expert witnesses confirmed that it was necessary to stay away from the ureter while the LigaSure device was in use. Indeed, knowing where the ureter is, and avoiding it is what 'protecting the ureter' means, while the mesentery is being removed."[52]

51. The Majority stated that "a trial judge who is prepared to proceed on the basis that only negligence could cause the relevant injury is obliged to consider and rule out non-negligent causes".[53] The Appellant submits that this finding is wrong in the circumstances of this case. A trial judge is not obliged to consider potential non-negligent causes where there is no evidentiary foundation to do so.[54] Moreover, the Trial Judge did consider and explicitly rejected the non-negligent causes put forward by Dr. Ward. There was no evidence to suggest that a reasonably competent surgeon, "trying" to stay at least 2mm away, might accidentally have injured the ureter during this particular operation. With respect, a trier of fact is required to determine standard of care and its breach based on the evidence and not the speculative inquiry prescribed by the

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[52] Judgment of the Court of Appeal below, at para. 123 [AR Vol 1, Tab 3]
[53] Judgment of the Court of Appeal below, at para. 56 [AR Vol 1, Tab 3]
[54] *Hassen v. Anvari*, 2003 CarswellOnt 3436 (C.A.) at para. 9, leave to appeal refused: 2004 CarswellOnt 1768 (S.C.C.); Judgment of the Court of Appeal below, at para. 134 [AR Vol 1, Tab 3]

Majority. As noted by van Rensburg J.A., "[t]he onus on a plaintiff in a medical malpractice case is not to disprove every possible theory that might be put forward by a defendant, let alone theories that are not raised at trial, but only on appeal."[55]

52. The Majority accepted that in some cases it would be appropriate to consider "what happened" in order to determine if the defendant had met the standard of care, but that in this case it was unnecessary and conflated standard of care and causation.[56] However, it is important to balance this against van Rensburg J.A.'s careful review of the jurisprudence.[57] In dissent, she concluded that "at times the court will need to determine 'what happened' (that is, the factual cause of the plaintiff's injury) in order to resolve whether the standard of care has been breached. Determining factual (and not "but-for") causation is sometimes necessary before a conclusion can be reached on whether there has been a breach of the standard of care."[58]

53. For van Rensburg J.A., the Trial Judge in this case had to determine how Ms. Armstrong's left ureter had been damaged, before he could reach any conclusion on whether Dr. Ward had breached the standard of care (i.e. "what happened"). As such, the fact the Trial Judge "considered evidence as to the mechanism of the injury in his analysis of the breach of standard of care" does not mean he conflated standard of care and causation.[59]

54. The Majority held that the Trial Judge's decision erred in part because he did not specifically state "that it is only by negligent acts or omissions that a LigaSure can be brought within two millimetres" of Armstrong's ureter.[60]

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[55] Judgment of the Court of Appeal below, at para. 135 [AR Vol 1, Tab 3]
[56] Judgment of the Court of Appeal below, at paraS. 63-65 [AR Vol 1, Tab 3].
[57] Judgment of the Court of Appeal below, at paras. 137-145 [AR Vol 1, Tab 3]
[58] Judgment of the Court of Appeal below, at para. 138 [AR Vol 1, Tab 3]; see also *Grass (Litigation guardian of) v. Women's College Hospital (2001)*, 2001 CanLII 8526 (ON CA).
[59] Judgment of the Court of Appeal below, at para. 144 [AR Vol 1, Tab 3]
[60] Judgment of the Court of Appeal below, at para. 47 [AR Vol 1, Tab 3]

(ii) Dissenting Opinion on Appeal

55. In her dissenting reasons, van Rensburg J.A. determined that the Trial Judge's conclusions were fully supported by the evidence. He made no errors of law and no overriding and palpable errors of fact. She would have dismissed the appeal.

56. van Rensburg J.A. highlighted that this "...was not a case about when a competent surgeon might, without negligence, come to close to the ureter. Nor was this case about misadventure or about circumstances beyond the control of a surgeon."[61] Rather, it should have been a routine matter for Dr. Ward, "surgery 101".[62]

57. van Rensburg J.A. provided a detailed explanation as to why the Trial Judge's conclusions on the standard of care were fully supported.[63] Ultimately, van Rensburg J.A. rejected Dr. Ward's contention that the Trial Judge made reversible errors in his articulation and application of the standard of care, in addressing causation (i.e. "what happened") before reaching a conclusion that Dr. Ward breached the standard, and, finally, in accepting Ms. Armstrong's expert's evidence.

58. van Rensberg J.A. found that the dispute about the final element of the standard (staying away from the ureter) being described as a "goal" or a "step" was perhaps only a matter of semantics. She referred to a prior Ontario Court of Appeal decision, *Rowlands v. Wright*, where the Court of Appeal noted "there is a difference between using the appropriate technique and executing it properly."[64]

PART II – STATEMENT OF ISSUES

59. The following issues arise on this appeal:

a. Did the trial judge err by articulating the standard of care in terms of goals rather than steps?

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[61] Judgment of the Court of Appeal below, at para. 82 [AR Vol 1, Tab 3]
[62] Judgment of the Court of Appeal below, at para. 96 [AR Vol 1, Tab 3]
[63] Judgment of the Court of Appeal below, at paras. 88-89, 136. [AR Vol 1, Tab 3]
[64] *Rowlands v. Wright*, 2009 ONCA 492, at para. 28.

b. Did the trial judge err by failing to consider and exclude non-negligent causes of the plaintiff's injury?

c. Did the trial judge err by considering factual causation before determining that Dr. Ward breached the standard of care?

d. Did the trial judge err by failing to find that Dr. Ward met the standard of care?

e. Did the Court of Appeal apply the correct standard of review to the trial judge's decision?

PART III – STATEMENT OF ARGUMENT

A. The Trial Judge Did Not Err By Articulating the Standard of Care in Terms of "Goals" Rather Than "Steps"

(a) The Question to Be Answered

60. The Trial Judge held that the standard of care required Dr. Ward to avoid using the LigaSure within 2mm of Ms. Armstrong's ureter.[65] There was ample evidence to support that articulation of the standard. It was consistent with the expert testimony of Dr. Burnstein, Dr. Hagen, and even Dr. Ward.

