S.C.C. File No.: 39049

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

B E T W E E N :

KAREN ARMSTRONG

APPELLANT
(Respondent)

- and -

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

RESPONDENT
(Appellant)

- and -

HEALTHCARE INSURANCE RECIPROCAL OF CANADA and ONTARIO TRIAL LAWYERS ASSOCIATION

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PART I – OVERVIEW

1. This is a straight forward case where the Trial Judge applied long-accepted negligence and evidentiary principles.[1] The Majority in the Ontario Court of Appeal would fundamentally change the law of evidence and the burden of proof on plaintiffs by abandoning inferential reasoning and adding a requirement for unprovable detail in the identification of the breach of the standard of care. There is no reason to change that which has served Canadians well for decades. The law is accessible, understandable and just.

2. The plaintiff in a negligence action has the onus to prove that there was a breach of the standard of care and that it caused harm. The plaintiff may prove either or both through the use of circumstantial evidence and inference, as was done to the satisfaction of the Trial Judge, who was entitled to deference.

3. In some cases, the evidence may be the same for both standard and causation. When the defendant controls the circumstances of the event/surgery (and, as here, the record of it), the occurrence of a negative outcome may raise a *prima facie* case. The defendant is in the best position to refute it with explanations that are equally consistent with no negligence as with negligence.

4. This Court has held that the standard of care must be responsive to the risk of harm. Standard, breach and causation are not silos that can only be analyzed in isolation from one another.[2] This Court has never held that it is wrong in law to consider factual causation in advance of the breach of standard of care analysis. Therefore, where the accepted standard is designed to avoid the risk of harm that ensued, it is not circular reasoning to infer that the standard was breached.

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[1] *Fontaine v. British Columbia*, 1998 CanLII 814 (SCC), [1998] 1 S.C.R. 424; *Metropolitan Toronto Condominium Corporation No. 1100 v A. & G. Shanks Plumbing & Heating Limited*, 2020 ONCA 67 at para 18.
[2] *Ediger v. Johnston,* 2013 SCC 18 at para 45.

PART II – ISSUES

5. OTLA takes the following positions on the issues raised in this appeal:

a. The majority of the court below have restated the law of negligence which has the result of imposing a novel evidentiary burden on plaintiffs, incapable of being met, particularly in cases of alleged surgical negligence; and

b. The Trial Judge determined the legal standard of care correctly, and found the respondent physician breached the standard of care based on permitted inferences from the evidence, including inferential reasoning arising from the outcome of the surgery, together with the evidence of an expert witness that such a result was unlikely to have occurred without negligence on the part of the surgeon.

PART III – ARGUMENT

The existing law of inferential reasoning should not be abandoned

6. The onus is on the plaintiff to prove that negligence by the defendant caused the plaintiff's injury. 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. Circumstantial evidence is admissible to prove negligence, including evidence of an outcome, surgical or otherwise: *Fontaine v. British Columbia (Official Administrator)* [*Fontaine*] 1998 CanLII 814 (SCC), [1998] 1 S.C.R. 424.

7. *Fontaine* was recently applied by the Ontario Court of Appeal in *Metropolitan Toronto Condominium Corporation No. 1100 v A. & G. Shanks Plumbing & Heating Limited*, [*Metropolitan*] 2020 ONCA 67, in the context of alleged negligence where a fire started shortly after a plumber had been using a torch. The Court of Appeal cited the applicable principles, at para 16:

> In *Fontaine v. British Columbia (Official Administrator)*, 1998 CanLII 814 (SCC), [1998] 1 S.C.R. 424, the Supreme Court of Canada explained the proper approach to be taken by trial judges when considering circumstantial evidence in negligence cases. The court stated, at para. 27:
>
> > [Circumstantial] evidence is more sensibly dealt with by the trier of fact, who should weigh the circumstantial evidence with the direct evidence, if any, to

> determine whether the plaintiff has established on a balance of probabilities a *prima facie* case of negligence against the defendant. Once the plaintiff has done so, the defendant must present evidence negating that of the plaintiff or necessarily the plaintiff will succeed.
>
> In other words, where circumstantial evidence has been adduced, the trial judge must consider whether that evidence gives rise to an inference, or a series of inferences, that support a finding of a breach of the standard of care or of causation. The trial judge must then weigh any such inferences along with any direct evidence to determine whether, on a balance of probabilities, the plaintiff has established a breach of the standard of care or causation. Where a plaintiff has done so, the defendant bears a strategic burden to present its own evidence to rebut the plaintiff's case. The "legal burden of proof, of course, remains on the plaintiff throughout": *Marchuk v. Swede Creek Contracting Ltd.* (1998), 1998 CanLII 6280 (BC CA), 116 B.C.A.C. 318, at para. 10.

