ONCA Provides Clarity On the Law Of Causation In Delayed Diagnosis

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The Court of Appeal has released another decision in a case stemming from allegations of delayed diagnosis (following in the footsteps of recent delayed diagnosis cases such as *Surujdeo v. Melady*, *Sacks v. Ross*, and *Ghiassi v. Singh*).

In *White v. St. Joseph's Hospital (Hamilton*), the plaintiffs brought an action against the defendant hospital and several of its nurses for delayed diagnosis of his "pinhole" bowel leak, a rare but well recognized risk of his routine bowel surgery. At trial, Justice Carpenter-Gunn dismissed the action in full, with reasons that were not reported.

On appeal, the appellants argued that the trial judge made several palpable and overriding errors of fact and misapplied the law of causation.

Justice Lauwers, writing for the Court of Appeal, reviewed the judge's findings of fact and determined that the trial judge made no palpable and overriding errors. These findings primarily centered on whether the standard of care was met in monitoring and reporting changes in the plaintiff's clinical status and the administration of antibiotics.

With respect to causation, the appellant argued that the trial judge erred in her findings of facts and that the trial judge improperly required him to establish that the respondents' negligence was the "most significant" cause of the harm. The Court reviewed the expert evidence and found the trial judge made no palpable and overriding error in concluding that the outcome would have been the same whether or not the alleged negligence occurred, and that the trial judge did not apply the wrong test for causation.

As part of the causation analysis, Justice Lauwers (who also wrote the decision in *Sacks v. Ross*, 2017 ONCA 773) made a brief clarifying statement on the decision in *Sacks*, as follows:

[25] In an action for delayed medical diagnosis and treatment, a plaintiff must establish that the delay caused or contributed to the unfavourable outcome: *Sacks v. Ross*, 2017 ONCA 773, 417 D.L.R. (4th) 387, leave to appeal to SCC refused, 2018 CarswellOnt 10678-10679, at para. 117; *Beldycki Estate v. Jaipargas*, 2012 ONCA 537, 295 O.A.C. 100, at para. 44. The phrase "caused or contributed" originates in the *Negligence Act*,

R.S.O. 1990, c. N.1, at s. 1, and is the normative test applied by this court, as set out in *Sacks v. Ross*, at para. 117, and embodied in the "but for" test prescribed by the Supreme Court in *Clements v. Clements*, 2012 SCC 32, [2012] 2 S.C.R. 181, at para. 8. In other words, "but for" the alleged delay would the plaintiff have suffered the unfavourable outcome? (Nothing in *Sacks v Ross* revived the "material contribution to injury" test.)

This statement adds some clarity to the decision in *Sacks*, which has been the subject of some commentary since its release. The statement makes it crystal clear that the Court of Appeal was not subtly reviving the "material contribution to injury" test in *Sacks*. The statement also speaks to the age-old disagreement between counsel as to whether the language "but for" or "cause or contribute" ought to be used in the causation analysis. From Justice Lauwers' clarification, it looks like the language "cause or contribute" is here to stay (at least for now), but that this language does not represent a departure from the traditional "but for" test, as some have suggested following the decision in *Sacks*.

By

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