61. The Majority below took issue with the Trial Judge's formulation of the standard of care as requiring that Dr. Ward do more than "try" not to bring the Ligasure too close to the ureter. The Majority concluded that the Trial Judge erred by framing the standard of care in terms of the "goal", rather than the "means" or "steps".[66] For the Majority, the Trial Judge's "goal" oriented approach incorrectly imposed a standard of perfection on Dr. Ward.

62. The question for this Honourable Court is therefore whether the Trial Judge erred in law by framing the standard of care in those terms – in other words, did the Trial Judge describe the standard of care correctly? By way of answer to this question, the Appellant submits the following:

a. the Trial Judge made no error;

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[65] Judgment of the Superior Court below, at para. 84 [AR Vol 1, Tab 1]
[66] Judgment of the Court of Appeal below, at para. 33 [AR Vol 1, Tab 3]

b. the Trial Judge's conclusion that a reasonably competent surgeon would have stayed 2mm away from Ms. Armstrong's ureter is fully supported by the evidence;

c. the Trial Judge *did* frame the standard of care in terms of procedural steps to be taken by a reasonably prudent surgeon in these circumstances;

d. the Trial Judge's articulation of the standard of care is not a statement of result or a "goal", but an essential step that was not taken in this case; and

e. in any event, the distinction between a "goal" and "step" is semantic whereas the standard articulated by the Trial Judge accurately reflects the expert testimony at trial as to what a reasonably prudent surgeon must do.

(b) Negligence & Medical Malpractice

63. The elements of a negligence action are not controversial. In order to succeed, a plaintiff must prove:

- the defendant owed them a duty of care;
- the defendant's behaviour breached the standard of care;
- the plaintiff sustained damage; and
- the damage was caused, in fact and in law, by the defendant's breach.[67]

64. In the context of medical malpractice actions, the standard of care has been described this way:

> 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 of one who does not profess to be so qualified by special training and ability.[68]

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[67] *Deloitte & Touche v. Livent Inc. (Receiver of)*, 2017 SCC 63 (CanLII), [2017] 2 SCR 855; *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27 (CanLII) at para. 3 and *Saadati v. Moorhead*, 2017 SCC 28 (CanLII), [2017] 1 SCR 543 at para. 13.
[68] *Crits v. Sylvester*, 1956 CanLII 34 (Ont. C.A.).

65. There is no doubt that, in setting out the standard of care, the Trial Judge must articulate what the defendant is actually expected to do (or refrain from doing). In *Fullowka v. Pinkerton's of Canada*, relied on by the Majority, this Honourable Court held that the Trial Judge had erred both by imposing an absolute duty (rather than a duty of reasonable care), and by failing to articulate what the defendant was *actually* required to do to discharge that duty, particularly given the unusual circumstances of that case.[69] No such error was made by the Trial Judge in this case.

66. In *Hassen v. Anvari,* a decision of the Court of Appeal rendered 16 years prior to the decision reached below, the Court summarized the legal principles applicable in a medical negligence case involving surgery:

- all surgery has risks, so that mere misadventure must not be considered negligence: *Crits v. Sylvester*, 1956 CanLII 34 (ON CA);
- a surgeon "should not be held liable for mere errors of judgment": *Lapointe v. Hôpital Le Gardeur,* 1992 CanLII 119 (SCC) at para. 29;
- a bad outcome does not, by itself, require a finding of negligence: *Dumais v. Zarnett* (1996), 1996 CanLII 8205 (ON SC).

67. In addition, the Court in *Hassen* noted that, following the abolition of the *res ipsa loquitur* maxim by the Supreme Court of Canada in *Fontaine v. British Columbia*, 1998 CanLII 814 (SCC), the onus is on the plaintiff to prove that negligence by the defendant caused the plaintiff's injury. For the Court of Appeal, that onus may be satisfied by circumstantial evidence that allows an inference of negligence to be made, unless the defendant negates the inference with an explanation that is at least as consistent with no negligence as with negligence.[70]

68. In this case, any inferences made by the Trial Judge were supported by the available evidence and Dr. Ward's alternative non-negligent explanation for the ureter damage (i.e. the 5-15cm theory) was considered and rejected.

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[69] *Fullowka v Pinkerton's of Canada,* 2010 SCC 5 (CanLII), [2010] 1 SCR 132 para. 80.
[70] *Hassen, supra* note 54*,* at para. 9.

(c) Semantics

69. In this case the Majority found that the Trial Judge erred in law by imposing an improper standard of care focused on "the goal a prudent surgeon would have when conducting the operation, rather than the means a prudent surgeon would use to attain that goal".[71] The Majority held that the Trial Judge's findings of fact led to the conclusion that the surgeon took the necessary steps to ensure the patient's safety, even though that goal was not met.

70. The distinction between a "step" and a "goal" is purely semantic, since virtually every aspect of surgery could be characterized as either. The goal of a colectomy is the removal of the colon. Every stage of the procedure – from the initial identification of the patient through sending the patient to the recovery room following surgery – is obviously a "step" in that procedure. Performing these steps correctly is the goal of every competent surgeon.

71. Perhaps recognizing this issue, the Majority later defined a "step" as "executing an act under one's control."[72] So understood, the standard of care should be defined in terms of the steps which should be taken by the defendant; that is, the standard of care should properly be defined in terms of what the defendant is actually expected to do. The question in this case is whether the Trial Judge failed to do so.

(d) The Standard

72. The evidence before the Trial Judge suggested that Dr. Ward would have met the standard of care if he had:

- identified the left ureter by locating it on the screen in the operating theatre, and then used a medial approach, tweaking it or pushing the structures around it to ensure it moved;

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[71] Judgment of the Court of Appeal below, at para.33 [AR Vol 1, Tab 3]
[72] Judgment of the Court of Appeal below, at para. 48 [AR Vol 1, Tab 3]

- pushed away the retroperitoneal structures, including the ureter, towards the head of the patient away from the colonic mesentery;

- opened the LigaSure to use it to divide the colonic mesentery only after the previous steps; and

- stayed away from the ureter towards the colon when using the LigaSure to divide the colonic mesentery.[73]

Quite clearly, the Trial Judge, relying on the evidence before him, found that Dr. Ward did not take the final reasonable step, of staying away from the ureter while dividing the mesentery.[74] As such, he breached the standard of care.