8. *Fontaine* has been applied in the healthcare context. *Hassen v. Anvari,* [2001] O.J. No. 6085 (SCJ)[3], aff'd: 2003 CanLII 1005 (ON CA) involved a surgeon who cut his patient's aorta during a hernia repair procedure. The evidence at trial was that there was a 2:10,000 risk of such a complication. The trial judge applied the principles in *Fontaine* and inferred negligence when the physician was unable to provide a non-negligent explanation for the injury. Kent J. wrote at para 10:

> The plaintiff must prove on a balance of probabilities that negligence of the defendant caused the plaintiff's injury. When circumstantial evidence permits an inference of negligence, the plaintiff may succeed unless the defendant offers an explanation to negate that inference. If the explanation is as consistent with no negligence as it is with the inference of negligence, the plaintiff's case must fail.

9. Of necessity, in many surgical cases (and cases of plumbing, electrical or other trade negligence where the defendant controls the events), it is unavoidable and only common sense to look at the outcome of the surgery to assist in determining what happened during the surgery.

10. It is on this issue that the Majority of the court below abandons the law and the use of common sense at para 57:

> Nor can liability properly be grounded in the low risk of injury identified by the trial judge. It is a logical error to infer that since an adverse result is improbable, a defendant was negligent in causing that adverse result. Negligence needs to be proved in each specific

[3] *Hassen v. Anvari,* [2001] O.J. No. 6085 (SCJ), [Book of Authorities, Tab 1].

> case, unless it is established that the kind of injury in question can only occur through negligence. Yet, as explained, the trial judge never found this to be so.

11. The Trial Judge was entitled to consider the outcome of the surgery as some evidence supporting a conclusion that the surgeon failed to keep the LigaSure sufficiently distant from the ureter. This was an inference he was entitled to make, and with the addition of expert testimony, supported a *prima facie* case of negligence.

12. There is no principled reason to abandon the law as set out in *Fontaine*. It is fair to both sides and permits the defendant to offer non-negligent explanations. In that regard, this case tracks perfectly on the statement of the law set out in *Metropolitan* at para 18:[4]

> Where, as here, the plaintiff has done nothing to cause the [injury], and the defendant is effectively in control of the place or thing that is the source of the [injury] , an inference of a breach of the standard of care, or of factual causation, or of both, may arise from the very happening of the [injury]. The defendant can rebut those inferences by adducing evidence that undermines the plaintiff's case, points to other non-negligent causes of the [injury], or supports the exercise of reasonable care. The precise nature of the evidence required to do so will be different in every case, depending on the relative strength of the plaintiff's evidence in support of the finding.

Finding a breach of the standard of care is sufficient

13. The principles of negligence law apply equally to a physician or a technician. Those principles were set out by this Court in *Mustapha v. Culligan of Canada Ltd*., 2008 SCC 27 at para 3:

> A successful action in negligence requires that the plaintiff demonstrate (1) that the defendant owed him a duty of care; (2) that the defendant's behaviour breached the standard of care; (3) that the plaintiff sustained damage; and (4) that the damage was caused, in fact and in law, by the defendant's breach.

14. It is sufficient for a plaintiff to prove that the standard of care has been breached. It has never been necessary for the plaintiff to prove how specifically a defendant breached the standard where it was proven that it was breached. For example, in the medical negligence case of *Chasse*

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[4] *Metropolitan Toronto Condominium Corporation No. 1100 v. A. & G. Shanks Plumbing & Heating Limited*, 2020 ONCA 6 at para 18.

v. Evenson, 2006 ABQB 342 a doctor was found negligent in performing a tubal ligation even though the judge was unable to determine the specific manner in which the doctor had breached the standard at para 85:

> … I conclude that it has been proven on a balance of probabilities that Dr. Evenson did not inspect the right clip; or if he did, he did not recognize that the upper arm was not extended under the hook of the lower arm; or having recognized this, he failed to apply a second clip despite this indication that the first clip was not securely fastened. Any one of these omissions would breach the standard of care …

15. The Majority of the court below held that the Trial Judge expressed the breach inadequately, and in terms of a goal. The goal of the surgery was to remove the colon without injuring other structures. The reasonably prudent surgeon accomplishes that goal, in part, by identifying the ureter and staying at least 2 mm away from it when using a LigaSure device.[5]

16. The Trial Judge did not define the standard of care with reference to the goal of the surgery (avoidance of injury). The appropriate standard of care was defined with reference to the defendant's conduct (identification of the ureter and maintenance of a safe distance from it).

