
CANADA / JUDGMENT

Holsten v. Card

2002 BCCA 44

COURT

British Columbia Court of Appeal

DECIDED

24 January 2002

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2002BCCA0044

Citation:

Holsten v. Card

Date: 20020124 8

2002 BCCA 44

Docket:

CA026607

Registry: Vancouver

COURT OF APPEAL FOR BRITISH COLUMBIA

BETWEEN:

GRETA HOLSTEN

PLAINTIFF

(APPELLANT)

AND:

DR. G.A. CARD and DR. KENNETH C.L. WU

DEFENDANTS

(RESPONDENTS)

Before:

The Honourable Madam Justice Rowles

The Honourable Madam Justice Ryan

The Honourable Madam Justice Levine

J.N. Laxton, Q.C. and R. Gibbens

Counsel for the Appellant

M.M. Skorah and J. Lamb

Counsel for the Respondents

Place and Date of Hearing:

Vancouver, British Columbia

October 25, 2001

Place and Date of Judgment:

Vancouver, British Columbia

January 24, 2002

Written Reasons by:

The Honourable Madam Justice Levine

Concurred in by:

The Honourable Madam Justice Rowles

The Honourable Madam Justice Ryan Reasons for Judgment of the Honourable Madam Justice Levine:

Introduction

- [1] On June 14, 1990, the respondent, Dr. Wu, extracted the lower right third mandibular molar tooth (the wisdom tooth, also referred to as tooth #48) of the appellant, Ms. Holsten. Subsequent to the extraction, the appellant began to experience severe pain in her jaw and facial area. Since then, the appellant has undergone many different treatments to lessen the pain, but it is likely she will suffer from chronic pain for the rest of her life.
- [2] The appellant sued the respondent, claiming the extraction was done in a negligent manner and caused the pain. The trial judge held that although the extraction was the cause of the appellant's injuries, the appellant had failed to satisfy the burden on her to prove that the respondent was negligent when he performed the extraction. (The trial judge's reasons for judgment are unreported, but may be found at [1999] B.C.J. No. 2638 (S.C.)(QL)).
- [3] On appeal, the appellant claimed the trial judge made palpable and overriding errors in assessing the facts, and reached conclusions that were inconsistent with his own findings, rendering such conclusions illogical and unsupportable.

- [4] In my opinion, there are three instances in which the trial judge seriously misapprehended the evidence of the two dental experts on which he relied for his conclusions with respect to the negligence of the respondent. Accordingly, the appeal must be allowed and, unfortunately, a new trial ordered.

Standard of Review

- [5] Where this Court is asked to interfere with a trial judge's conclusion on matters of fact, the standard of review is as set out in *Toneguzzo-Norvell v. Burnaby Hospital*, [1994] 1 S.C.R. 114 at 121:

It is by now well established that a Court of Appeal must not interfere with a trial judge's conclusions on matters of fact unless there is palpable or overriding error. In principle, a Court of Appeal will only intervene if the judge has made a manifest error, has ignored conclusive or relevant evidence, has misunderstood the evidence, or has drawn erroneous conclusions from it: see *P.(D). v. S.(C.)*, [1993] 4 S.C.R. 141, at pp. 188-89 (per L'Heureux Dubé J.), and all cases cited therein, as well as *Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353, at pp. 388-89 (per Wilson J.), and *Stein v. The Ship "Kathy K."*, [1976] 2 S.C.R. 802, at pp. 806-8 (per Ritchie J.). A Court of Appeal is clearly not entitled to interfere merely because it takes a different view of the evidence. The findings of facts and the drawing of evidentiary conclusions from facts is the province of the trial judge, not the Court of Appeal.

Background

- [6] The issues addressed at trial were primarily causation and damages. The appellant's claims of almost total disability resulting from a tooth extraction were thought by the various specialists she consulted to be surprising, unusual and unique. Ultimately, however, the specialists agreed that her chronic pain disorder was caused by the development of a neurotransmitter disorder in the brain that had been triggered by the events of, or surrounding, the extraction, including damage to the right inferior alveolar nerve and exacerbation of a pre-existing temporomandibular problem. The trial judge's finding (at para. 208) is not in issue in this appeal:

As I understand their evidence, the experts are in general agreement that a causal relationship exists between the extraction of Ms. Holsten's tooth #48 on June 14, 1990 and the onset of what may be a chronic pain condition or a chronic pain syndrome.

