No. CA012236
Vancouver Registry

Court of Appeal

BETWEEN:

HARBHAJAN SINGH CHATTU

PLAINTIFF
(RESPONDENT)

AND:

DR. HENRY R. PANKRATZ

DEFENDANT
(APPELLANT)

REASONS FOR JUDGMENT

OF THE HONOURABLE

MR. JUSTICE HINDS

Before: The Honourable Mr. Justice Taggart
The Honourable Mr. Justice Toy
The Honourable Mr. Justice Hinds

Counsel for the Appellant: Harvey J. Grey, Q.C.
Stephen P. Grey

Counsel for the Respondent: John N. Laxton, Q.C.
Robert D. Gibbens

Place and Date Heard: Vancouver, B.C.
January 21 and 22, 1991

Place and Date of Judgment: Vancouver, B.C.
February 25, 1991

For the Court

Introduction

In lengthy and carefully written reasons for judgment the learned trial judge found, in a medical malpractice action, that the defendant was in breach of his duty in failing to conduct a full and careful examination of the plaintiff in an emergency setting in an outlying hospital, and in failing to make periodic re-assessments of his critical condition. The trial judge found

that the negligence of the defendant caused the majority of the serious physical disabilities which resulted from the plaintiff's condition and he awarded substantial damages of approximately $1,400,000.00 inclusive of interest. The defendant has not appealed the finding of breach of duty but has appealed the findings of the trial judge with respect to causation. Moreover, the defendant has appealed several aspects of the award of damages. The plaintiff has cross-appealed with respect to a relatively minor aspect of the claim for damages.

General Circumstances

In 1986 the plaintiff was a 52-year-old Indo-Canadian who worked in a sawmill at Williams Lake, B.C. At 6:10 a.m. on August 20, 1986, he suffered a sudden attack of tremendous pain in his abdomen. He was taken by ambulance to the Cariboo Memorial Hospital at Williams Lake (the Cariboo Hospital), and arrived there at 6:55 a.m. He was examined by a nurse in the emergency ward and she telephoned the defendant at his home. The defendant arrived at the hospital at 7:40 a.m. and tentatively diagnosed a central disc protrusion with resulting neurological symptoms. At approximately 8:20 a.m. the defendant telephoned Dr. Joneja, an orthopaedic surgeon in Kamloops, who had previously treated the plaintiff for a back problem. Dr. Joneja advised the defendant to send the plaintiff by air ambulance as quickly as possible to the Royal Inland Hospital at Kamloops (Royal Inland). There was a delay, for

which the defendant acknowledged responsibility, in calling for an air ambulance, and when it was requested at approximately 9:23 a.m. it was summoned on a priority two, rather than a priority one, basis. The latter would have provided swifter service.

Later in the morning the plaintiff was taken from Cariboo Memorial to the Williams Lake Airport and he left there by air ambulance at 11:54 a.m. He arrived at Royal Inland and was seen by Dr. Joneja at 2:00 p.m. He quickly noted an absence of pulse in the lower extremities and suspected that the plaintiff was suffering from a vascular problem rather than a central disc protrusion. Dr. Joneja sought the assistance of Dr. Chacko, a general surgeon, who had some experience, but not a specialty, in vascular disorders. Dr. Chacko examined the plaintiff at 2:45 p.m., and after requesting an angiogram be done on the plaintiff, he and Dr. Joneja concluded that the plaintiff probably had a dissecting aortic aneurysm. That was a condition which could not be treated at Royal Inland. Accordingly, after speaking on the telephone to Dr. A. J. Salvian at Vancouver General Hospital (VGH), Dr. Joneja arranged for the plaintiff to be sent by air ambulance to VGH where he arrived at 6:51 p.m. He was then in critical condition.

Shortly after his arrival at VGH the plaintiff was examined by Dr. Salvian. He believed that the plaintiff was

suffering from an aortic saddle embolism. In order to confirm that diagnosis and to rule out the diagnosis of Dr. Chacko of a dissecting aortic aneurysm it was necessary for Dr. Salvian to require a further angiogram and other tests to be done. At approximately 10:50 p.m. Dr. Salvian commenced operating on the plaintiff to remedy the aortic saddle embolism. By 1:00 a.m. on August 21 he had completed the operation and had restored the flow of blood to the lower extremities. However, by that time the right lower leg was dead. An above-the-knee amputation was performed later on August 21 and, on August 26, the remainder of the right leg was amputated at the hip.

