

Health



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IN THIS ISSUE:

MEDICAL PRACTITIONERS

Negligence in Delayed Treatment by Obstetrician 3
 Damages for Failed Abortion and Wrongful Birth 4
 Standard of Care for Patient Reported Lump 5
 Negligence in Laparoscopy 6
 Failure to Diagnose Uterine Rupture 7
 Physician's Claims: Expiry of Statute of Limitation 8
 Other Recent Medical Practitioner Decisions - September 2004 9
 Other Recent Procedural Issues - September 2004 10

MEDICAL PROFESSIONALS

Patient Abuse: Charges not Sustained 11
 Other Recent Medical Professional Decisions - September 2004 12

MEDICAL PATIENTS

Duty to Inform Depends on Patient Circumstances 13
 Involuntary Commitment and Wrongful Detention 14
 Patient Incompetent to Consent to Treatment 15
 Involuntary Status: Patient Threat to Himself 16

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MEDICAL PRACTITIONERS and THE LAW

Negligence in Delayed Treatment by Obstetrician

Facts

Early in the morning of September 18, 1994, two women were admitted to the Branson Hospital with complaints relating to their full-term pregnancies. Ms. C.S. (the "First Patient") was admitted at 1:40 am with vaginal bleeding. The second patient, Ms. Tsur-Shofer (the "Second Patient") was admitted at 2:35 am with a breech presentation. Dr. Lee, the on-call obstetrician, was aware of the First Patient's situation but chose to manage the initial stages of her care from his home. At 2:50 am he was made aware of the Second Patient's situation as well, but did not arrive at the hospital until 4:10 am. At that time, he saw the First Patient and determined that an emergency c-section was indicated. He then saw the Second Patient at 4:25 but did not perform an examination, merely advising her that as soon as he completed the first operation, he would take care of her. At 4:35 am, while Dr. Lee was in surgery, the fetal heart rate (the "FHR") of the Second Patient's child dropped to 60. Nurse intervention led to a recovery but by 4:45 the FHR had dropped again and this time, intervention did not lead to recovery. Dr. Lee was advised of the situation at 4:45 but was already in surgery with the First Patient. By the time the second child, Naomi, was delivered, she had suffered brain damage.

Cause of Action

Ms. Tsur-Shofer and her child claimed that her own obstetrician, Dr. Grynspan, had been negligent in failing to provide the hospital with complete antenatal records; that certain of the nurses had been negligent in failing to use continual electronic fetal heart rate monitoring, and that Dr. Lee had fallen below the appropriate standard of care in failing to attend at the hospital in a timely fashion and failing to examine her when he first saw her at 2:35 am.

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Decision

The claim against Dr. Grynspan was dismissed on the basis that, whatever the inadequacy of the records, his acts did not contribute to Naomi's injuries. The claim against the nurses was dismissed, as well, on the basis that their failure to provide continuous FHR was a judgment call that did not constitute negligence. The claim against Dr. Lee succeeded.

Reasons

The Court dwelt at length on a timeline of events throughout the morning of September 18, 1994, focusing primarily on what Dr. Lee knew, or should have known, at various stages. The essence of Dr. Lee's negligence was in failing to arrive at the hospital in time to deal promptly with the First Patient who was in an emergency situation so that he did not have time to deal with

the Second Patient in a timely manner. He knew as early as 2:50 a.m. that he could have two emergency patients on his hands but did not arrive at the hospital until more than an hour later. The Court noted that, had Dr. Lee examined the Second Patient promptly, she and her child might have been treated first.

Tsur-Shofer v. Grynspan, [2004] O.J. No. 2361 (Ont. S.C.J.)



Damages for Failed Abortion and Wrongful Birth

Facts

In January 1997, the plaintiff Roe underwent an abortion performed by the Defendant Dr. Dabbs. Her reasons for seeking the procedure were largely financial, as she was then the single mother of two children aged 11 and 4, and she had uncertain income. Prior to the pregnancy, she had been using an IUD and this was still in place at the time of the abortion. She was later assured by Dr. Dabbs that the procedure had been successful, and she was given a shot of Depo-Provera for ongoing birth control. On April 1, 1997, her family physician advised her that she was still pregnant. At the time she was beyond the time limit for a therapeutic abortion in British Columbia, and so she continued with the pregnancy and gave birth to a normal healthy child.

Cause of Action

Ms. Roe brought an action in negligence against the doctor for failing to properly perform the abortion, as well as failing to follow up appropriately.

Decision

The doctor was found liable for having failed to conform to the applicable

standard of care with regard to the procedure, particularly having regard to the presence of the IUD, and for failing to pay sufficient attention to the post-abortion laboratory report which was somewhat vague and inconclusive. At the end of the day, Ms. Roe was awarded \$55,000 for non-pecuniary damages and \$5,000 for loss of income.

Reasons

The Court dealt first with the standard of care expected of a doctor where an IUD device is in place, both as regards to the abortion procedure and in follow-up. It found that, in failing to advance the suction curette sufficiently, in light of the embedded IUD and in failing to pay sufficient attention to the lab report, the doctor breached the standard of care an ordinary competent physician in similar circumstances.

It then went on to address, at length, the issue of damages, noting that there were four "traditional" legal approaches to damages in other "wrongful birth" cases; the "no recovery" approach, which is founded on the assumption that any birth is a blessing for the parents, and should not result in damages; the "total recovery" approach which provides the full cost of raising the child, without any deduction for the benefits that accrue to a parent as the result of

having a child; the "offset/benefits" approach, which allows the recovery of damages for the cost of raising a child, but tries to set off the benefits parents receive as a result of having the child; and the "limited damages" approach which allows an award for the pregnancy, the childbirth and the costs of initially accommodating the newborn, but provides nothing for the costs of raising the child. The Court considered each of these approaches, but decided that none of them was appropriate.

The judge decided that non-pecuniary damages, or "general damages" would be most appropriate, noting that this might seem arbitrary, but that "it is no less arbitrary to try and force this type of claim into a pecuniary or economic loss model. Instead, the overall circumstances must be considered in arriving at an appropriate award." In this case the Ms. Roe had suffered the normal pain and suffering of childbirth, limitation on her lifestyle and activity and emotional upheaval of thinking that one of twins had been aborted or that the fetus was damaged. She also had to make a stressful decision about late-term abortion.

Roe v. Dabbs, [2004] B.C.J. No. 1485 (B.C. S.C.)

