Supreme Court leaves the standard of care in medical negligence untouched

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It is rare for medical negligence cases to make their way to the Supreme Court of Canada. Until last week, the last case focused on the test for standard of care in medical negligence was *ter Neuzen v. Korn* in 1995.

What you need to know

On Jan. 18, 2021, the Supreme Court of Canada heard the *Armstrong v. Ward* case, which centered on the appropriate standard of care for a surgeon and the proper order of the elements of negligence. After hearing from both parties and two interveners, the panel of seven Supreme Court Justices unanimously ruled from the bench to allow the appeal and adopt the reasons from Justice van Rensburg, who dissented below at the Court of Appeal.

Justice van Rensburg's reasons maintain the status quo of the law of negligence. In them, she reinforced the well-established burden of proof on the plaintiffs and emphasized that courts ought to avoid the dangers of a results-oriented approach. She also confirmed that causation ought not to be considered prior to standard of care. However, she acknowledged it is sometimes necessary to look at the injury for circumstantial evidence of what happened to informed whether a breach of the standard of care occurred.

Background

The appellant, Karen Armstrong, suffered a left ureter obstruction ten weeks after a laparoscopic colectomy performed by the respondent.

At trial, the surgeon was found liable. The trial judge found that the ureter obstruction was caused by the surgeon's use of a LigaSure instrument (which emits heat to seal tissue) within 2mm of the ureter. The trial judge determined that the standard of care was to identify, protect and avoid close proximity to the ureter when using the LigaSure. While the trial judge was satisfied that the surgeon did take steps to identify and protect the ureter, he ultimately concluded that if a surgeon brought the LigaSure within 2mm of the ureter, it was a breach of the standard of care. As he determined the injury here was

caused by the LigaSure being used within 2mm, the surgeon was found to have breached the standard of care.

The Court of Appeal was split on appeal. The majority overturned Justice Mulligan's finding of liability. They stated that by basing the standard of care on a goal (*i.e.* to stay 2mm away from the ureter) rather than steps (*i.e.* to identify and try to protect the ureter), the surgeon was improperly held to a "standard of perfection" in what they characterized as an improper form of strict or absolute liability. The majority commented that the fact a patient was injured cannot form the basis of a finding of negligence, except potentially in rare cases, such as leaving a sponge inside a patient or operating on the wrong limb. Finally, the majority stated that if a trial judge proceeds on the basis that only negligence can cause the injury at issue, the judge is obliged to consider and rule out non-negligent causes.

Justice van Rensburg's reasons

Justice van Rensburg dissented, finding that deference was owed to the trial judge. She dismissed the distinction between a step and a goal, stating that it is not enough to simply use the appropriate technique, but that the practitioner needs to execute the technique with reasonable skill as well. She also disagreed that staying more than 2mm away from the ureter was a "goal" rather than a "step". She ultimately concluded that there was no factual or expert evidence to suggest a competent surgeon using reasonable care would be unable to stay more than 2mm away from the ureter.

With respect to ruling out non-negligent causes, Justice van Rensburg found that the trial judge is not responsible for considering defence theories not raised by the defendant or in the evidence. A plaintiff is not required to disprove every possible theory that could have been put forward by a defendant.

Justice van Rensburg and the majority were in agreement regarding the order of the elements of negligence. It is clear that causation (both factual causation which looks at the "but for" test or legal causation which looks at proximity and remoteness) cannot be determined prior to standard of care. The three Court of Appeal judges also all agreed, based on the Court's prior decisions in *Meringolo (Committee of) v. Oshawa General Hospital* (1991 CarswellOnt 1078) and *Grass (Litigation Guardian of) v. Women's College Hospital*, that in some cases, a plaintiff's injury can be examined for circumstantial evidence about what happened at the time of the alleged negligence to assist in the inquiry of whether the defendant breached the standard of care. However, Justice van Rensburg made it clear that a court cannot reason backwards from an unfortunate or improbable outcome to establish negligence.

Takeaway

Justice van Rensburg's reasons, which have now been adopted by a unanimous Supreme Court, reinforce the law of medical negligence as we know it.

For further information about the implications of this decision on medical negligence law in Canada, please feel free to contact any one of the co-authors of this article.

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