The plaintiff suffered renal failure. His left kidney died and he lost 50% of the function of his right kidney. Eventually, to grapple with that problem, it was necessary to put a shunt in the plaintiff's right forearm. That has caused a partial paralysis in that arm and in his right hand.

At page 31 of his judgment, the trial judge summarized the plaintiff's condition at trial in this way:

> The left leg is now fully able to bear weight, but it is permanently partially paralysed. The plaintiff has impaired control over his left hip, pelvis and knee, so that he cannot sit, stand or propel himself with his left leg, without assistance. He has discomfort, numbness and a tingling sensation with occasional burning in his left leg, and he has a drop left foot, for which he wears a brace.

> In addition to his other disabilities, the plaintiff now suffers a partial right median nerve palsy. As a result, the plaintiff's right hand is weak in both grip and pinch. He has some difficulty in fine manipulation with the right hand. He has tingling and altered sensation in the first three digits of his right hand. He is right handed.

In addition to that summary it is recognized that the plaintiff sustained a right hip disarticulation, an amputation of the right leg at the hip joint, and his kidney function has been restricted by about 75%.

Breach of Duty

At page 21 of the judgment the learned trial judge summarized his conclusions with respect to the defendant's breach of duty by stating:

> 1. The defendant was in breach of his duty as an emergency room physician in failing to conduct a full and careful examination of the plaintiff when he saw him at about 7:45 a.m.;
>
> 2. If the defendant had conducted a full and careful examination of the plaintiff at that time he would have found the absence of pedal and femoral pulses, and he would have realized that the plaintiff's symptoms were the result of arterial insufficiency;
>
> 3. The defendant was also in breach of his duties as the physician responsible for the plaintiff's care after his admission to the ward at Cariboo Memorial Hospital, in failing to conduct full and careful

re-assessments of the plaintiff at one-half hourly to hourly intervals;

4. Had the defendant performed such follow-up examinations he would probably have reached the same conclusions as those set out under point 2 above.

(The paragraph numbering has been revised.)

The evidence fully supported those conclusions. As the findings with respect to the defendant's breach of duty was not appealed, it is unnecessary to consider that issue.

Causation

The trial judge interpreted the evidence of J. M. Brickett, an air ambulance dispatcher employed by the Provincial Emergency Health Services Commission, to establish that if the defendant had requested an air ambulance on a priority one basis at approximately 8:20 a.m. on August 20, 1986, the plaintiff would have reached VGH at between 10:30 and 10:45 that morning. He concluded that Dr. Salvian would have examined the plaintiff by 11:00 a.m., and he specifically accepted the opinion of Dr. Salvian that he would have diagnosed the plaintiff's condition to be the result of an aortic saddle embolism, that he would have proceeded to operate without first having obtained an angiogram, and that he would have removed the embolism and would have re-established the flow of blood to the plaintiff's legs by between 2:00 and 2:30 p.m. on August 20.

The judge acknowledged that there was a generally accepted medical opinion that there is a "golden period" of 6 hours within which to restore circulation following a blockage of the blood supply to a limb or part of the body. Generally, if the blood supply is not restored by then, the limb or body part will be affected in an adverse manner. Although the re-establishment of the blood supply by 2:00 or 2:30 p.m. would have been approximately 2 hours in excess of the "golden period", the judge reached the following conclusion at p. 46 of his reasons for judgment:

> I summarize my conclusions as to the probable result if the plaintiff had been seen and treated at Vancouver General Hospital commencing at 11:00 a.m. on August 20, 1986:
>
> 1. The plaintiff would in any event have suffered some permanent damage to his right leg, similar to the drop foot condition he now has in his left leg;
>
> 2. The plaintiff would have suffered no damage, or no significant damage, to his left leg;
>
> 3. The plaintiff would not have suffered renal failure or the loss of his left kidney; and
>
> 4. The plaintiff would not have suffered damage to the right median nerve with consequent disability in the right arm and hand.
>
> Damages for the plaintiff will therefore be assessed on the basis of the difference between his present condition, and what his condition would probably have been had he arrived at the Vancouver General Hospital by 11:00 a.m.

