

COURT OF APPEAL FOR ONTARIO

CITATION: Crump v. Fiture, 2018 ONCA 439

DATE: 20180509

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Hourigan, Benotto and Fairburn JJ.A.

BETWEEN

Jennifer Crump, Victoria Crump, Peter Crump and
Christopher Crump, by his Litigation Guardian, Victoria Crump

Plaintiffs
(Respondents)

and

Dr. Ali Otman Fiture, Diane Pappas and
York Central Hospital

Defendant
(Appellant)

Sarit E. Batner and Carole Piovesan, for the appellant

Aleks Mladenovic and James V. Leone, for the respondents

Heard: May 4, 2018.

On appeal from the judgment of Justice Hugh K. O'Connell of the Superior Court of Justice, dated October 3, 2017.

REASONS FOR DECISION

Introduction

[1] The appellant, Dr. Ali Fiture, appeals from the trial judge's judgment in a medical negligence action, wherein he was found to be negligent in the treatment of the respondent, Jennifer Crump.

[2] For the reasons that follow, the appeal is dismissed.

Facts

[3] Jennifer first complained of abdominal pain on May 20, 2000. At the time she was 11 years old. By the evening of May 23, she was still suffering from pain and her mother, Victoria Crump, took her to a walk-in clinic. She was seen there by Dr. Paul Woo, who concluded that she likely had acute appendicitis with perforation. He referred her to the emergency room at the local hospital.

[4] In the emergency room, Jennifer was seen by Dr. Vito Sorrento, who also concluded that she potentially had appendicitis and referred her for a surgical consult. The appellant, a general surgeon, examined Jennifer at around 11:00 p.m. that evening. He concluded that she could be suffering from: (1) mesenteric adenitis secondary to respiratory tract infection and viremia; (2) menstrual pain related to cramps; or (3) early appendicitis.

[5] The appellant did not order an ultrasound or admit Jennifer to the hospital. He discharged her and gave Victoria instructions, which will be discussed below, regarding the circumstances upon which Jennifer should be returned to the hospital.

[6] The next day, May 24, Victoria took Jennifer to a scheduled appointment with her family doctor. The doctor instructed Victoria to follow the appellant's advice.

[7] Over the course of the next week, Jennifer's symptoms remained stable. She had a mild fever, continued abdominal pain, and did not vomit. However, by May 30, Jennifer's fever had increased so Victoria took her to the hospital. Due to the wait time there, Jennifer left with her mother without being seen by a doctor.

[8] On May 31, Jennifer again saw her family doctor. Her fever had increased and she was referred to the hospital. At the hospital she underwent surgery. Her appendix had ruptured causing significant damage to her bowel.

The Trial Judge's Decision

[9] The parties agreed on the issue of damages. Thus, the trial was focused on whether the appellant was liable for Jennifer's injuries.

[10] There were four witnesses: Victoria; Dr. Raymond Mathews, the respondents' expert witness; the appellant; and the appellant's expert witness, Dr. Ian Soutter.

[11] The trial judge concluded that the appellant had breached the requisite standard of care. He found that but for the appellant's negligence, Jennifer's appendix would not have ruptured nor would she have suffered the complications thereof.

Issues

[12] The appellant submits that the trial judge erred in determining the standard of care of a general surgeon and in finding that causation had been established on a balance of probabilities. He further submits that the trial judge's reasons were neither timely nor sufficient.

Analysis

(1) Standard of Care

[13] The appellant submits that Dr. Mathews admitted in cross-examination that the appellant met the standard of care required of a general surgeon at the time. In particular, he says that Dr. Mathews admitted that the standard of care did not require any one of: ordering an ultrasound, hospital admission, or scheduling a follow-up visit. Given this admission, the appellant submits that the trial judge erred in finding that one of those actions was required in the circumstances in order to meet the standard of care. The appellant says that this error was compounded when the trial judge essentially ignored Dr. Mathews' admission on the basis that it was made during his cross-examination, when the witness was fatigued and exasperated.

[14] We do not give effect to this argument. There was a divergence in the evidence between the appellant and Victoria regarding the appellant's discharge instructions. The appellant has no independent recollection of treating Jennifer, but says that he told her mother to bring her back if she did not get better. The

appellant maintains that this instruction accords with Dr. Matthew's admission about the applicable standard of care.

[15] Victoria's evidence was that the instructions were to only bring her daughter back if her condition worsened. She says she was given no instruction about what to do if Jennifer did not improve.

[16] The trial judge preferred Victoria's evidence over the appellant's on this issue. This was a finding of fact that was well grounded in the evidence. The appellant dictated a note, made contemporaneously with his examination of Jennifer, which includes the following comment: "The mother is agreeable to monitor her at home and bring her back if she vomits, develops fever or more pain. Otherwise she will give her clear fluids today and advance her diet slowly." On Jennifer's chart, he made the handwritten note: "If problem ↑ return." There is no indication in the records that Victoria was told to return with Jennifer if her condition did not improve. The trial judge made no error in accepting Victoria's version of events.