73. As noted above, the Trial Judge found that an essential element of the standard of care is "to identify, protect, and avoid direct contact with or close proximity to the ureter when using an energy emitting device like the LigaSure".[75] The expert testimony at trial indicated that 'close proximity' in this context means 2mm.[76]

(e)The Majority's Mischaracterization

74. Obviously, the use of the LigaSure is within the control of the surgeon. The question, for the Majority, is whether the surgeon could avoid using the LigaSure within 2mm of the ureter – that is, whether the distance between the LigaSure and the ureter is within the control of the surgeon. Paciocco J.A., for the Majority, wrote:

> The controversial component of the standard of care that the trial judge imposed was therefore his finding that a normal, prudent surgeon would avoid direct contact or close proximity (within two millimetres) between the ureter and the LigaSure.[77]

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[73] Trial Transcript, Evidence of Dr. Burnstein, p. 76-78 [AR Vol 2, Tab 13]; Judgment of the Court of Appeal Below, at para. 104 [AR Vol 1, Tab 3]
[74] Judgment of the Court of Appeal below, at para. 156 [AR Vol 1, Tab 3]
[75] Judgement of the Superior Court below, at para. 81 [AR Vol 1, Tab 1]
[76] Judgement of the Superior Court below, at para. 82 [AR Vol 1, Tab 1]
[77] Judgment of the Court of Appeal below, at para. 38 [AR Vol 1, Tab 3]

75. This completely mischaracterizes the case before the Trial Judge. The question of whether a surgeon could avoid coming within 2mm of the ureter was not "controversial" – indeed, it was not raised at all, either in evidence or argument before the trial judge. This point was made forcefully by van Rensburg JA in her dissent:

> With respect, there was no evidence at all in this trial to suggest that a surgeon exercising reasonable care could not have stayed two millimetres away from the ureter while using the LigaSure to remove the mesentery during Ms. Armstrong's colectomy. That was not an opinion offered by the appellant's experts, who assumed that Dr. Ward had in fact stayed centimetres away from the ureter. Nor were any of the expert witnesses questioned about how an injury could have occurred if a surgeon had taken reasonable care to identify, protect and stay away from the ureter. While at one point in his cross-examination Dr. Hagen said he would "try" to stay two millimetres away, he did not offer any evidence as to why, despite trying, he might come too close. Indeed, Dr. Hagen had never seen a LigaSure-related injury of the ureter in his own practice. And Dr. Ward did not say that he had tried to stay away from the ureter but had been unable to do so. He was confident that he had in fact stayed centimetres away from the ureter, and that he was "nowhere near" the ureter when he was using the LigaSure device.[78]

76. Each of Dr. Burnstein, Dr. Hagen and Dr. Ward described the use of the LigaSure away from the ureter as a "step" to be completed by the surgeon.[79] Implicit in this characterization is the assumption that this is something a surgeon actually does. More importantly, nobody suggested that there was any circumstance in which maintaining an appropriate distance might not be possible, or that protecting the ureter was somehow out of the surgeon's control.

77. This case is distinguishable from *Carlsen v. Southerland*, another case referred to by the Majority. In that case, the defendant conceded that his instruments had passed beyond the annulus fibrosis, causing the plaintiff's injury, but led evidence that this was a recognized event which could occur even if the surgeon met the standard of care – i.e., a mere misadventure.[80] The Trial Judge in *Carlsen* held that the defendant breached the standard of care by "failing to ensure that

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[78] Judgment of the Court of Appeal below, at para. 127 [AR Vol 1, Tab 3]
[79] Trial Transcript, Evidence of Dr. Burnstein, p. 77-78 [AR Vol 2, Tab 13]; Trial Transcript, Evidence of Dr. Hagan, p. 12-13 [AR Vol 2, Tab 16]; Trial Transcript, Evidence of Dr. Ward, p. 22, l 5-10 and p. 46 [AR Vol 2, Tab 14]
[80] *Carlsen v. Southerland*, 2008 BCSC 1772 paras. 17-22.

he not let his instruments penetrate past the annulus fibrosus," but did not explain how this was a breach, in light of the defence evidence.[81] On appeal, Kirkpatrick J.A. held this was an error because the Trial Judge focused on the result of the surgery and not "the precise manner in which Dr. Southerland failed to meet the standard of care."[82] In *Carlsen*, the specific breach identified by the Trial Judge was something that, on the evidence before him, could have occurred absent negligence. Unlike the circumstances before the Trial Judge in this case, the standard of care in *Carlsen* could not be identified in terms of that breach (absent, presumably, an explicit rejection of the evidence called by the defendant). That analysis is not engaged here.

78. In this case, there was simply no evidence that a surgeon could take reasonable precautions and nevertheless come with 2mm of the ureter. There was no suggestion that maintaining a safe distance might be somehow out of the control of the surgeon; indeed, all the witnesses agreed that this was possible (and Dr. Ward alleged that he had done so). Using the Majority's terminology, it follows that, based on the evidence *actually* before the Trial Judge, staying more than 2mm from the ureter was a step, not a goal. On the Trial Judge's findings, Dr. Ward breached the standard of care by failing to do so.

B. The Trial Judge Did Not Err By Failing To Exclude Non-Negligent Explanations For the Injury

(a) The Trial Judge Considered Non-Negligent Causes

79. The Majority concluded that the Trial Judge should have found that Dr. Ward met the standard of care, noting that he did not exclude non-negligent causes for Ms. Armstrong's injury. However, this finding does not withstand scrutiny of the Trial Judge's reasons. The Appellant submits, as van Rensburg J.A. found in dissent,

- that the Trial Judge *did* consider and reject the non-negligent causes presented to him at Trial; and

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[81] *Carlsen v. Southerland*, 2006 BCCA 214, 53 B.C.L.R. (4th) 35, (B.C.C.A.) at para. 8.
[82] *Ibid.* at para. 15.

- that Ms. Armstrong had no obligation to disprove *every* non-negligent explanation, including those that might have been put forward by Dr. Ward, but were not raised at trial.

