

Verdict nixed in \$14.9-million medical malpractice case

BY ALEX ROBINSON

For Law Times

An Ontario judge has refused to enter a jury's verdict in a medical malpractice case that some plaintiff-side lawyers say could have implications for how juries answer questions on causation.

In *Cheung v. Samra*, Ontario Superior Court Justice Darla Wilson took the rare step of not entering a judgment after a six-member jury rendered a verdict due to what she said were problems with the way jurors handled certain questions about causation. Wilson found that the jury's answers were "fatally flawed" and ordered a new trial be held.

Hilik Elmaleh, one of the lawyers who represented the plaintiff at trial, says the decision, if ultimately upheld, will result in significantly more appeals challenging the language used by juries in their verdicts.

"Is there any doubt what the jury thought at the end of the day when you read their answers? There's really no doubt," he says. "What the judge is asking is well beyond what is required of jurors."

The case involves a woman who brought a medical malpractice case against doctors claiming they were negligent in the handling of her pregnancy and the delivery of her baby. The baby was born with severe brain damage, which the mother claimed was a result of the defendants not performing a caesarean section as early as they should have.

The two sides agreed upon damages of \$14.9 million. The remaining issues to be determined at trial were whether the doctors had met the standard of care required of them, whether any failure to meet that standard caused the injury and what ways the failure to deliver the baby in time caused the damage.

The jury came back with a verdict in favour of the plaintiff, but lawyers acting for the defendants brought a motion asking the

judge not to enter judgment.

They argued that there was no evidence for the jury to make its finding on causation and that in any event the judgment should not be granted because the jury's answers on causation failed to show how the negligence led to the injuries and were insufficient to justify judgment.

Under rule 52.08 of the Rules of Civil Procedure, judges can order a retrial where the jury "disagrees . . . makes no finding on which judgment can be granted; or . . . answers some but not all of the questions directed to it or gives conflicting answers, so that judgment cannot be granted on its findings."

Wilson found that there was some evidence for the jury to make its findings on causation but that their answers on the critical issue of causation were insufficient.

"The answers of the jury are not responsive to the issue they were tasked to determine on the evidence: causation, how the brain damage was sustained. The questions required the jury to provide 'clear and specific answers' of how the breach caused Rhonda's brain damage," Wilson wrote. "The answers given fail to answer the questions and the causation issue is not explained. Without the establishment of that crucial link between the breach and the outcome, causation cannot be made out."

The judge found that the jury had misunderstood what it was required to do in answering the causation questions and that the jurors failed to follow her instructions on how to deal with the causation questions.

She said the answers the jury provided were "contrary to law, do not explain the causal link between negligence and the result, and cannot form a foundation for a judgment." She continued that, at best, the jury was "confused and conflated" the issues of standard of care and causation.

Lawyers are now gearing up to appeal the case and are questioning whether the jury should



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have had to give reasons for its findings on causation in the way they were asked to do so in this case.

Gavin MacKenzie, one of the lawyers representing the plaintiffs on appeal, says he will be arguing that a jury is differently situated than a trial judge who is trying a negligence action without a jury to provide reasons for a decision. The expectation of a jury is simply to respond to questions, he says.

"They have to answer all the questions. They can't give inconsistent answers, but if they provide answers to the questions that are put to them that are sufficient to enable the judge to enter judgment, it's for the Court of Appeal, not for the trial judge, to determine if the jury's verdict was reasonable," he says.

There have been other cases in which judges have refused to enter a judgment in accordance with a jury's verdict because there was no evidence to support it, their answers were inconsistent or they failed to answer certain questions. But MacKenzie says this case is unusual as the jury did answer all the questions consistently.

"We will be arguing the answers were more than sufficient to enable the judge to enter judgment in the plaintiff's favour," he says.

The plaintiff's lawyers had first sought leave to appeal to the Court of Appeal, but they encountered a procedural snag when that court transferred the case to the Divisional Court, determining that Wilson's endorsement was interlocutory as the case was not finished. MacKenzie says he has now filed notice seeking leave to appeal the decision to the Divisional Court.

He adds that if the underlying decision is ultimately upheld, it would place a higher obligation on juries to provide reasons for their decisions in a way that he says has not traditionally been accepted by the courts.

Darryl Cruz, one of the lawyers representing the plaintiffs, says the conclusion Wilson came to was ultimately the correct one.

"The findings of the jury are decisions of fact by the trier of fact, but at the end of the day, in order for there to be a judgment, you have to apply the law to that and that's exactly what Justice Wilson did," he says.

Cruz says the decision is consistent with case law and that, while this issue is not going to come up often, when it does, there is clear jurisdiction of the court to do what Justice Wilson did.

"Their answers were non-responsive to the questions that were put to them and that's the real problem," he says. "This case turns on the unique situation and the unique answers of the jury."

John Makins, counsel with Cohen Highley LLP, who is not involved in the case, says the concept of causation is difficult for lawyers to understand, let alone for six lay jurors. While jurors are the finders of fact, the legal implications of those findings are the exclusive jurisdiction of the trial judge, he says.

Makins says this decision, if upheld on appeal, will require plaintiff's counsel to call specific factual evidence from their experts as to why they believe the defendant's negligence caused the injury and damages that are being claimed in the action.

"This will require plaintiff's counsel when requesting an expert opinion in writing from an expert to carefully address the causation issue with their expert and have him explain the factual basis for his causation opinion," he says. "If it is not in his written report, then the expert will probably be prevented from giving this evidence at trial."

He adds that causation needs to be established on the balance of probabilities and not on scientific certainty. Makins says lawyers need to be very careful in their instruction letters to their experts and the questions they wish them to address.

Kate Cahill, a partner with personal injury firm Thomson Rogers Lawyers, says plaintiff's lawyers face a lot of challenges in proving causation in medical malpractice cases. She says the case highlights that you cannot just ask for a jury in the hope that it will circumvent judicial review.

Cahill, who was not involved in the case, adds that in drafting their questions to a jury, lawyers need to make sure the questions clearly elicit the kind of responses they want.

"The message from this on two levels is you can't just put in a jury notice and expect there isn't going to be judicial review of those two main issues," she says.

She says that in this case the plaintiffs seemed to over-rely on evidence that because there was an increased risk that could be linked to a bad outcome. Cahill says that, in any malpractice case, it is not enough simply to have an expert say that a breach in the standard of care caused the bad outcome.

Plaintiff's lawyers will need the expert to explain what the mechanism of harm was and what clinical data they relied on in reaching that conclusion.

"It's not just enough to say the patient was at risk at harm and a breach of the standard of care occurred, therefore, that explains the bad outcome," she says.

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