

Ontario judge awards record \$10 million over botched birth

By Cristin Schmitz
Ottawa

In what is believed to be the largest medical malpractice award in Canadian history, an Ottawa judge has ordered two family physicians to pay some \$10-million damages for "catastrophic" injuries suffered by a baby and her parents as a result of a botched delivery.

In addition to the sheer size of the award, the 127-page decision is noteworthy for how Ontario Superior Court Justice Denis Powers handled a host of thorny negligence, evidentiary and damages issues, including: duty and standard of care; conflicting expert evidence; future care; future loss of income of the child and her mother, and deductions for various contingencies.

The judge found that Melissa Crawford, now 19, was a "healthy and viable" baby before she was born "basically dead" in 1983 at Smith Falls Hospital as a result of "an obstetrical catastrophe" caused by the negligence of Drs. Brian J. Penney and Greg Healey.

Because Jeanette Crawford's gestational diabetes during pregnancy was not diagnosed or treated, Melissa grew *in utero* to more than 10 pounds and during delivery her shoulders became stuck in the birth canal. The long delay in delivering deprived her brain of oxygen, which resulted in cerebral palsy. Melissa is confined to bed and is completely disabled, physically and mentally. She will require round-the-clock nursing for the rest of her life. Justice Power found that if she continues to get good care, she is likely to live to age 54.

Plaintiffs' counsel Robert Roth of Toronto's Sommers & Roth,

who handled the 57-day trial with co-counsel Richard Sommers, said the largest component of the damages — some \$5 million — is for 24-hour care by a registered practical nurse.

Roth said the plaintiffs' accountants have estimated the judgment totals about \$10.1 million, before gross-up. "To my knowledge, it's the largest medical malpractice personal injury award in Canada."

Defendants' counsel Domenic Crolla of Gowling Lafleur Henderson in Ottawa told *The Lawyers Weekly* his clients were still analyzing the judgment and had not yet decided whether to appeal. He declined further comment pending that determination.

Roth said one of the judgment's most important aspects is its rejection of a "locality rule," under which a lower standard of care would be expected of physicians in rural or smaller communities like Smith Falls. Citing expert evidence, Justice Power accepted that "the standards of practice should be the same throughout Ontario, regardless of where the practice is conducted. ... [I]n some small towns, the quality of care is often at the cutting edge."

In a case which presented conflicting evidence by a phalanx of experts, Roth said it is noteworthy that the court rejected a defence based on the principle expressed in House of Lords case *Maynard v. West Midlands*, [1985] 1 All E.R. 635. *Maynard* stated that "in the realm of diagnosis and treatment, negligence is not established by preferring one respectable body of opinion to another."

The defence argued that since

they were able to produce respectable opinion approving the defendants' course of conduct, the doctors could not be held to be at fault.

The *Maynard* principle "is used in every single [medical negligence] case," Roth said. However Justice Powers agreed with the plaintiffs that if the defence was correct, no plaintiff would ever succeed in establishing negligence, since a defendant doctor could always find colleagues or practitioners who approved of the treatment given.

According to Justice Power, "where there are conflicting expert opinions, the trier of fact must weigh the conflicting testimony and ultimately assess the weight to be given to the evidence. There is no necessitated dismissal of a medical negligence claim simply because honest and competent experts disagree over a doctor's diagnosis or treatment."

Roth said the judgment is also "significant in deciding that a duty of care exists in circumstances where a specialist consultant provides advice in a telephone communication with an attending physician, which advice impacts on the management provided to the patient, notwithstanding that the consultant never met or examined the patient or entered into a direct patient/doctor relationship."

Justice Power did not accept Dr. Penney's testimony that he sought the advice of an obstetrician about Jeanette Crawford's pregnancy via telephone. In *obiter dicta*, however, the judge rejected a defence argument — based on U.S. caselaw — that medical opinions provided by one doctor to another during a "hallway conversation" or "corridor consult" is a class of consultation that does not give rise to a duty of care for the person whose care is being discussed, even if the opinion is relied on.

"In the absence of a clear disclaimer, I would have had no difficulty in concluding that a physician owes a duty to provide advice that meets the relevant standard of care and that a duty of care does, indeed, exist," Justice Power observed.

He made numerous findings of negligence against Dr. Penney, Jeanette Crawford's family physician. They included a failure to: properly monitor the fetus's growth and test Jeanette for gestational diabetes; determine that she had a risky, and even "high-risk" pregnancy; inform her of those risks; recognize that the delivery of the large baby would be beyond the competence of a family physician and the mother should therefore be referred to a specialist-obstetrician for "opinions and/or care"; and recognize that Smith Falls Hospital did not have adequate facilities to provide intensive care to a distressed newborn.