(b) The Majority View & Dissent

80. With respect to the Trial Judge's consideration of non-negligent explanations or causes for Ms. Armstrong's injuries, the Majority noted:

> I say this because at no time did the trial judge make the supplementary finding that the only way a LigaSure could be deployed within one to two millimetres of the ureter is by negligent act or omission.[83]
> …
> More importantly, Dr. Burnstein did not attempt to explain why accidental but non-negligent thermal injuries can be ruled out. It is obvious, for example, that surgical success depends on dexterity, yet Dr. Burnstein did not address whether an ordinary prudent surgeon would always have the dexterity to succeed in maintaining a safe distance. Nor did he address whether periodic vermiculation guarantees that a prudent surgeon could not cause unintentional injury to structures that have unexpectedly moved during surgery, a prospect that the practice of repeated vermiculation appears to contemplate.[84]

81. The Majority went on to hold that:

> A trial judge who is prepared to proceed on the basis that only negligence could cause the relevant injury is obliged to consider and rule out non-negligent causes. Only if this is done, can the trial judge properly use success as the standard of care. In determining whether this is so, the burden is not on the defendant to raise potential non-negligent causes with evidence, nor is it improper speculation for a trial judge to consider potential non-negligent causes that are open on the evidence but that the plaintiff has failed to address. A plaintiff whose liability theory is that only negligence could have caused the injury in question is obliged to demonstrate that this is so, and the trial judge is required to accept this before finding liability. That did not occur in this case.[85]

82. In fact, the Trial Judge did address and reject the one potential non-negligent cause of the injury raised at trial: Dr. Ward's theory that use of the LigaSure several centimeters from the ureter was the cause of the plaintiff's damage. What the Majority seems to have in mind are other

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[83] Judgment of the Court of Appeal Below, at para. 52 [AR Vol 1, Tab 3]
[84] Judgment of the Court of Appeal Below, at para. 54 [AR Vol 1, Tab 3]
[85] Judgment of the Court of Appeal Below, at para. 56 [AR Vol 1, Tab 3]

possibilities, such as a lack of dexterity on the part of the surgeon, or the unexpected movement of structures during surgery.[86] This argument was cogently rejected by van Rensburg J.A.:

> [134] The burden of proof was on Ms. Armstrong to establish that Dr. Ward failed to meet the standard of care of a reasonably competent surgeon when her ureter was injured in the course of the laparoscopic removal of her colon. A trial judge is not obliged to consider potential non-negligent causes where there is no evidentiary foundation to do so: see, for example, *Hassen v. Anvari*, 2003 CarswellOnt 3436 (C.A.), at para. 9, leave to appeal refused: 2004 CarswellOnt 1768 (S.C.C.).
>
> [135] In this case, the trial judge considered and explicitly rejected the non- negligent causes put forward by the appellant's expert witnesses. As I have explained, there was no evidence in this trial to suggest that a reasonably competent surgeon, "trying" to stay at least two millimetres away, might accidentally have injured the ureter during this particular operation. The expert evidence detailed earlier was to the contrary. The trier of fact is required to determine standard of care and its breach based on the evidence and not on speculation. The onus on a plaintiff in a medical malpractice case is not to disprove every possible theory that might be put forward by a defendant, let alone theories that are not raised at trial, but only on appeal.[87]

(c) Why the Dissenting View Must Be Preferred

83. As between the Majority and Dissenting reasons, it is submitted that van Resnburg J.A.'s approach is the correct one. The Court of Appeal has noted previously that "[i]t is trite law that a trial judge must decide a case on the evidence and only on the evidence presented at trial."[88] Moreover, appellate courts have consistently and repeatedly cautioned that that trial judges must not rely on information obtained *outside* the trial process, lest they assume "the multi-faceted role of advocate, witness, and judge."[89] And while a trial judge is of course not bound to accept the evidence of an expert witness, if she rejects the expert's opinion she must not do so on the basis of information obtained outside of the trial process, which was never put to the expert.[90]

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[86] Judgment of the Court of Appeal below, at para. 54 [AR Vol 1, Tab 3]
[87] Judgment of the Court of Appeal below, at paras. 134-135 [AR Vol 1, Tab 3]
[88] *R. v. Cloutier,* 2011 ONCA 484 at para. 99; also *R. v. Bornyk* 2015 BCCA 28 at para. 8; *Phillips et al. v. Ford Motor Co. of Canada Ltd. et al*., 1971 CanLII 389 (ON CA), [1971] 2 OR 637
[89] *R. v. Hamilton,* 2004 CanLii 5549 (ONCA) at para. 1; *Hearn v McLeod Estate*, 2019 ONCA 682 at paras. 28-30.
[90] *Hearn* at paras. 28-30; *R. v. Bornyk* 2015 BCCA 28 at para 8 and 18.

84. As noted by van Rensburg J.A., it was never suggested to any witness that there might be a non-negligent reason – such as the surgeon's dexterity or movement of the anatomy – for a surgeon to use the LigaSure within 2mm of the ureter. It was never suggested to the Trial Judge that such explanations might be available. Contrary to the Majority, these non-negligent causes were not "open on the evidence" rather, they were "speculative possibilities without evidentiary support."[91] Indeed, on this record, it would have been an error for the Trial Judge to reject Dr. Burnstein's opinion because he did not address imagined, non-negligent causes.

(d) Negative Implications of the Majority Decision

85. The danger of permitting a trial judge to reject an expert's opinion based upon information or theories not grounded in the record, as the Majority prescribes, is that it risks the trial judge inadvertently reaching the wrong conclusion. The purpose of the expert witness is to provide the trial judge with information on matters outside of her own experience and knowledge.[92] Courts have long recognized that the standard of care of a physician is a matter which requires, in virtually every case, expert evidence. "A judge or jury is in no position to compare the conduct of the doctor to that required of the 'reasonable practitioner' without expert evidence."[93] Inviting a trial judge to consider matters not put to the experts, or otherwise raised by the parties, is inviting the trial judge to substitute his own opinion for that of the expert – even though the trial judge is, *prima facie*, not qualified to do so.