[17] It is in the context of this finding that Dr. Mathews' alleged admission needs to be considered. The question put to Dr. Mathews was:

Q. And so it would have been appropriate to give a discharge instruction which essentially puts the mother in charge; "I want you to look at her. And this is what I want you to look for and if she's not better, I want you to bring her back", right? That's what you're saying. If she's not better the following morning to return for

reassessment, an ultrasound, that's what you say, right?

A. Right.

[18] The factual premise underlying the question was not established, i.e. that Jennifer was to be brought back to the hospital the next morning if she was not feeling better. Therefore, there was no admission and the trial judge made no error in not relying upon the alleged admission.

[19] We are also not persuaded that the trial judge erred in finding that the appellant should have prioritized appendicitis as a “top drawer consideration” in his differential diagnosis. That finding was also supported by the evidence. The appellant’s expert provided an opinion that the likelihood of appendicitis was very low. However, his expert report did not withstand cross-examination. The trial judge found that it was unreliable given that Dr. Soutter demonstrated a “surgical bias” to support the appellant. Further, he found that Dr. Soutter failed to mention a critical distinction between sets of studies that were relied upon in giving his opinion and that he “cherry-picked” statistics. Dr. Mathews’ evidence was that had he seen Jennifer on May 23, he probably would have operated on her that evening.

[20] In our view, the trial judge made no palpable and overriding error in finding that the appellant fell below the requisite standard of care for a general surgeon as at the relevant time.

(2) Causation

[21] The appellant submits that the trial judge erred by relying solely on a different ranking of differential diagnosis as a basis for finding causation. This is not a fair reading of the trial judge's reasons. In his reasons, the trial judge states:

Dr. Fiture fell below the standard of care of a similarly situated surgeon in his assessment of Jennifer Crump and also in his discharge instructions. Causation has been established. But for the negligence of Dr. Fiture, Jennifer Crump would not have suffered the issues that befell her when she was eventually operated on by Dr. Lee.

[22] It is clear that the trial judge did not exclusively base his causation finding on the differential diagnosis, as he also relied on the finding that the appellant was negligent in his discharge instructions.

[23] The appellant also argues that the trial judge erred in not taking into account that when Jennifer's family doctor examined her on May 24, the doctor did not diagnose appendicitis or refer her to the hospital.

[24] We would not give effect to this submission. The trial judge accepted Victoria's evidence that she was told by the family doctor to follow the appellant's advice. He also explicitly relied on Dr. Matthews' evidence regarding causation, which he found to be uncontradicted. Dr. Matthews testified that in the circumstances a family doctor would defer to the advice given by a surgeon and

he was of the view that Jennifer needed to be seen in a follow up visit by a surgeon, not a family doctor.

[25] The appellant's submission also ignores Dr. Soutter's evidence that had Jennifer returned to the hospital either the next day or a day or two after, there was a likelihood that a diagnosis of appendicitis would have been made.

[26] In summary, the causation finding was available to the trial judge on the evidence. There is no basis for appellate interference.

(3) Timeliness and Sufficiency of Reasons

[27] The appellant notes that the last witness testified at trial in May 2015 but that the reasons were not released until October 2017. He submits that in addition to being untimely, the reasons are also insufficient to permit appellate review.

[28] We start with the sufficiency of the reasons. In our view, the reasons, when read in the context of the trial record, permit appellate review. While there are parts of the reasons that would have benefitted from a more detailed analysis, this court was able to understand the trial judge's conclusions on the issues and how he reached them.

[29] We are sympathetic to the appellant's complaint about the timeliness of the reasons. Written submissions were filed in August 2015 and the reasons were not released until over two years later in October 2017. Although the reasons

were released after what can only be described as an inordinate delay, we conclude that, in the context of this case, the delay did not impede the trial judge's ability to fairly decide the case. This conclusion, however, should not be understood as excusing the delay. Litigants are entitled to a timely judicial determination and that did not occur here.

Disposition

[30] The appeal is dismissed.

[31] The respondents seek their costs of the appeal on a full indemnity or substantial indemnity basis. They submit that costs on a higher scale are justified because the appellant engaged in a "scorched earth" litigation strategy that increased costs. We are not satisfied that the manner in which the the appellant conducted the appeal warrants increased costs. On a partial indemnity basis, the appellant seeks costs in excess of \$105,000. In our view, this amount is excessive. We award partial indemnity costs to the respondents in the all-inclusive sum of \$80,000.

"C.W. Hourigan J.A."

"M.L. Benotto J.A."

"Fairburn J.A."