

CANADA / JUDGMENT

Ewert v. Marshall

2003 BCSC 1429

COURT

Supreme Court of British Columbia

DECIDED

19 September 2003

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2003BCSC1429

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Ewert v. Marshall et al.,

2003 BCSC 1429

Date: 20030919

Docket: S002414

Registry: Vancouver

Between:

Jeffrey Ewert

Plaintiff

And

Brenda Marshall, Patricia David,

Dr. John Hogan, Holly Dirk, and

Attorney General of Canada

Defendants

Before: The Honourable Mr. Justice Goepel

Reasons for Judgment

Counsel for the Plaintiff:

D.M. Turko

Counsel for the Defendant, Dr. John Hogan:

J. Corbett

Counsel for the Defendants, Brenda Marshall, Patricia David, Holly Dirk, and Her Majesty the Queen in Right of Canada:

K.A. Manning

Date and Place of Hearing:

September 8, 2003

Vancouver, B.C.

INTRODUCTION

- [1] Jeffery Ewert claims damages for negligence in the provision of medical services. He alleges that the defendants failed to take proper steps to diagnose and treat his appendicitis.
- [2] The defendants apply pursuant to Rule 18A for an order that the action be dismissed with costs. Mr. Ewert submits that the matter is not suitable for summary determination and should proceed to trial.

BACKGROUND

- [3] In 1998 Mr. Ewert was an inmate at the Kent Institution in Agassiz, British Columbia, serving a life-sentence for second degree murder. Dr. John Hogan is a physician who practises general medicine. In 1998 he was under contract with the Federal Government to provide medical care for inmates in the federal penitentiary system, including those at the Kent Institution. In that capacity he treated Mr. Ewert.
- [4] Holly Dirk was a registered nurse employed by the Correctional Services of Canada. She attended to Mr. Ewert at the times that are critical to this litigation. Her supervisor was Patricia David. Brenda Marshall was the warden of the Kent Institution.
- [5] The main issue is whether or not the health professionals treating Mr. Ewert were negligent in failing to diagnose his appendicitis during visits he made to the Kent Institution Health Unit between April 25, 1998 and April 28, 1998. It is common ground that Mr. Ewert was suffering from appendicitis and that the medical staff failed to make the proper diagnosis.
- [6] Mr. Ewert attended the Health Unit on several occasions between April 25 and April 28 complaining of abdominal pain. On the morning of April 27, Dr. Hogan conducted a physical exam. He noted that Mr. Ewert's abdomen was soft and hypersensitive to deep palpitations. Dr. Hogan referred him to an urologist and ordered lab tests and imaging studies.

- [7] On the evening of April 27, Mr. Ewert returned to the Health Unit where he saw Ms. Dirk. He was complaining of unbearable abdominal pain. He demanded pain killers. She told him he would have to cope as best he could.
- [8] At approximately 7:20 p.m. on the evening of April 28, he again returned to the Health Unit. He said he was in extreme pain. When asked by Ms. Dirk to provide a urine sample, he was verbally abusive. He demanded pain killers but refused to allow a physical examination. He was escorted out of the Health Unit.
- [9] He returned approximately three hours later. He complained of continuing pain and had tears in his eyes. Mr. Ewert says he told Ms. Dirk he might have appendicitis. He says she pressed down on his abdomen and then told him that he did not have appendicitis. Mr. Ewert says no further examination was performed.
- [10] Ms. Dirk claims she was unable to palpitate his abdomen because Mr. Ewert was guarding and pulling away from her. She observed his skin to be warm and dry. She took his temperature and blood pressure and observed that bowel sounds were present in all four quadrants. She says that Mr. Ewert denied constipation or diarrhoea and told her he had eaten light meals during the day. Her affidavit is silent as to whether Mr. Ewert raised the possibility of appendicitis.
- [11] Subsequent to this examination, Ms. Dirk telephoned Dr. Hogan and advised him of her findings. Based on Ms. Dirk's report, combined with the patient's history and the results obtained in his previous examination, Dr. Hogan deposes that he did not suspect any acute problem with Mr. Ewert's abdomen and decided that it was appropriate to await the results of the tests he had ordered on April 27. The affidavits of Dr. Hogan and Ms. Dirk are both silent on whether there was any discussion between them concerning the possibility that Mr. Ewert was suffering from appendicitis.
- [12] Mr. Ewert's pain continued. At 3:00 a.m. on the morning of April 29, 1998, he again returned to the Health Unit. He says he felt like his stomach was going to explode. An ambulance was called and he was transferred to Chilliwack General Hospital.
- [13] Mr. Ewert was suffering from a retrocaecal appendix abscess. This diagnosis was made at the Chilliwack General Hospital on April 29, 1998. Mr. Ewert underwent an appendectomy on April 30, 1998.

EXPERT EVIDENCE

- [14] Mr. Ewert relies on a report from Dr. Panton. Dr. Panton's expertise is laparoscopic surgery. The defendants submit that Mr. Ewert cannot rely upon expert evidence from a physician who has more specialized training and who has significantly different background, education and experience than that of Dr. Hogan.