86. This poses a risk to the administration of justice. Assume that, as a matter of fact, patients' anatomical structures do not unexpectedly move during surgery. In such a case, it is unlikely that the defendant would raise such movement as a possible explanation for the injury. Had the Trial

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[91] *Hassen, supra* note 54, at para. 14.
[92] *R. v. Mohan,* 1994 CanLII 80 (SCC), [1994] 2 SCR 9*; R. v. Bornyk*, 2015 BCCA 28.
[93] Gerald Robertson & Ellen Picard., *Legal Liability of Doctors and Hospitals in Canada*, 5th ed. (Toronto: Thomson Reuters, 2017) at 287 [Book of Authorities "BA" Tab 2]; *Cranwill v. James*,1994 CanLII 9254 (AB QB), affirmed (1997), 193 A.R. 204 (C.A.), leave to appeal to S.C.C. ref'd [1997] S.C.C.A. No. 139 at para. 40; *Dezwart v. Misericordia Hosptial,* 1988 CanLII 3578 (AB QB), affirmed (1990), 105 A.R. 312 (C.A.), at para. 28

Judge herein dismissed the case on the basis that the plaintiff had not established that unexpected movement was not the cause of her injuries, the community might well question how the result could be correct.

87. An even more stark example was raised by the panel during the oral argument before the Court of Appeal. Had an earthquake occurred during the surgery, this presumably might have provided a non-negligent explanation for Dr. Ward's failure to maintain a safe distance from the ureter. As it happens, no party led evidence at this trial as to whether an earthquake occurred or did not occur, because this was not raised as a defence by Dr. Ward. Suppose the Trial Judge had dismissed the action on the basis that the plaintiff had not excluded the possibility that an earthquake caused the defendant to slip and use the LigaSure too closely. Given that there had not, in fact, been an earthquake during the surgery, would not the community be rightfully outraged?

88. The reason Trial Judges must not stray from the case actually presented at trial is that it is an essential feature of the adversarial system that each party is expected to put its best case forward. As Binnie J. noted in *Danyluk v. Ainsworth Technologies*, "The law rightly seeks a finality to litigation. To advance that objective, it requires litigants to put their best foot forward to establish the truth of their allegations when first called upon to do so."[94]

89. A similar point was made by Justice Ginsberg, writing for the United States Supreme Court:

> In our adversary system, in both civil and criminal cases, in the first instance and on appeal, we follow the principle of party presentation. That is, we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present. To the extent courts have approved departures from the party presentation principle in criminal cases, the justification has usually been to protect a *pro se* litigant's rights. See *Castro* v. *United States*, 540 U. S. 375, 381–383 (2003).[Footnote 2] But as a general rule, "[o]ur adversary system is designed around the premise that the parties know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief." *Id*., at 386 (Scalia, J., concurring in part and concurring in judgment).[Footnote 3] As cogently explained:

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[94] *Danyluk v. Ainsworth Technologies Inc.,* 2001 SCC 44, at para. 18.

> "[Courts] do not, or should not, sally forth each day looking for wrongs to right. We wait for cases to come to us, and when they do we normally decide only questions presented by the parties. Counsel almost always know a great deal more about their cases than we do, and this must be particularly true of counsel for the United States, the richest, most powerful, and best represented litigant to appear before us." *United States* v. *Samuels*, 808 F. 2d 1298, 1301 (CA8 1987) (R. Arnold, J., concurring in denial of reh'g en banc).[95]

90. This expectation frames the roles of both the litigants and the trial judge. As Evans J.A. held in *Phillips v. Ford Motor Co. of Canada Ltd.*:

> Our mode of trial procedure is based upon the adversary system in which the contestants seek to establish through relevant supporting evidence, before an impartial trier of facts, those events or happenings which form the bases of their allegations. This procedure assumes that the litigants, assisted by their counsel, will fully and diligently present all the material facts which have evidentiary value in support of their respective positions and that these disputed facts will receive from a trial Judge a dispassionate and impartial consideration in order to arrive at the truth of the matters in controversy. A trial is not intended to be a scientific exploration with the presiding Judge assuming the role of a research director; it is a forum established for the purpose of providing justice for the litigants.[96]

91. Our system recognizes that the parties are in the best position to raise possible defences, such as an earthquake that may have jolted the surgeon's hand. Where the party chooses not to advance some explanation which occurs to the trial judge (or appellate judge) in chambers, the judge should conclude that the facts simply did not support it, even though it may not have been addressed in evidence. After all, unless the defendant alleged that there had been an earthquake, it would be very unusual for the plaintiff to specifically lead evidence that no earthquake occurred during the surgery. Inviting trial judges to pontificate about possible explanations not raised by any party is to invite judicial error.

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[95] *Grenlaw v. United States*, 554 U.S. 237 (2008)
[96] *Phillips et al. v. Ford Motor Co. of Canada Ltd. et al*., 1971 CanLII 389 (Ont. C.A.), [1971] 2 OR 637

C. The Trial Judge Did Not Err By Determining the Factual Cause of Armstrong's Injury Before Concluding that Dr. Ward Breached the Standard of Care

(a) Issues & Law

92. A live issue before the Court of Appeal was Dr. Ward's contention that the trial judge had erred in conflating the standard of care and causation analysis. Essentially, Dr. Ward's objection was that the Trial Judge's analysis of the cause of Ms. Armstrong's injuries (at paras. 95–112 of the trial decision) occurred *before* the finding that Dr. Ward breached the standard of care (at para. 113 of the trial decision).

93. Although it is a well established principle that a trial judge should determine whether the defendant breached the standard of care before determining legal causation,[97] in some cases it is necessary to determine what actually happened – that is, how the injury occurred – in order to determine whether the standard of care was breached. As noted in both the majority and dissenting opinions below, the injury itself may be relevant circumstantial evidence of what happened.[98] There is ample support for this proposition.[99]

94. The point was explained succinctly by Gravely J. in *Kennedy v. Jackiewicz*:

> My inquiry then is to focus on what Dr. Jackiewicz did or failed to do and whether that was acceptable for a reasonably prudent and diligent surgeon in the same circumstances. The inquiry must not be outcome-oriented. <u>It is nonetheless open to experts and to the court to draw inferences of fact. It may be appropriate, then, for an expert or the court to infer from the nature of the injury what it was the surgeon did.</u> In this exercise the outcome to the patient is irrelevant. Once having determined on all the evidence what the surgeon did, the inquiry shifts to the question of whether what was done falls below the standard.[100]

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[97] Judgment of the Court of Appeal Below, at para. 60 [AR Vol 1, Tab 3]; *Bafaro v. Dowd*, 2010 ONCA 188 at para 35; *McArdle Estate* at para 25

[98] Judgment of the Court of Appeal Below, at paras. 62 and 138 [AR Vol 1, Tab 3]

[99] *Meringolo (Committee of) v. Oshawa General Hospital (1991)*, 46 O.A.C. 260 (C.A.), leave to appeal ref'd, [1991] S.C.C.A No. 155 (S.C.C.) [BA Tab 1]; *Grass, supra* note *58; Kennedy v. Jackiewicz,* 2003 CanLII 1994 (ON SC), Aff'd on appeal 2004 CanLII 43635 (ON CA)

[100] *Kennedy*, *Ibid,* at para 6.

