

SCC clarification hoped for in medical malpractice case

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For Law Times

Plaintiff personal injury lawyers are hoping that the Supreme Court of Canada will clarify the issue of causation involving multiple defendants in medical malpractice cases in a leave to appeal filed in *Sacks v. Ross*.

At issue is a negligence claim made by Jordan Sacks, who in 2008 suffered an anastomotic leak after bowel surgery, resulting in bowel contents spilling into his abdominal cavity. According to the fall Ontario Court of Appeal ruling, discovery and treatment of the leak was delayed and Sacks went into septic shock and fell into a coma. He then required the amputation of both legs below his knees and all of his fingertips.

In the original trial, the jury found that there was breach of some elements of the standard of care but that they did not cause the injuries and the action was dismissed.

In upholding the lower court's decision, the Ontario Court of Appeal listed what is required to prove malpractice in cases involving several tortfeasors. It explored the "but-for" test, which examines whether or not the injuries would have occurred but

for the actions of the defendants.

The appeal court also lay out a process on how to apply the but-for test to determine causation in medical malpractice cases involving more than one person.

Rikin Morzaria, a plaintiff personal injury lawyer who focuses on critical injury and wrongful death cases with McLeish Orlando LLP in Toronto, says *Sacks* provides guidance for cases when a number of people are responsible for causing a problem and allows a way for the case to be presented.

"It will definitely go beyond the medical malpractice scope into other situations involving multiple defendants and then, hopefully, can be catered to other situations as well," he says.

"The more guidance we can have and the more consistency we have in those cases moving forward on this test the better. We may still get further guidance from the Supreme Court on this issue and, if there's that further guidance, I think that will be welcome."

The appeal court recommended beginning by determining whether the plaintiff proved that a delay in treatment caused the injuries. If so, the next step is deciding if they proved that the delay caused or contributed to



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the injuries. A positive finding to that question would lead to the next question — how was the standard of care breached?

The argument that several people — *Sacks* referred to the entire team at Sunnybrook Hospital — were at fault was not thought through until the appeal was argued, wrote Lauwers.

Morzaria says plaintiff lawyers face challenges in these types of cases, depending upon the causation approach used.

"The problem has always been

if you start the analysis by looking at each person's incremental contribution you can get these very small contributions from each person that, on their own, don't appear to be sufficient to cause the problem," he says, even though there's an acceptance by the trier of fact that delay, overall, caused by negligence was the cause of the harm as in *Sacks*.

When the approach is to simply examine an individual's contribution to the harm without looking at the global delay, the cause of the harm can't be tied to one particular defendant and so the plaintiff wouldn't be successful in proving systemic delay on the part of several people. The concern is the decision in *Sacks* is inconsistent with *Surujdeo v. Melady*, a case heard by another Court of Appeal panel.

Surujdeo involved Rossana Surujdeo, who went to hospital with flu-like symptoms and died about nine hours later. The cause of death was found to be a rare cardiac condition.

It went before the Court of Appeal, which found that the trial judge should have worded the questions for the jury using the but-for causation test and the phrase "caused or contributed" should not be put to the jury when considering causation.

"Lawyers going forward with jury trials are confused. One court says it has to be the but-for test and the other one says it has to be the caused or contributed test, the material contribution test," says Toronto personal injury lawyer Charles Gluckstein.

Like *Sacks*, the case was not sent back for trial because the Court of Appeal found the outcome would have been the same.

"[*Sacks*] is a very, very important case and we really hope it gets clarified by the Supreme Court, because you can imagine there are so many cases in medical negligence where there are more than one doctor and nurse involved, and we don't know which standard of causation is going to be applied at trial," says Gluckstein.

Kate Cahill, a partner with Thomson Rogers in Toronto whose personal injury practice focuses largely on medical malpractice, believes clarification is essential.

"In the context of medical malpractice cases, it's a really, really important issue that needs to be sorted out because it's not uncommon in medical malpractice cases that you have multiple care providers who may have been negligent either by act or omission and on a global basis caused harm to a patient," she says. **LT**