17. On the basis of the expert evidence it was open to the trier of fact to infer from the injury that there was a failure to either identify the ureter or maintain a safe distance. This was the *prima facie* case.

18. It was not necessary, for example, for the plaintiff to prove that the defendant's failure was the result of inattentiveness or misuse of the LigaSure device, something she could only do with direct evidence, which would never have been available to her. In this case, it was appropriate for the defendant, who has control of all the circumstances, to discharge the tactical burden by adducing evidence to undermine the *prima facie* case.

19. The plaintiff is then required to respond to any scenarios developed by the defendant. The plaintiff must refute them or risk losing. This is fair to both the plaintiff and the defendant.

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[5] Reasons of the Court of Appeal at para 12, 19. This Intervenor adopts the Appellant's submissions set out at paragraphs 74 to 78.

20. The Trial Judge did not use a prohibited outcome-based analysis. This is where unknown foreknowledge is used to judge the conduct of the defendant. For example, where a surgical misadventure occurs as a result of aberrant anatomy, which could not have been known or anticipated. It would be wrong to use the later acquired knowledge to judge the conduct of the defendant.

21. In this case, the evidence disclosed that the risk of the injury was known to the defendant and was usually avoidable through the use of known surgical techniques and practice. In the particular circumstances of this case, it called for an explanation by the defendant.

22. It was open to the Trial Judge to put less weight on the defendant's self-serving evidence. It was not enough for the defendant doctor to say he intended to keep a safe distance, without providing a non-negligent explanation for the injury. A driver running a stop sign would be similarly unsuccessful in defending a negligence claim by asserting that he did not intend to drive through a stop sign. It is the conduct that is judged, not the intention. A surgeon may intend to stay away from the ureter but due to negligent inattention, fail to do so.

Plaintiff not required to disprove non-negligent causes not raised by the defendant

23. The Majority introduced conjecture about non-negligent surgical causes of the injury. It is here that the Majority would impose an impossible standard of proof on a plaintiff by requiring her to raise and refute all possible non-negligent causes, even those not raised by the Defendant.[6]

24. The Trial Judge considered the non-negligent explanations posited by the Defendant and rejected them for cogent reasons.[7] This was accepted by Justice Van Rensburg in dissent:[8]

> 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.).

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[6] Judgment of the Court of Appeal below at para 56.
[7] The Intervener adopts the Appellant's submissions at paras 82-91.
[8] Judgment of the Court of Appeal below at para 134.

> 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.[9]

25. The Intervener submits that the foregoing quote is a correct statement of the law. The policy reasons for keeping the parties and the trier of fact to the evidence are obvious. In technical areas, speculation about non-negligent causes invites arbitrary decision making.

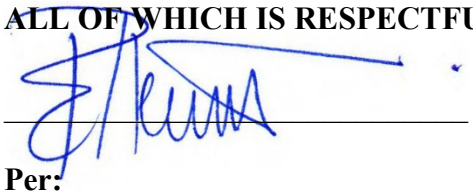
PART IV – COSTS

26. The intervener OTLA does not seek any costs and asks that it not be subject to any costs orders.

PART V – ORDER SOUGHT

27. The intervener OTLA takes no position on the ultimate disposition of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 10th day of December 2020.



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[9] Reasons at para 134-5

PART VI – TABLE OF AUTHORITIES

Case Law

		Paragraph Reference(s)
1.	*Fontaine v. British Columbia*, 1998 CanLII 814 (SCC), [1998] 1 S.C.R. 424	1, 6, 7, 8, 12
2.	*Metropolitan Toronto Condominium Corporation No. 1100 v A. & G. Shanks Plumbing & Heating Limited*, 2020 ONCA 67	7, 1, 12
3.	*Ediger v. Johnston,* 2013 SCC 18	4
4.	*Hassen v. Anvari,* [2001] O.J. No. 6085, aff'd: 2003 CanLII 1005	8, 24
5.	*Mustapha v. Culligan of Canada Ltd*., 2008 SCC 27	13
6.	*Chasse v. Evenson*, 2006 ABQB 342	14

Statutes, Regulations, Rules, Etc.:

None.