(b) Application

95. In this case, the Trial Judge was presented with two explanations of how the injury occurred:

- Dr. Ward brought the LigaSure within 2mm of Ms. Armstrong's ureter; or
- Dr Ward stayed 5-15cm away, nonetheless causing scarring, which travelled through the abdomen and caused damage to the ureter.

96. Each explanation assumed a different account of what Dr. Ward had actually done during the surgery. Having decided that an essential step required by the standard of care was for the surgeon to stay more than 2mm from the ureter, the Trial Judge had to rely upon the circumstantial evidence, including the nature of the injury itself, in order to determine how the injury occurred in order to decide whether Dr. Ward had met this standard.

97. Both the Majority and Dissent accepted that, in the circumstances of this case, this was an appropriate approach. The Majority held that:

> In this case, given the trial judge's misconception of the standard of care, he had to resolve "what happened", specifically, whether the LigaSure was deployed within two millimetres of the ureter. The thermal injury showed that it was, since on the evidence the trial judge accepted, the LigaSure had to be brought within that range to cause the thermal injury Ms. Armstrong sustained. In other words, the thermal injury was circumstantial evidence of what happened. On the trial judge's standard of care theory, it would therefore not be improper for a trial judge to consider the injury or its relationship to what happened, before resolving whether the standard of care had been violated. Put more simply, if the standard of care the trial judge applied had been correct, it would not have been an independent error to analyse the case as he did.[101]

98. The Majority felt that this was unnecessary however, having improperly found the Trial Judge erred with respect to the standard of care.[102] Given that the Trial Judge correctly articulated the standard of care in this case, it follows that it was also appropriate for him to consider the factual cause of the plaintiff's injury *before* determining whether that standard was breached.

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[101] Judgment of the Court of Appeal Below, at para. 64 [AR Vol 1, Tab 3]
[102] Judgment of the Court of Appeal Below, at para. 65 [AR Vol 1, Tab 3]

99. In dissent, van Rensberg J.A. agreed that, in some cases, it is indeed appropriate to determine what happened before analyzing whether there has been a breach of the standard of care.[103] She would have held that the Trial Judge did not err in doing so in this case.[104]

100. Given the competing theories advanced at trial to explain the plaintiff's injury, the Trial Judge could not have determined what Dr. Ward actually did without first determining how the injury occurred. It was not an error for him to do so.

D. The Trial Judge Did Not Err in Finding that Dr. Ward Failed to Meet the Standard of Care

101. Lastly, the Majority held that the Trial Judge erred by failing to find that Dr. Ward met the standard of care. This argument is based upon the following comment of the Trial Judge:

> I am satisfied that Dr. Ward took steps during this laparoscoptomy to identify and protect the ureter. He explained those steps and testified that he always kept at least five centimeters away from the ureter.[105]

102. The Majority acknowledged that the Trial Judge found that, despite having taken steps, Dr. Ward failed to keep at least 5cm from the ureter.[106] Nevertheless, the Majority held that "had the trial judge properly applied the facts to the law he found, he would have exonerated Dr. Ward from liability."[107] Later, the Majority concluded:

> Having found that Dr. Ward took the steps that a prudent surgeon would take during this surgical procedure, the trial judge should have found that it was not proved that Dr. Ward breached the standard of care.[108]

103. The problem with this argument is that it ignores the essential finding that, despite having taken some steps to identify and protect the ureter, Dr. Ward failed to do so. Dr. Ward testified

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[103] Judgment of the Court of Appeal below, at para. 144 [AR Vol 1, Tab 3]
[104] Judgment of the Court of Appeal below, at paras. 137-145 [AR Vol 1, Tab 3]
[105] Judgement of the Superior Court below, at para. 109 [AR Vol 1, Tab 1]; Judgment of the Court of Appeal Below, at para. 49 [AR Vol 1, Tab 3]
[106] Judgment of the Court of Appeal below, at para. 50 [AR Vol 1, Tab 3]
[107] Judgment of the Court of Appeal below, at para. 51 [AR Vol 1, Tab 3]
[108] Judgment of the Court of Appeal below, at para. 58 [AR Vol 1, Tab 3]

that he took steps and, as a result of those steps, stayed more than 5cm from the ureter. The Trial Just found that this was simply not the case.

104. The point was made succinctly by van Rensberg J.A. in her dissent:

> As such, the reference at para. 109 to Dr. Ward having taken steps was not a finding by the trial judge that the appellant had met the standard of care. While conceding that Dr. Ward did take (some) steps to identify and protect the ureter, the trial judge was not satisfied he did everything he said he did— specifically, he did not stay five centimetres away from the ureter. Rather, the trial judge found that he came within one to two millimetres of the ureter, and that this had resulted in the injury to the ureter. In other words, Dr. Ward was not sufficiently diligent in checking and rechecking where he was when dividing the colonic mesentery, and he came too close to the ureter inadvertently.[109]

105. The Majority seems to conflate the finding that Dr. Ward took some steps (with the intention of meeting the standard of care) with actually meeting the standard. As was noted in *Rowlands v Wright*, "there is a difference between using the appropriate technique and executing it properly."[110] Whether Dr. Ward intended to meet the standard is hardly dispositive of whether he actually did. It has never been the law, in this or any common law jurisdiction, that merely intending or trying to meet the standard of care is sufficient.