- [7] The trial judge went on to say (at para. 216):

But the presence of a causal relationship between the extraction and Ms. Holsten's condition of chronic pain, or a chronic pain syndrome, begs the question whether Dr. Wu was negligent and whether his actions resulted in an injury to Ms. Holsten's inferior alveolar nerve which, in turn, has caused chronic pain or the exacerbation of a pre-existing chronic pain syndrome.

- [8] At trial, the heart of the appellant's negligence allegation was that the respondent relied on an inadequate x-ray for the purposes of determining the procedure he used to remove the tooth and based on that x-ray, used an improper technique.
- [9] There was scant evidence as to how the extraction was actually performed. While the appellant described her perception of the procedure in detail to the various medical and dental specialists who examined and treated her over the years, and to the court, she could not know exactly what the respondent was doing and in the opinion of the trial judge was not a reliable witness. One of the experts called by the appellant who gave evidence concerning the procedure observed that "the surgical extraction procedure in this case is extremely difficult to analyze."
- [10] The respondent kept incomplete notes of the procedure and could not remember it at all. Nor could his assistant. The respondent testified concerning his standard procedure for extractions and referred to the brief notes he had made of the extraction of the appellant's tooth. The trial judge accepted his evidence.
- [11] The respondent stated that he would have first used periosteal and straight elevators to loosen the tooth from the gums and then forceps "to grip onto the tooth and deliver it from the socket". In this case, his records showed that he cut a "flap" in the gum and cut away some bone, before using forceps to finally pull out the tooth. He testified he would have cut the "flap" to provide greater visibility and access to the tooth and cut away the bone as it was obstructing the removal of the tooth from the socket. When asked in what order he would use the flap procedure, the elevators and forceps, the respondent stated:

Generally, if -- if the tooth is exposed, I would not consider raising a flap right off the start. I would - if I can - if I can see the tooth, if I have - if I can get - get a purchase on the tooth, if I don't anticipate a lot of tearing of the tissues, then I would not raise a flap.

- [12] The appellant says that the initial use of forceps by the respondent was not the correct procedure. That issue is closely related, in the evidence, to the adequacy of the x-ray the respondent relied on. The appellant alleges that the respondent used the wrong procedure because the x-ray did not show the relationship between the tooth and the inferior alveolar nerve, which was found to have been damaged in the extraction. The theory of the appellant is that in using elevators and forceps to attempt to remove the tooth, the respondent applied downward pressure to the tooth, causing damage to the nerve which passed underneath. As the x-ray did not show the entire root of the tooth or the location of the nerve, the appellant says that the respondent did not have sufficient information to plan and use the proper procedure to avoid the risk of nerve damage.

[13] The trial judge quoted long passages from the opinions of the various experts; however, much of that evidence related to the causation issue. On the questions relating to the respondent's negligence, he considered the opinions of Dr. Burton H. Goldstein, relied on by the appellant, which the trial judge rejected, and Dr. William S. Walter, tendered by the respondent, which the trial judge accepted.

[14] Dr. Walter stated in his report of August 21, 1998:

I would honestly feel that if this radiograph was shown to any number of dentists, that it would be unreasonable to expect that any significant number of them would have required a new x-ray to be taken. . . . I see no definite cause and effect relationship between the quality of the work carried out by Dr. Wu and the patient's continued problems. Though I have compassion for this patient, I feel that Dr. Wu met the current accepted standards of practice within the community of practicing dentists.

[15] Dr. Goldstein stated in his report of July 24, 1998:

. . . It seems likely that given the unduly long extraction (1-1 1/2 hours when only 1/2 hour should have been necessary) the surgical procedure used, and the force used, that the nerve was damaged and the previous temporomandibular [sic] problem was exacerbated during the extraction. To allow this to happen in this case was below the standard of practice. . . . In my opinion, if an adequate pre-operative x-ray had been taken and appropriate surgical treatment planning and technique had been used, it is likely (51% or more) that an extraction would have been achieved that avoided damage to the inferior alveolar nerve and exacerbation to the TM problem. . . .

Issues

[16] The appellant argues that the trial judge made evidentiary findings inconsistent with his conclusions that the x-ray was adequate and the respondent was not negligent, rendering those conclusions illogical and unsupportable. Much of the argument set out in her factum is a summary of the evidence that supports the conclusions she maintains should have been drawn by the trial judge.