The judge also found Dr. Healey, with whom Penney consulted before inducing labour, was negligent on several counts, including failing to physically examine Jeanette before giving his opinion.

In awarding damages, Justice Power noted Melissa's parents have been "absolutely devoted" to her care, basically doing "everything for her." He awarded Melissa the capped maximum for pain and suffering, approximately \$280,000. Her parents were each awarded \$80,000 under s. 61 of Ontario's *Family Law Act* for loss of their daughter's "guidance, care and companionship." Jeanette, 60, was also awarded her loss of income and pension benefits, totaling \$102,700, because she retired from her job five years early to look after Melissa.

The parents were awarded \$375,000 for the care necessitated by their daughter's injuries that they provided from her birth to age 19, based on \$10 per hour.

Using evidence of the work ethic and employment history of Melissa's parents and siblings as



Robert Roth

a guide, the judge projected Melissa's future loss of income on the basis that she would have been a community college graduate who began her career at 20 and retired at 60. Her annual income, adjusted for contingencies, was assessed at \$36,900.

Reasons in *Crawford* (*Litigation Guardian of v. Penney*, [2002] O.J. No. 89, are available from FULL TEXT: 2237-023, 127 pp.

Refresher program modules approved

By John Jaffey
Toronto

The Law Society of Upper Canada has approved a guide to the Private Practice Refresher Program (PPRP) modules, written to assist lawyers changing categories by telling those moving into private practice which modules they must complete.

In September 2001, Convocation approved the PPRP program itself, which replaced a requalification program. In May 2002, benchers were shown a proposed guide which was made available to the profession for comments on the appropriateness of the modules designed for each job category. Nine responses were considered and rejected on the following bases:

- The PPRP has been designed with a high degree of flexibility. Therefore, a member who becomes subject to the program can apply to do fewer than the required modules for his or her job category, and can appeal to a bencher for review if he disagrees with the decision.

- The program is entirely self-study and can be completed in a relatively short time on the lawyer's own schedule. In fact, two of the eight modules are "read only" and the others have quite limited testing.

- The program is meant to be merely a "refresher course" for lawyers who have been working out of private practice for five years or more.

- It will not come into effect until 2007.

In debate before the guide was approved by benchers attending the law society's Jan-

uary Convocation, bencher Awy Go pointed out that one of the nine responses came from legal clinics, composed of 200 lawyers. Since clinic lawyers were practising law in the trenches, it did not seem that moving into private practice would be a significant change. She suggested clinic lawyers should not be subject to the PPRP.

Todd Ducharme agreed, arguing that even though the requirements are minimal, they carry with them "an underlying suggestion that there are two tiers of lawyers. ... Forcing clinic lawyers to study professional management for example, or professional liability, sends the message that a clinic lawyer is a lesser lawyer. The fact that they work in a clinic doesn't mean their practice is any different than that of a lawyer in private practice."

Janet Minor explained that the modules were meant only to be helpful to lawyers returning to private practice. She said the kind of material in the modules is extremely useful.

The eight modules are time management, file management, financial management, client service and communication, technology, professional management, personal management, and professional responsibility.

Of the 18 categories that would be required to do some or all of the PPRP modules, these are a sample: corporate in-house counsel, government litigator or Crown, clinic lawyer, mediator, politician, justice of the peace, legal editor or publisher, and post-graduate student.

'We can help lawyers get over problems'

LARKIN

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A partner with the Halifax firm Pink Breen Larkin, the NSBS president said it is "very, very, very uncommon for lawyers to make a report [about another lawyer]. It's rare," he stressed.

Part of this reluctance has to do the perception—and misconception—about what the barristers' society will do if one lawyer reports on another. "The society doesn't just respond to problems with one approach: heavy handed. We can help lawyers get over problems," Larkin said.

"Reporting on someone isn't like throwing them to the wolves," he added.

Larkin maintains that today there is little justification for not coming forward. Ten or 15 years ago there may have been no place for lawyers to turn when they had a drinking problem or a personal problem, but that is no longer the case. The Lawyers Assistance Program and the Practice Assistance Committee are two options available to

lawyers in Nova Scotia looking for a helping hand.

"The confidentiality of the complaints resolution process only permits publication of the horror stories of poor judgment and professional misconduct," Larkin noted. "The stories about how the society has stepped in to help lawyers in need, even in the face of complaints, remain confidential. For these lawyers, the sky didn't fall when a concerned colleague or client called the society, and they are now back on their feet and functioning well."

In addition, making a report benefits all lawyers. "The reputation of the profession is harmed when clients are not being dealt with properly by lawyers," he said.

The bottom line is also adversely affected. In Nova Scotia, the barristers' discipline expenditures went over budget by \$85,000 before the last fiscal year came to a close.

"This will translate into an increase in fees to every member," Larkin said.