The trial judge based the foregoing conclusions on several factors. In the clinical records of Dr. Joneja and Chacko there was an absence of any recorded findings of non-viability in the plaintiff's legs when they examined him at the Royal Inland at 2:00 p.m. and at 2:45 p.m. on August 20. He preferred the opinion of Dr. Salvian to that of the defendant's expert, Dr. P. D. Fry. He accepted the opinion of Dr. Salvian that the passage of time is of less importance in measuring the chance of success in re-vascularization than is the viability of the limb or body part at the time surgery is commenced.

Mr. Grey alleged, and counsel for the plaintiff conceded, that the trial judge had erred in concluding that if the defendant had requested an air ambulance on a priority one basis at approximately 8:20 a.m., the plaintiff could have arrived at VGH at between 10:30 and 10:45 a.m. In reaching that conclusion it is apparent that the trial judge misapprehended a portion of the evidence of Mr. Brickett. He stated that it would have taken 40 minutes to assemble an air crew at Kamloops and get the plane airborne and on its way to Williams Lake. Therefore an additional period of 40 minutes should have been added to the estimated time of the plaintiff's arrival at VGH. Counsel for the defendant calculated that the estimated time of arrival should have been 11:21 a.m. That was a reasonable estimate and only two minutes more than the estimate advanced by Mr. Laxton.

In my view the revised estimated time of arrival of approximately 11:20 would have made no appreciable difference to the conclusions reached by the trial judge, to which I have earlier referred. He accepted the emphasis placed by Dr. Salvian on the viability of the limb at the time of surgery, rather than the mere passage of time, as being of greater importance in the prognosis for success of an anticipated re-vascularization procedure. Moreover, there was the testimony of Mr. Brickett that if the defendant had requested at approximately 8:20 a.m. the attendance of an air ambulance on a priority one basis, a jet engined air ambulance could have been diverted to Williams Lake, and it would have enabled the plaintiff to arrive at VGH by 10:45 a.m.

The error of the trial judge with respect to the omission of the 40 minutes in his calculation of the estimated time of arrival of the plaintiff at VGH did not constitute a "palpable and overriding error", as referred to in such authorities as Jaegli Enterprises Ltd. v. Taylor, [1981] 2 S.C.R. 2.

There was ample evidence, which was accepted by the trial judge, upon which to base his conclusions that no reasonably competent general surgeon at Royal Inland would have accepted the plaintiff from the defendant at Williams Lake knowing that the plaintiff's emergent medical condition was probably vascular in nature. He would have been sent directly to Vancouver. Moreover,

there was ample evidence, which was accepted by the trial judge, upon which he based his conclusion that the defendant's breach of duty to the plaintiff was causative of the plaintiff's residual difficulties to the extent thereof found by the trial judge.

I am unable to accede to the defendant's grounds of appeal based upon the alleged failure of the plaintiff to establish causation.

Non-Pecuniary Damages

At the commencement of that portion of the reasons for judgment pertaining to non-pecuniary damages the trial judge had this to say:

> In view of my findings on the issues of causation, the defendant is responsible for the plaintiff's loss of one leg at the hip joint, for his renal failure and its consequences, and for the right median nerve damage and its consequences. The defendant is not, however, responsible for the drop foot condition and related problems in the other leg, because even [if] the plaintiff's condition had been diagnosed and treated in a timely way, he would in all probability have suffered the same or similar disability in his right leg.

It was only on the basis that the trial judge had erred in his determination of the extent of causation, that is to say that the defendant's breach of duty of care had not been causative of some aspects of the plaintiff's residual disabilities, that counsel for the defendant challenged the amount of the award under this head.

As the conclusions of the trial judge on the issue of causation have been upheld, his general approach to the assessment of the plaintiff's non-pecuniary damages, above quoted, cannot be assailed.

The trial judge carefully and fully summarized the circumstances relevant to the award of $165,000.00 for non-pecuniary damages. No error in principle or in the consideration of the evidence has been established. The award was well within the range of damages for the extensive disabilities suffered by the plaintiff as a result of the negligence of the defendant. The award is upheld.

Past Income Loss

At trial the plaintiff claimed for past loss of income from the date that he experienced the aortic saddle embolism on August 20, 1986, to the date of trial. It amounted to $125,372.00.