- [15] In support of that position the defendants rely on the decision of Madam Justice Quijano in *Hughes v. Cooper*, (3 Oct. 1996), Victoria 91/3001 (B.C.S.C.). Hughes was an oral decision given in the course of trial. In that case, the plaintiff was trying to introduce evidence of a gastroenterologist in regard to the standard of care of a general practitioner. Madam Justice Quijano refused to admit that evidence. She relied on an unreported decision of Mr. Justice Gow in *St. Jules v. Chen* (October 17th, 1989), Nanaimo Registry No. 8412.
- [16] *St. Jules* was also an oral decision given in the course of trial. Mr. Justice Gow refused to allow a paediatrician to give an opinion on the standard of care of a general practitioner. No case authority was cited.
- [17] Madam Justice Allan in *Phillips v. Central Cariboo Chilcotin Council*, [2002] B.C.J. No. 1245 (S.C.), in a reserved decision, considered the admissibility of evidence from an expert who was better qualified than the defendant. After referring to decisions of the Courts of Appeal of Newfoundland, Saskatchewan and Ontario, she held that while locality and specialization may be relevant to the applicable standard of care in a particular case, they are not relevant considerations when determining the admissibility of expert evidence on the standard of care.
- [18] The considered decision of Madam Justice Allan is binding upon me. I am not prepared to follow Hughes. See: *Hansard Spruce Mills (Re)*, [1954] 4 D.L.R 590 (B.C.S.C.).
- [19] The report of Dr. Panton is admissible. The difference between his expertise and work experience and that of Dr. Hogan may be a relevant consideration when determining the weight to be given to Dr. Panton's opinion.
- [20] Dr. Panton acknowledges that when the appendix is in the retrocaecal position, appendicitis is frequently difficult to diagnose. In his report, he states that if the patient had been referred to the Chilliwack General Hospital earlier in the course of his illness, the diagnosis would probably have been made earlier and Mr. Ewert would have avoided the excruciating pain that he experienced between the onset of his symptoms and his transfer to hospital on April 29, 1998. Dr. Panton opines that the nursing and medical staff involved in Mr. Ewert's care at the Kent Institution fell below a reasonable standard in failing to recognize that Mr. Ewert had appendicitis.
- [21] Mr. Ewert has also filed a report from Ms. Lynne Esson. Ms. Esson is a faculty member of the School of Nursing at the University of British Columbia and she teaches both theoretical and clinical nursing. Her area of expertise is medical-surgical nursing, with a focus on the care of patients undergoing general surgical procedures.
- [22] In her report, Ms. Esson notes that the patient had, since 1997, numerous visits to the infirmary for chronic abdominal and urinary complaints and these complaints may have affected the objectivity of the Kent Institution staff who dealt with Mr. Ewert in April 1998. She also notes that Mr. Ewert was not always cooperative, which may have affected the ability of the nurse and physician to take a more detailed history or do a complete physical

assessment. Ms. Esson concludes that the patient was not well served by the medical and nursing staff of the Kent Institution. She states that the patient had a long-standing complaint of abdominal pain that was not satisfactorily investigated.

- [23] The defendants have also filed expert reports. Dr. Murschell, who practises family medicine, concludes that this was a challenging case from a diagnostic point of view and that there were several factors which made the diagnosis more difficult, including Mr. Ewert's long history of abdominal complaints and other known conditions of Mr. Ewert that could account for symptoms of abdominal pain. Dr. Murschell notes that appendicitis is infrequently a straightforward and easy diagnosis. This is especially so if the appendix lies in a retrocaecal position. Dr. Murschell concludes that Dr. Hogan did not fall below the standards expected of a reasonable general or family practitioner in his management of Mr. Ewert.
- [24] The defendants also rely on a report from Ms. Diane Thiessen. Ms. Thiessen is a registered nurse with extensive experience in the Provincial Corrections Branch. She concludes that the nursing staff at Kent Institution consistently acted in accordance with generally accepted nursing practice that would have been employed by a competent nurse in the same circumstances.

DISCUSSION

- [25] On an application under Rule 18A, the court may grant judgment unless it is unable on the whole of the evidence to find the facts necessary to decide the issues of fact or law, or the court is of the opinion that it would be unjust to decide the issues on the application. In this case there are contradictory expert opinions as to whether Mr. Ewert received appropriate treatment. None of the experts have been cross-examined.
- [26] Further, the affidavit of Dr. Hogan is silent as to whether or not he ever considered that Mr. Ewert might be suffering from appendicitis. Mr. Ewert says that he advised Ms. Dirk when he saw her on the evening of April 28th that he believed he had appendicitis. It is not known whether Ms. Dirk passed that information on to Dr. Hogan in their subsequent telephone conversation. Whether Dr. Hogan should have considered the diagnosis of appendicitis and whether his failure to do so was below the standard of care is very much a live issue.
- [27] A further factor in this case is that Mr. Ewert was at all material times a prisoner with severe restraints on his liberty. He was at the mercy of the medical staff at the Health Unit. None of the expert reports give consideration to the standard of care when that care is being given in a prison setting. I was referred to no authority on this point.

[28] Having considered the evidence as a whole, I am not satisfied that I can find the facts necessary to decide the issues to determine this litigation. Further, I do not think it just to decide the issue of the appropriate standard of medical care in a prison setting in a summary manner. This is an issue of general importance best determined on a full evidentiary record.

[29] The defendants' applications are dismissed. Costs will be in the cause.

"R.B.T. Goepel, J."

The Honourable Mr. Justice R.B.T. Goepel

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