[17] Given the conflicting evidence of the two experts who considered the procedure used and the adequacy of the x-ray in determining that procedure, the trial judge had to choose one expert over the other. This Court would not interfere with his choice unless he made a "palpable error" in understanding that evidence. The appellant submits that the trial judge made such palpable errors in considering the evidence, as follows:

[1] The evidence of Dr. Walter that the x-ray was adequate should not have been accepted by the trial judge because Dr. Walter's reports contained contradictions and were based on an erroneous assumption.

- [2] The trial judge misunderstood Dr. Walter's evidence concerning the forceps procedure used by the respondent for the extraction.
- [3] The trial judge erred in rejecting the evidence of Dr. Goldstein on the grounds that Dr. Goldstein had relied on reports of the plaintiff, which the trial judge found to be unreliable, and had changed his opinion over the course of his involvement with the case.
- [18] The appellant argues further that the trial judge erred in failing to draw an inference that the respondent was negligent in performing the extraction.

Analysis

Dr. Walter's Evidence - the X-Ray

- [19] The appellant's first argument is that the trial judge erred in accepting the evidence of Dr. Walter.
- [20] Dr. Walter's written reports with regard to the prudence of relying on the x-ray in question contradicted each other and were based on an erroneous assumption. In his report of June 14, 1993, he said:

The entire root is not noted on the x-ray, however, at least 98+% of the tooth is noted. The inferior alveolar nerve vascular canal can just be noted at the bottom of the film and does not appear to be touching the root of the offending tooth. [Emphasis added]

- [21] On August 21, 1998, however, Dr. Walter wrote:

In regards to the radiograph available to Dr. Wu. Everyone agreed that the entire tooth is not shown. This is tooth #4-8 or the mandibular right third molar. This x-ray was taken almost one year to the date prior to the removal of tooth #4-8. In that radiograph, as previous [sic] stated, graded 98% of the tooth is visible. As well, there is no definite evidence of the inferior alveolar neurovascular canal being present around at 98%+ of the tooth. As that tooth had further erupted into the mouth in the year since the x-ray was taken, it can be assumed that the tooth obviously would be farther away from the canal than it was the year before and, in fact, the canal was not noted on that x-ray. [Emphasis added]

- [22] When the contradiction was pointed out in cross-examination, Dr. Walter reiterated his opinion that the x-ray was acceptable.
- [23] The assumption made in the August 21, 1998 report, that the tooth had further erupted into the mouth since the x-ray was taken, was first stated by Dr. Walter in his report of January 5, 1996. Dr. Walter said:

There is no evidence in the available x-ray to show involvement of the tooth with the inferior alveolar canal. According to the Examination For Discovery of Dr. Wu, he states that first a periosteal elevator was utilized and then an attempt to remove this tooth with forceps was carried out. That would make me feel that tooth #4-8 had erupted farther in towards the occlusal plane from the x-ray of August 1989, as the x-ray of August 13, 1989, would suggest that forceps application would not be possible. [Emphasis added]

[24] In his report of January 10, 1996, in discussing the relationship between the x-ray and the procedure used by the respondent for the extraction, Dr. Walter repeated the assumption. He said:

The available dental x-ray, though has been previously mentioned in the report, though not ideal, would be very acceptable to myself for the performance of this procedure and in light of the fact that Dr. Wu initially attempted to use a forceps for the removal of the tooth, I must assume that the tooth has erupted further into the occlusal plane making it more assessable [sic] and further decreasing the possibility that the root of the tooth could be involved with the inferior alveolar neurovascular bundle. [Emphasis added]

[25] The respondent's evidence was that the tooth had not erupted further into the mouth since the x-ray was taken. When faced with this evidence and asked whether he maintained his opinion concerning the adequacy of the x-ray, Dr. Walter said:

You seem to want me to change what I'm saying, but I'm not going to change what I'm saying.

[26] In his reasons for judgment (at paras. 163 and 168), the trial judge noted both the contradictions and erroneous assumption, and the confirmation of Dr. Walter's opinion.

[27] It is not an error reviewable by this Court for the trial judge to have chosen to accept Dr. Walter's evidence, although it contained the inconsistencies and incorrect assumption. The weight to be given the evidence was a matter for the trial judge.