The trial judge concluded that absent the defendant's negligence the plaintiff would not have been fit to return to work until January 1, 1987. He therefore made no award for the period from August 20 to December 31, 1986. In assessing the plaintiff's claim under this head of damages the trial judge took into consideration several factors that would reduce the award including the plaintiff's history of back problems, his history of chest

pains, and his history of consumption of alcohol. He used a 20% discount factor for negative contingencies and assessed the plaintiff's damages for past income loss at $90,000.00.

Counsel for the defendant took issue with the basis of the trial judge's award. He maintained that even if the defendant had not been negligent the plaintiff would not have been able to return to his previous job as a lumber grader in a sawmill because he would have had a drop foot in his right leg and he would have had a restriction in his right hand and arm.

The trial judge did not conclude that the plaintiff would have had a right hand and arm disability in the absence of the defendant's negligence. He attributed the right hand and arm disability to the negligence of the defendant. Moreover, he made a finding that the plaintiff would have made a sufficient recovery from the aortic saddle embolism to return to his former job by January 1, 1987. In the face of those findings the submission of counsel for the defendant cannot succeed. The award of $90,000.00 for past loss of income is confirmed.

Future Loss of Income Earning Capacity

The trial judge accepted the evidence of the plaintiff that he would have continued to work at his job as a lumber grader until age 65. He accepted the calculation of Mr. J.G. McKellar of

the Wyatt Company that the plaintiff's claim under this head amounted to $337,026.00 plus loss of pension benefits and an allowance for an investment management fee. The judge deducted 30% for negative contingencies including mortality, the plaintiff's pre-existing health-related problems, and the possibility that, absent the negligence of the defendant, the plaintiff would have had to take time off work due to the disabilities resulting from the occurrence of the aortic saddle embolism on August 20, 1986. At trial the plaintiff's claim for future loss of earning capacity, for loss of pension benefits, and for investment management fees, was reduced by 30%, resulting in the following awards:

for future loss of earning capacity	$225,000.00
for loss of pension benefits	17,000.00
for investment management fees	10,000.00

On appeal Mr. Grey asserted that the trial judge should have concluded that the plaintiff would have retired at age 55 or at least by age 60 because of his diminished health resulting from the aortic saddle embolism. He did not contest the small awards for loss of pension benefits and for investment management fees awarded under this head. The difficulty with the foregoing submission is that it is in direct conflict with a finding by the judge that the plaintiff would have continued at his job, or at a similar job, until he reached 65. There was evidence upon which the judge based that finding - the testimony of the plaintiff.

Under those circumstances there is no basis upon which the assessment of damages under this head can successfully be challenged. It is confirmed.

Cost of Future Care

Mr. Grey took issue with the award for cost of future care on two grounds. First, he submitted that the determination of the annual allowance for future care of $30,660.00 was too high and failed to take into account evidence adduced by the defendant which indicated a lower annual allowance. Second, he maintained that the trial judge had erred in basing his calculations on an anticipated life expectancy for the plaintiff of 22 years, rather than 15 years.

With respect to the first ground, it is noted that the judge had this to say at p. 57 of his judgment:

> The plaintiff's claim for the cost of future care, allowing for the risk of mortality, is $585,684.00. This claim is based on the medical evidence, the evidence of Mr. and Mrs. Chattu, the assessment of a rehabilitation nurse, R.J. Schulstad, and the actuarial calculations of Mr. McKellar. The factual premises underlying this claim have, in general, been established by the evidence, and subject to some adjustment I accept Mr. McKellar's actuarial calculations as a guide to the assessment of these damages.

It is apparent that the trial judge was satisfied that the factual underpinning for the actuarial calculations made by Mr.

McKellar had been established on the evidence. There was ample evidence to support that finding. The first ground cannot succeed.

With respect to the second ground, it is noted that Mr. McKellar calculated the present value (the value at trial) of the cost of future care based on an assumed average life expectancy for the plaintiff of 22 years. However, the trial judge had earlier determined that the plaintiff's life expectancy was "about 15 years". He had reached that conclusion taking into account the fact that the plaintiff had suffered the aortic saddle embolism, a circumstance which on the evidence would have shortened his life expectancy. He did not take into consideration the negligence of the defendant which would have further reduced the plaintiff's life expectancy.