106. The Majority's conclusion that the Trial Judge should have found that Dr. Ward met the standard of care given that he found Dr. Ward had taken steps to protect the ureter is baffling, in light of the Trial Judge's finding that Dr. Ward did not achieve what he thought he had. The exact opposite is true. Given the Trial Judge's findings of fact, based on the evidence before him, it followed that Dr. Ward had breached the standard of care.

E. The Majority Erred in Failing to Defer to the Trial Judge

(a) Holding the Trial Judge to an Unfair Standard

107. The standard of review is not controversial. The articulation of the standard of care is a question of law reviewed for correctness. At the same time, it is generally accepted that whether

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[109] Judgment of the Court of Appeal below, at para. 124 [AR Vol 1, Tab 3]
[110] *Rowlands v. Wright*, 2009 ONCA 492, at para. 28.

the standard has been met in a given case is a question of mixed fact and law reviewed for palpable and overriding error. A 'palpable' error is one that is "plainly seen". An error that is "overriding" is one that is sufficiently significant to vitiate the challenged finding of fact.[111]

108. A Court of Appeal cannot overturn the trial decision simply because it takes a different view of the evidence.[112] The finding of facts and the drawing of evidentiary conclusions is the province of the trial judge.[113]

109. In the Court of Appeal below, the Majority stated that, had the Trial Judge articulated his findings with respect to the applicable standard of care differently, his reasons would have passed appellate scrutiny. In other words, had the Trial Judge found that "the goal or desired result could only have been missed by negligent acts or omissions"[114] it would have been acceptable to the Majority.

110. The Majority here flirts with the notion that the Trial Judge was correct, but because he failed to express himself to the Majority's satisfaction, the decision must be overturned. With the greatest respect, the Majority held the Trial Judge to a "results oriented" standard of perfection.

(b) Considering the Deferential Altenative

111. The Trial Judge relied upon the evidentiary record which was before him yet his enunciation of the standard of care did not pass appellate scrutiny. In the cases referenced above the trial judge's articulation of the standard of care withstood appellate scrutiny – is there a principled reason to reject the Trial Judge's decision here?

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[111] *Housen v Nikolaisen*, 2002 SCC 33 (CanLII) at para. 12, 37, 20-25; *McAllister v Calgary (City)*, 2019 ABCA 214 (CanLII) at para. 20; *541788 Alberta Ltd v Bourgeois & Company Ltd*, 2018 ABCA 310 (CanLII) at para. 18; *Timlick v Heywood, 2017 MBCA 7* (CanLII) at para. 38; *Peters v Chasty*, 2019 ONCA 294 (CanLII) at paras. 3-4.
[112] *Lu v. Mao* 2007 BCCA 609 at para. 12.
[113] *Housen*, *subra* at para. 25, *F.H. v. McDougall*, [2008] 3 S.C.R. 41, 2008 SCC 53 at para. 73.
[114] Judgment of the Court of Appeal Below, at para. 47 [AR Vol 1, Tab 3]

112. The Alberta Court of Appeal, in *Cooper v. Flood*, came to a different conclusion on a similar set of facts. The trial judge found that the only possible cause of injury *on the evidence* was negligence. The trial judge "accepted that both negligent and non-negligent causes for the bowel perforation were possible. Eliminating the three possible causes suggested by Dr. Mainprize (infection, abnormal anatomy, and adhesions and/or scar tissue), then the only possible cause of the injury on the evidence was negligent manipulation of the trocar". [115]

113. The Court in *Cooper* held as follows:

> Ultimately, the appellants' argument comes down to asking this Court to take a different view of the evidence and the inferences drawn therefrom. While appellate review must, to some extent, re-examine and re-weigh the evidence and inferences drawn, viewed through the lens of judicial experience, the finding of negligence is not unreasonable.

114. With respect, the Majority of the Court of Appeal committed an error of law by holding that the Trial Judge's articulation of the standard of care as a "goal" was not acceptable. These findings, properly characterized, are matters of fact, of evidence. The Trial Judge's discretion in this regard commands deference and can only be interfered with in the presence of a palpable and overriding error.

115. Similarly, in *Hassen*, Dr. Anvari was unable to say what caused the unfortunate outcome of the surgery in question. He was the sole surgeon, and the plaintiff alleged that he failed to use the diligence, skill, knowledge and care to the standard required of a surgeon of his specialty. The evidence before the trial judge established that the complication that occurred in the surgery at issue was extremely rare in that it occurred in only two in ten thousand such surgeries (or 0.02 percent). There was also evidence that when such an injury occurred, it was known to be caused by the insertion of an instrument called the "trocar". The court inferred negligence and that inference was not rebutted.

116. Dr. Anvari submitted that because there were two non-negligent explanations for the injury, the court was not entitled to draw the inference of negligence. He argued that the only

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[115] *Cooper v. Flood*, 2016 ABCA 365 at para. 26

evidence of negligence on the record was the mishap itself, and that vascular injury does not necessarily indicate negligence. The Court of Appeal rejected this argument, stating "[t]he trial judge was alive to the first two possible causes of the injury suggested by the appellant and rejected them. He was entitled to do so, based on the evidence."[116] This finding mirrors van Rensburg J.A.'s description of the Trial Judge's reasons – that he considered all possibilities from the evidence before him, and determined that Dr. Ward's explanation was simply not supported by the evidence.

117. Significantly, whereas the Majority below interfered, the Court of Appeal in *Hassen*, like the Court of Appeal in *Cooper*, found no issue with the trial judge's finding that the defendant's explanations were nothing but speculative possibilities without evidentiary support. To the contrary, the Court of Appeal in *Hassen*, following this Honourable Court's guidance in *Housen v. Nikolaisen* [117] showed deference: "A trial judge is not obliged to mention every piece of evidence. The trial judge heard and considered all the evidence. He clearly did not agree with the appellant's submission as to the cogency or relevance of this evidence, and was certainly entitled to do so. It is not the function of this court to reweigh the evidence or to second-guess the findings of fact made by a trial judge".[118]

(c) Leave Questions of Fact to the Trial Judge

118. A long line of authority makes it plain that negligence and causation are questions of fact. For example, in *Benhaim v. St-Germain*, this Honourable Court held the following:

> It may be useful to recall the many reasons why appellate courts defer to trial courts' findings of fact. Deference to factual findings limits the number, length and cost of appeals, which in turn promotes the autonomy and integrity of trial proceedings. Moreover, the law presumes that trial judges and appellate judges are equally capable of justly resolving disputes. Allowing appellate courts free rein to overturn trial courts' factual findings would duplicate judicial proceedings at great expense, without any concomitant guarantee of more just results. Finally, according deference to a trial judge's findings of fact reinforces the notion that they are in the best position to make those findings. Trial judges are immersed in the evidence, they hear viva voce testimony, and they are familiar with the case as a whole. Their expertise in weighing large quantities of evidence and making factual

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[116] *Hassen, supra* note 54, at para. 19.
[117] *Housen v. Nikolaisen*, 2002 SCC 33.
[118] *Hassen, supra* note 54, at para. 27.