Dr. Walter's Evidence - the Extraction Procedure [28] The appellant argues that the trial judge misunderstood Dr. Walter's evidence concerning the forceps procedure used by the respondent for the extraction.

[29] In discussing Dr. Walter's evidence concerning the extraction procedure involving the use of elevators and forceps, the trial judge said (at para. 168):

At trial, Dr. Walter explained that, on the basis of his own evaluation of the available x-ray he had concluded that, because the tooth was impacted, such a procedure would be successful. [Emphasis added] [30] In his report of January 5, 1996 (quoted in para. 21 above), Dr. Walter stated: "...the x-ray of August 13, 1989 would suggest that forceps application would not be possible" [Emphasis added]. At trial, while discussing his assumption that the tooth had erupted further into the mouth, Dr. Walter said:

... I said that because the evidence was that Dr. Wu had attempted a forceps extraction initially, and my evaluation of the X-ray was that a forceps most likely would be ineffective in removal of that tooth, because I didn't feel that you could get the forceps seated on the tooth below the height of contour of that tooth. [Emphasis added]

[31] The key to the appellant's argument is that the respondent used an improper procedure to extract her tooth. Thus, the trial judge must properly understand the evidence on this point. While it is arguable from the context of his reasons for judgment that the trial judge understood the evidence and simply misstated it, it is too critical to the conclusion he reached on the liability of the respondent to make that assumption. I therefore conclude that the trial judge misapprehended the evidence on this important point.

Dr. Goldstein's Evidence

[32] The appellant argues that the trial judge erred in rejecting the evidence of Dr. Goldstein.

[33] The trial judge noted (at para. 225) that the appellant's case rested, to a large extent, on the evidence of Dr. Goldstein, but rejected his evidence for two reasons: that Dr. Goldstein's reports relied on the appellant's reporting, which the trial judge found to be unreliable, and that Dr. Goldstein had changed his opinions over the course of his involvement in the case.

[34] The trial judge commented on the validity of Dr. Goldstein's reports (at para. 225):

In turn, the validity of many of his opinions rest [sic], to a considerable extent, on the accuracy and reliability of the information given by Ms. Holsten to him and to the others whose reports he reviewed and relied upon. That brings into issue the reliability of her accounts, not only of what transpired on June 14, 1990, during the extraction procedure itself, but also as to the timing, nature and degree of the pain, dizziness, muscle spasms and other symptoms she experienced afterwards.

[35] He went on to assess the appellant's credibility concerning the extraction procedure (at paras. 226-7):

I do not believe her when she insists that she has a vivid and accurate recollection of the extraction procedure.... I find that Ms. Holsten's recollection of what happened during the extraction procedure on June 14, 1990, is faulty, and that her estimate of the length of time it took is very questionable.

[36] As the trial judge found the appellant not to be credible, it follows that the validity of the opinions of the experts, to the extent they were based on her reporting, would suffer.

[37] Dr. Goldstein had acted both as treating and consulting specialist to the appellant. In his reports, he commented that he was concerned, at times, about the accuracy of her reports of her symptoms. Dr. Goldstein's opinion on the issue of the respondent's negligence, however, was not based on evidence given to him by the appellant to any significant degree.

- [38] Dr. Goldstein determined, based on his personal examination of the x-ray relied upon by the respondent, that it was not adequate.
- [39] Dr. Goldstein also determined that the respondent did not perform the extraction properly. In his opinion, based on the available information at the time of the extraction, the proper procedure was to section the tooth and remove it in pieces, rather than to attempt to pull it out with forceps, which might exert downward pressure on the nerve below the tooth to be extracted.
- [40] Dr. Goldstein's opinions on these two critical issues of liability did not depend on anything the appellant reported to him or to others.
- [41] The only information received by Dr. Goldstein from the appellant relating to the extraction procedure was that the operation took one-and-a-half hours. Dr. Goldstein doubted the accuracy of this report, and in any event, it was not in any way determinative of his opinion that the respondent's actions were below the standard of practice.
- [42] The trial judge's second reason for rejecting Dr. Goldstein's opinions was because he concluded that over the course of Dr. Goldstein's involvement with this case, Dr. Goldstein had changed his opinions of the cause of the injury and whether or not the respondent was negligent.
- [43] The trial judge first cited (at para. 229) Dr. Goldstein's report of January 23, 1996, in which Dr. Goldstein wrote:

