Alberta Doctors' Digest

Risk of losing a case on an easily foreseeable issue

In this article, we will touch on a case which, while focused on a medical legal matter, is a warning to lawyers involved in litigation to be alive to things going sideways in a trial.

As many readers may know, injured plaintiffs are often represented by knowledgeable, experienced legal counsel, and they rely on those lawyers to steer them through the procedural steps required to prepare for and ultimately proceed with a trial. The court's legitimate expectation is that all preliminary steps will be taken and all information exchanged as per our rules of court and that once valuable trial time is allotted (which can take years), that time is a precious resource that should not be frittered away.

In light of this, a recent Court of Queen's Bench decision that deals with the adjournment of a five-week trial in a very complicated case is noteworthy for physicians who may be currently involved in litigation and looking for a light at the end of the tunnel.

In *Hugo v Ewashko*, 2022 ABCA 110, a sole justice of the Court of Appeal considered whether a plaintiff's right to an adjournment to provide new or additional medical expert evidence midway through trial was manifestly unjust. This case arose from alleged medical negligence of two doctors after an infant was left with "catastrophic and permanent injuries" at the time of birth. The plaintiffs retained two doctors as experts to provide evidence regarding the defendants' respective standards of care at the time of the child's birth. One of the doctors was from a large metropolitan area.

Given that the child was born in Camrose, Alberta, the defendants had chosen two physicians from rural Alberta to provide responding expert opinions "… on a doctor's standard of care in light of the resources available at the particular practice location in question." After the plaintiffs submitted their expert reports as required under the rules, the defendants notified the plaintiffs of their objections and argued that some of the opinions that the key plaintiffs' expert expressed were outside the scope of that doctor's expertise.

Initially, the plaintiffs had sought to qualify their expert to give opinion evidence in the areas of obstetrical care including prenatal management, management of delivery, fetal surveillance including heart monitoring, and determining the need for and performance of Caesarean section deliveries. At trial, however, the judge ruled that the plaintiffs' doctor possessed the proper qualifications to provide opinion evidence on all of the proposed matters except for evidence related to Caesarean section deliveries due to the doctor's insufficient training and experience in that area. As quoted by the trial judge: "Qualifications are always in issue until they are not …." This particular area (Caesarean section deliveries) was crucial to the opinion and the plaintiffs' case.

The plaintiffs feared that their case would be dismissed as a result of not having expert testimony to establish the standard of care, so they sought an adjournment, arguing that they required expert evidence related to obstetrical care in the context of a rural facility. The defendants objected, pointing to the fact that the plaintiffs were aware that their expert worked 500 kilometres away from any obstetrician. They also pointed out that the lack of qualification issue had been clearly addressed in the defendant physicians'

expert rebuttal reports, and all reports had been exchanged well in advance of trial as provided for in the rules of court.

Despite the defendants' objections, the trial judge agreed to adjourn the trial to allow the plaintiffs to find another expert. The defendants then sought permission from the Court of Appeal to appeal the trial judge's decision immediately due to the potential for the huge costs arising from adjournment, potential delays, the parties' strict compliance with the rules regarding expert report exchange and notification, and general prejudice against the defendants. In other words, the defendants contended that the plaintiffs were given a mulligan.

In reviewing the submissions about whether a right of appeal should be granted, the sole justice of the Court of Appeal dealing with the application noted the "unusual and exceptional circumstances" of the case. While mid-trial adjournments are uncommon, the judge highlighted that an adjournment that allowed a plaintiff to obtain new or additional evidence was not without precedent. Moreover, the Court of Appeal noted that any delay resulting from an appeal was nonetheless likely to occur in an attempt to obtain new trial dates. Therefore, permitting an appeal now would avoid a scenario where a trial would conclude and ultimately be ordered for retrial anyway.

However, the Court of Appeal justice ultimately granted the defendants permission to appeal. The Court commented on the "injustice" that could result by allowing a party to adjourn a five-week trial when both parties were ready to proceed, only to "shore up" its expert opinion evidence after their expert was successfully challenged.

While the actual appeal has not yet been heard (we are advised it may be expedited), the fact that a Court of Appeal justice was willing to accept the defendant physicians' arguments regarding delays and their impact on the defendants is significant. These particular plaintiffs were very sympathetic, and it is certainly unusual for the Court to "side" with physicians in a case like this.

The case is also silent on whether the sole justice was asked to consider the question of the "locality rule," which might be relevant to these facts. That rule historically limited judges from considering a physician's location in determining standard of care, the argument being that all physicians should be equally competent regardless of where they practice. A fairly recent decision (2019) of the Court appears to provide a qualification on that rule, which might be in use here:

"This does not mean that 'rural' practitioners are assessed by a lower or more forgiving standard of care than 'urban' practitioners … (l)ocation may be relevant, though, because (e.g.) facilities in remote communities may not match facilities in larger centres. A physician could not be faulted for working with the equipment at hand, although a physician should also recognize when local resources are insufficient and transportation of the patient may be required to a better-equipped facility with specialists. In that sense, different circumstances of care entail different standards of care." (* DD vs. Wong Estate, 2019 ABQB 171, at paragraph 211)

This may well be an argument in the main appeal once it is heard.

In any event, the decision is a stark reminder to those in our profession to be prepared for any contingency at trial and to not run the risk of losing a case on a critical issue that was easily foreseeable.

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