> findings ought to be respected. These considerations are particularly important in the present case because it involves a large quantity of complex evidence.[119]

119. While reasonable judges can disagree on what a trial record suggests in a medical negligence case, deference to first instance findings of fact still applies.[120] Most recently, in 2019,[121] this Honourable Court reaffirmed:

> Where the deferential standard of palpable and overriding error applies, an appellate court can intervene only if there is an obvious error in the trial decision that is determinative of the outcome of the case (*Benhaim*, at para. 38, quoting *South Yukon Forest Corp. v. R.*, 2012 FCA 165, 4 B.L.R. (5th) 31 (F.C.A.), at para. 46; see also *L. (H.) v. Canada (Attorney General),* 2005 SCC 25, [2005] 1 S.C.R. 401 (S.C.C.), at paras. 56 and 69-70). Morissette J.A. explained this metaphorically as follows in *G. (J.) c. Nadeau*, 2016 QCCA 167 (C.A. Que.), at para. 77: [TRANSLATION] \ palpable and overriding error is in the nature not of a needle in a haystack, but of a beam in the eye. And it is impossible to confuse these last two notions\" (quoted in *Benhaim*, at para. 39). The fact that an alternative factual finding could be reached based on a different ascription of weight does not mean that a palpable and overriding error has been made (*Nelson (City) v. Mowatt*, 2017 SCC 8, [2017] 1 S.C.R. 138 (S.C.C.), at para. 38).

120. Recent appellate authority from other Canadian jurisdictions suggests that a Trial Judge's preference of one expert over another is a matter to be reviewed on a reasonableness standard. Just last year, the Alberta Court of Appeal stated that "the acceptance or rejection of expert evidence is not to be disturbed absent palpable and overriding errors."[122]

121. The Trial Judge has the benefit of hearing the experts testify at trial and it is within the trier of fact's discretion to determine if a witness' testimony should be ascribed probative value or not. In a complex medical negligence matter, the expressed preference of the trial judge for the testimony and credibility of an expert should not be set aside lightly. It deserves strong deference and this Honourable Court should overturn the Court of Appeal's interference and restore the Trial Judge's reasonable findings and conclusions.

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[119] *Benhaim v. St-Germain,* 2016 SCC 48 at para. 37
[120] *Goodman v. Viljoen*, 2012 ONCA 896 at para. 142, leave to appeal to SC.C. ref'd.
[121] *Salomon v. Matte-Thompson*, 2019 SCC 14, at para. 33.
[122] *Cooperatieve Centrale Raiffeisen-Boerenleenbank BA v Stout & Company LLP*, 2019 ABCA 455, at paras. 18-20.

122. In her dissenting opinion, van Rensburg J. makes it clear that the law requires that "deference is owed to the trial judge on all findings other than on questions of pure law." In her view, there was no error in how the trial judge defined or applied the standard of care. The determinations made by the Trial Judge were available and fully supported by the evidence presented at trial.[123]

123. The Majority did not give deference to the Trial Judge with respect to determinations of fact including enumerating the elements of the standard of care, preference for one expert opinion over another, and determination of factual causation as circumstantial evidence to determine the question of negligence. In doing so, the Majority failed to respect the findings of the Trial Judge, usurping his function.

F. Conclusion

124. Determining negligence by focusing solely on the result of the medical treatment rather than the manner in which it was performed is improper and amounts to imposing a standard of excellence or perfection.[124] However, contary to the findings of the Majority below, that is not what happened here. The Trial Judge did not hold Dr. Ward to a standard that was higher than could reasonably be expected of an "average reasonable prudent practitioner" performing a colectomy where no complicating features were present. As set out by this Honourable Court in *ter Neuzen v. Korn*,[125] the Trial Judge described the procedure to be followed, and pointed to evidence of the need to identify the ureter so as to stay a safe distance away (i.e. 2mm away).

125. The Trial Judge's conclusion that a reasonably competent surgeon would have stayed 2mm away from the ureter was fully supported by the evidence. It was not a statement of result or a "goal", but an essential step that was not taken by Dr. Ward in this case. Dr. Ward failed to properly execute the required step of protecting Armstrong's ureter. The record reflects the appropriateness of the Trial Judge's findings, findings which are entitled to strong deference.

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[123] Judgment of the Court of Appeal Below, at paras. 71 and 166 [AR Vol 1, Tab 3]
[124] *Carlsen, supra* note 81, at para. 13.
[125] *ter Neuzen v. Korn*, 1995 CanLII 72 (SCC) at para. 33.

126. The court is entitled to assume that the best evidence has been presented by the parties. Dr. Ward's decision not to lead evidence suggesting that a competent surgeon might, without negligence, come within 2mm of the ureter, confirms the correctness of the Trial Judge's decision. This appeal should be allowed.

PART IV – ARGUMENTS ON COSTS

127. The Appellant seeks her costs of the appeal in this court, in the court appealed from, and in the court of original jurisdiction.

PART V – ORDERS SOUGHT

128. The Appellant seeks an order setting aside the judgement of the Court of Appeal, restoring the trial judgment, with costs throughout.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at Toronto, ON this 19th day of August, 2020.

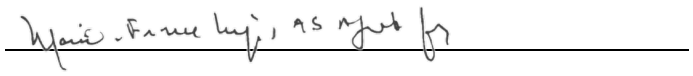

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TABLE OF AUTHORITIES

Cases **at Paragraph(s)**

Other