There was some debate between counsel as to whether the trial judge made the finding of "about 15 years" as of the date of the plaintiff's illness in August, 1986, or as of the date of trial. A careful reading of the reasons for judgment establishes that the judge made that determination as of the latter date.

Mr. McKellar calculated the present value of the cost of future care for the plaintiff to be $585,684.00. The trial judge reduced that amount by 5% to reflect the cost of future care that the plaintiff would have needed regardless of the defendant's

negligence as a result of suffering the aortic saddle embolism. That was an appropriate reduction.

It is apparent that in correlating the mass of evidence concerning this head of damages, including the testimony and the voluminous experts reports, the trial judge inadvertently overlooked the fact that Mr. McKellar based his calculations on a life expectancy of 22 years, whereas the assessment of the allowance for future care costs should have been based on a life expectancy of 15 years. In view of that circumstance, and keeping in mind the 5% reduction above referred to, I would reduce the allowance for the cost of future care to $415,000.00.

Investment Management Fees

In addition to awarding an investment management fee of $10,000.00 with respect to the award for future loss of income, the trial judge made an award of $60,000.00 in connection with the award for the cost of future care. Counsel for the defendant submitted that it should be reduced substantially for two reasons. A reduction in the award for the cost of future care would justify a reduction being made in the award for investment management fees. Furthermore, the re-assessment of the cost of future care based on a reduction in the life expectancy from 22 to 15 years would result in the fund being managed for a significantly shorter period of time. I agree with those submissions. I would reduce the award

under this head of damages for investment management fees to $40,000.00.

Tax Gross Up

On the material before him the trial judge was unable to make a precise calculation of the amount of tax gross up to which the plaintiff was entitled. He nevertheless allowed $150,000.00. Counsel for the defendant did not take issue with the method of assessment under this head but did assert that if the award for cost of future care was reduced, so too should the award for tax gross up be reduced. There is merit in that argument. I would reduce the tax gross up award to $110,000.00.

"In Trust" Claim for Mrs. Chattu

The trial judge allowed a claim advanced on behalf of Mrs. Chattu for the value of services she had rendered to her husband for the approximately 3 years prior to trial. Her claim was based on 6 hours per day, at $6.00 per hour, totalling $39,420.00.

Counsel for the defendant argued that the plaintiff required help for only one year after his release from hospital. It is apparent from the reasons for judgment that the trial judge thought otherwise. I would not disturb that award.

Collateral Benefits

In his factum counsel for the defendant raised for the first time the issue of collateral benefits. He alleged that the plaintiff received long term disability benefits from 1987 until the date of trial, totalling approximately $52,000.00, which amount should have been deducted from the award for past loss of income. He relied on the recent Supreme Court of Canada decision in Bloomer v. Ratych, [1990] 1 S.C.R. 940.

Associate counsel for the plaintiff, Mr. Gibbens, objected to this issue being considered. He stated that the issue had not been raised in the pleadings and had not been the subject of submissions before the trial judge. Moreover, he alleged that the plaintiff was prejudiced because he had not adduced at trial documentary evidence concerning the circumstances under which the plaintiff received the disability benefits and the obligations reposing on the plaintiff to repay, from any award he might receive for past loss of wages, the amounts he has received by way of long term disability benefits. Under those circumstances, not disputed by associate counsel for the defendant, Mr. S. P. Grey, I would not be prepared to embark upon consideration of the alleged collateral benefits issue.

CROSS-APPEAL

The plaintiff cross-appealed with respect to the disallowance by the trial judge of the plaintiff's claim of $13,665.00 for the cost of renovating his home at Williams Lake to make it wheelchair accessible. The judge disallowed the claim on the basis that the plaintiff had testified that he might move from Williams Lake and purchase a home in the Lower Mainland area in order to be nearer to medical and other assistance.

The plaintiff needs the assistance of a wheelchair whenever he leaves his home. For the long term it is necessary that whatever home the plaintiff occupies, be it situate in Williams Lake or in the Lower Mainland area, that it be wheelchair accessible. I would therefore allow the reasonable claim for the cost of renovating the home to make it wheelchair accessible. I would allow the cross-appeal in the amount of $13,665.00.

The Honourable Mr. Justice Hinds

I AGREE:

The Honourable Mr. Justice Taggart

I AGREE:

The Honourable Mr. Justice Toy