In my opinion, based upon my review of both pre and post-operative radiographs, it is probable that nerve damage would not have occurred and would not have been particularly expected from this surgical procedure. In my opinion, this would hold true whether the surgery was performed by a specialist in oral and maxillofacial surgery or a general practicing dentist. I feel that the preoperative anatomy was a cause only for mild concern and there would not be any greater expectation for permanent nerve injury either statistically or subjectively. [Emphasis added by trial judge]

- [44] The trial judge then stated (at para. 230):

It was not until July 24, 1998, that Dr. Goldstein made the rather extraordinary statement that:

...if an adequate pre-operative x-ray had been taken and appropriate surgical treatment planning and technique had been used, it is likely (51% or more) that an extraction would have been achieved that avoided damage to the inferior alveolar nerve and exacerbation to the TM problem.

[45] The language of Dr. Goldstein's January 23, 1996 report is not as clear as it could be, but I do not find the two statements to be inconsistent, as the trial judge apparently did. As I interpret both reports, Dr. Goldstein's opinion is that if the respondent had known the structure of the tooth and the location of the nerve canal before performing the surgery and had used that knowledge in planning and carrying out the surgery, it is not likely that nerve damage would have occurred.

[46] The trial judge stated further (at para. 231) that it was in Dr. Goldstein's report of July 24, 1998:

...that Dr. Goldstein expressed for the first time the opinion that "standard practice" required the sectioning of tooth #48 followed by its removal in pieces. In his earlier report [January 10, 1996] he simply stated that:

Planned surgical sectioning of the tooth would be included as a possible necessity in order to avoid having to use excessive pressure in removing the tooth in one piece. The surgical decision as to actual methods of tooth removal would be a clinical one based upon clinical findings at the time of the extraction itself. [Emphasis added by trial judge]

[47] The trial judge made no reference to Dr. Goldstein's testimony, in which Dr. Goldstein attempted to explain his use of the term "possible necessity". Dr. Goldstein said:

My, my opinion may not be clearly stated as a possible necessity. It is what is necessary to remove the tooth without the undue forces.I would say that is probably the most appropriate way of doing it.

[48] He went on to say:

...Based on the information that I saw, the use of forceps would have been inappropriate to get that tooth out.

[49] Nor did the trial judge refer specifically to Dr. Goldstein's statement in his report of January 23, 1996, where he said:

In addition based on the available pre-operative radiograph, I would not have considered using a forceps to extract this tooth as its radiographic appearance indicated tooth sectioning and elevator techniques to be appropriate.

[50] As the trial judge explicitly stated, the success of the appellant's case rested, to a large extent, on the evidence of Dr. Goldstein. It is therefore crucial to the outcome that the trial judge properly understood Dr. Goldstein's evidence. In my opinion he did not.

Summary - Misapprehension of the Evidence [51] There are three examples of the trial judge misapprehending crucial evidence: Dr. Walter's opinion of the effectiveness of the use of forceps; Dr. Goldstein's reliance on the appellant's reports for his opinions; and the consistency of Dr. Goldstein's opinions. In my view, for these reasons, his decision cannot stand and the appeal must be allowed.

Inference of Negligence

[52] Appellant's counsel submitted that in this case an inference of negligence should be drawn despite the relative absence of positive evidence of what the respondent actually did in extracting the tooth, citing *Farrell v. Snell*, [1990] 2 S.C.R. 311. As the trial judge pointed out in his response to this submission, *Farrell v. Snell* dealt with the issue of causation in a medical malpractice action, where the defendant's negligence is proven and is known to be a likely cause, but is not scientifically proven to have caused, the injuries suffered by the plaintiff. It does not deal with the proof of negligence. In my view, the trial judge was correct. I would not accede to the appellant's submission on this point.

Conclusion

[53] The appellant has successfully shown that the trial judge misapprehended the evidence. While there is great expense and inconvenience to all parties to have to re-litigate the issue of liability, I see no alternative.

[54]

I would allow the appeal and remit the matter to the Supreme Court for a new trial.

"The Honourable Madam Justice Levine"

I AGREE:

"The Honourable Madam Justice Rowles"

I AGREE:

"The Honourable Madam Justice Ryan"

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