5 O.R. (3d) 413

De Boer v. Bosweld

Elizabeth De Boer and Martin De Boer Plaintiffs v. Gerald C. Bosweld, M.D. and William M. Johnson Defendants

Ontario General Division

Webber J.

Judgment: September 30, 1991
Docket: Doc. 3132/88

Counsel: Jane Ferguson, counsel for the applicant/defendants.

Chris Haber, counsel for the respondent/plaintiff.

Webber J.:

REASONS FOR JUDGMENT

1 The defendants move to strike out the jury notice herein.

The Issue.

2 The plaintiff contends that the decision that the jury is required to make is essentially factual. The defendants contend that the decision is much more complex involving consideration of operative procedures, medical techniques, medical diagnosis and prognosis which must be determined on the basis of medical and scientific evidence and opinion.

The Facts.

3 The plaintiff had a medical history of menstrual difficulty and a kidney stone in 1979 and 1980 respectively. Additional investigation as to her menstrual condition occurred in 1986 which led to a dilation and curettage (D. & C.). After subsequent medical investigation a hysterectomy operation was performed in April 1987. It should be noted that the evidence that will be led for the plaintiff will be to the effect that the menstrual difficulty was not her major problem.

4 Post operative recovery was marred by a difficulty which seemed to the plaintiff unrelated to the hysterectomy operation. She complained of pain similar to that of her kidney stone problem which occurred in 1980. The plaintiff contends the doctors told her that during her hysterectomy operation an examination of her kidneys and other organs were conducted which revealed no problems.

5 In July 1987 the plaintiff suddenly took ill and was rushed to Stratford Hospital where emergency surgery was performed. The surgery removed her left kidney as well as two large benign tumors and two small benign tumors. It appears the evidence will be that the tumors had been present for some considerable period of time.

Submissions.

6 The defendants submit there are a number of complicated considerations for a jury which may be summarized as follows:

1. Was the early kidney stone problem significant with reference to subsequent treatment?

2. Should an Intravenous Pyelogram (I.V.P.) test and other x-rays have been

performed?

3. Was the hysterectomy operation an unnecessary procedure which arose from the failure to diagnose the kidney problem?

4. Will the considerable technical evidence, which will be led by the defendant, be understood by the jury and, in particular, the hysterectomy procedure and type of incision used?

5. Will the jury understand both the hysterectomy operation procedure and the kidney problem diagnosis procedure with a view to determining if the doctors acted negligently?

6. Will the operative procedures used to remove the tumors be clear to the jury in view of their essential complexity?

7 Associated with these above considerations it is anticipated that there will be conflicting medical opinions although the plaintiffs have not yet received their expert reports. The defendants also contend that different standards of care apply to the general practitioner and the gynecologist. The defendants contend that the course of treatment by both doctors must be considered not only prior to and after the hysterectomy operation but at the time of the operation itself.

8 The defendants suggest that when the above considerations are presented with the combined issues of liability and damages it will be entirely inappropriate to have this action tried by a jury.

9 These submissions by the defendants do raise the concern of complicated evidence and a difficult presentation of the case to the jury both by counsel and the judge. However, upon hearing the submissions the question arose, in my mind, as to whether these issues are simply ones of fact that can be answered by the jury (i.e., the jury will not be required to analyze operative techniques but to decide if certain steps should or should not have been taken).

10 The submissions of the plaintiff addressed this question. Those submissions can be summarized as follows:

1. Should the I.V.P. test and x-rays have been ordered prior to the hysterectomy?

2. Should the medical history of the plaintiff have warned the doctors to make further investigation before performing the hysterectomy operation?

3. Should the blood studies which were conducted have been further analyzed to determine if other problems such as the kidney difficulty existed?

4. Was the hysterectomy operation in itself necessary?

5. Should the post-operative complaints which were documented have been more seriously investigated?

6. Did the doctors communicate to the plaintiff that all of her essential organs were normal after their completion of the hysterectomy operation?

The Law.

11 In *Campbell v. Sinal*, 35 C.P.C. (2d) 283 Mr. Justice McDermid after a careful review of the factual issues stated at p. 289 certain principles with which I agree and which I have adopted for the purpose of these reasons.

12 In the case at bar there is the plaintiffs' position that the issues are essentially factual with little expertise required. The defendants counter this

position with suggestions of extreme complexity. At p. 290 of the above judgment Mr. Justice McDermid said:

> However, it is only when "the facts, the law, or both are such that a jury cannot reasonably be expected to be able to follow the evidence properly or to apply the judge's charge properly" that the jury should be struck. This must be determined on a case by case basis.

13 In his concluding remarks at p. 292 he observed as follows:

> I believe that the right to trial by jury is very important and not ought to be taken away simply because there are additional burdens cast upon counsel and the trial judge due to the presence of a jury, unless it is probable that even with a reasonable amount of additional time the jury "cannot reasonably be expected to be able to follow the evidence properly or to apply the judge's charge properly".

I agree.

14 I conclude as he did in the above case with the observation that if the issues become so complicated as a result of the yet undelivered plaintiffs' experts' medical opinion or the presentation of the evidence the trial judge can always exercise his or her discretion to discharge the jury. That is the purpose of Rule 47.02(3) which reads as follows:

> Where an order striking out a jury notice is refused, the refusal does not effect the discretion of the trial judge, in a proper case, to try the action without a jury.

15 For these reasons the motion is dismissed with costs in the cause. If there is any reason for a different order as to costs, counsel may arrange a telephone conference to discuss that issue through my secretary.

16 Dated at Brampton, Ontario this 30th day of September 1991.

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