News

Negligence proof onus on plaintiffs, court reaffirms

CHRISTOPHER GULY

The Court of Appeal for Ontario has ruled that neither the physicians nor the medical facility played a role in the February 2004 death of a woman after undergoing an elective caesarean section and giving birth to her second child, a girl.

In *Mangal v. William Osler Health Centre* [2014] O.J. No. 4344, the appellants — Sharon Mangal's husband, son and daughter — argued that Superior Court Associate Chief Justice Frank Marrocco erred last year in finding that Mangal died from an untreatable blockage in her lung, and not, as her family alleged, because of postpartum hemorrhaging the nurses and doctors caring for her failed to diagnose and treat. The Mangals also submitted that Justice Marrocco wrongly found that William Osler and the physicians played no causal role in the woman's death, despite also finding that the attending anaesthetist breached his duty of care by failing to notify an obstetrician about Mangal's condition at a critical stage. (The respondent physicians cross-appealed that finding, which the appeal court also dismissed.)

In Justice Marrocco's decision ([2013] O.J. No. 1866), the trial judge rejected both the respondents' theory that Mangal died due to an amniotic fluid embolism — because her lungs didn't contain any amniotic content — as well as the appellants' theory of hemorrhaging at the C-section site, since this allegation was inconsistent with the evidence and the physicians' observations. He concluded Mangal died because of a blockage in her lung that prevented blood from flowing from the right side of her heart to the left side.

Toronto appellate counsel Paul Pape, who represented the appellants, said an autopsy report showed Mangal's lungs were clear of any blood clots, yet Justice Marrocco relied on evidence that showed doctors had determined the woman suffered from

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>
> **Nina Bombier**
> Lenczner Slaght Royce Smith Griffin

disseminated intravascular coagulation in which multiple blood clots were forming in her blood vessels, constricting blood flow, and that she would not have been saved regardless of any medical intervention.

"The judge wasn't free to find there was a clot in her lung when there was evidence to the contrary," said Pape, who added that he and co-counsel Tanya Pagliaroli are "taking a hard look" at the appeal court ruling as to whether they will recommend the appellants seek leave to appeal to the Supreme Court of Canada.

"This case hurts because a woman went for a C-section and bled to death in an Ontario hospital bed."

But a "bad" and "rare outcome in a modern hospital" should not lead to the conclusion that "somebody's been negligent or failed to meet the standard of care, which was the plaintiffs' argument," countered Borden Ladner Gervais partner Bill Carter, who served as co-counsel for the William Osler Health Centre on the appeal.

Although Justice Marrocco didn't identify the precise location of the blockage that kept blood flowing from Mangal's heart — and which "may or may not have been consistent with the pathology report" —it was supported by evidence from the obstetrician and surgeons who attended to her, explained Carter.

"The trial judge considered the theories advanced by both parties and rejected them, as he was entitled to do" and did not conduct "an either-or-exercise where he was obliged to accept one theory of liability or the other," wrote Justice William Hourigan in the appeal court's 2-1 ruling agreed to by Justice James MacPherson.

Justice Marrocco's "function was to determine if the appellants had met their onus of proving on a balance of probabilities that, but for the negligence of the respondents, Ms. Mangal would not have died." He could have accepted "some, none, or all of a witness' evidence, including an expert witness' evidence," which he did from the defendant physicians.

Even if the trial judge erred in his cause of death finding, the appellants failed to establish he erred in rejecting their theory, the appellate court said.

However, in her dissent, Justice Kathryn Feldman held that the appeal should be allowed, finding the trial judge made a "palpable and overriding error and misapprehended the evidence" in determining Mangal died from a blood clot that caused a blockage in the lung.

She said Justice Marrocco also committed an error of law described in *Grass (Litigation Guardian of) v. Women's College Hospital* (2005) O.J. No. 1403 — which the appellants also argued — by finding a cause of death that wasn't advanced by anyone at trial.

She said he could have rejected both parties' theories of causation only if his theory had been "explored in evidence with the witnesses so that the parties had an opportunity to address it and show why and how they refuted it."

A new trial is necessary because the appellants didn't have the opportunity, "to address the causation analysis ultimately relied on by the trial judge because it was not an analysis put forward by them, by the respondents or by the witnesses," Justice Feldman wrote.

Nina Bombier, a partner at Lenczner Slaght Royce Smith Griffin and co-counsel to the respondent physicians, said the majority decision reaffirmed basic principles, one of which was showing deference to a trial judge "who sits for weeks listening to competing evidence."

As long as the lower court's finding is grounded in the evidence, then it won't be overturned on appeal, she explained, adding the appellate court affirmed that an appellant cannot make a case on something not pleaded, which in this case involved the hospital's alleged negligence in administering blood and blood products.

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Moldaver: 'No magical incantation'

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be criminals won Mack's confidence by recruiting him into a fictional crime organization headed by a "Mr. Big." Mack was given various small paid jobs over four months, mostly repossessing vehicles and delivering packages, for which he was paid a total of $5,000, plus his expenses. He was told that if he wanted to move up in the organization he had to reveal to Mr. Big the details surrounding his roommate's disappearance and death. He eventually confessed to shooting the victim four times in the chest, and once in the back, and took one of the undercover officers to a fire pit on his father's property. The fire pit contained bone and teeth fragments from the victim, as well as shell casings fired by a hunting rifle found in Mack's apartment.

Justice Moldaver said trial judges should tell the jury that the reliability of the accused's confession is a question for the jury. The judge should then review the factors relevant to the confession and the surrounding evidence, including the operation's length, the number of interactions between the police and the accused, the nature of their relationship, the nature and extent of the inducements offered, the presence of any threats, the conduct of the interrogation, and the personality of the accused.

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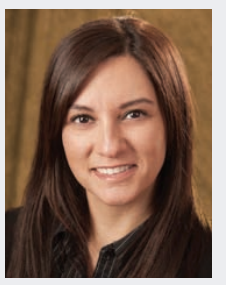
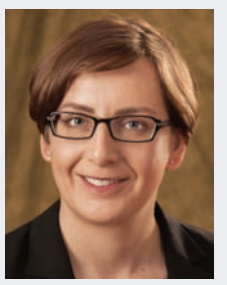


Sepal Bonni - Called to the Ontario Bar in 2013, Ms. Bonni joined Carters' Ottawa office to practice intellectual property law with a focus on charities and not-for-profits after having articled with a trade-mark firm in Ottawa. Ms. Bonni has practiced in all aspects of domestic and foreign trade-mark prosecution before the Canadian Intellectual Property Office, as well as trade-mark portfolio reviews, maintenance and consultations, and is increasingly interested in the intersection of law and technology, along with new and innovative strategies in the IP world.

Linsey E.C. Rains - Called to the Ontario Bar in 2013, Ms. Rains joined Carters Ottawa office to practice charity and not-for-profit law with a focus on federal tax issues after more than a decade of employment with the Canada Revenue Agency (CRA). Having acquired considerable charity law experience as a Charities Officer, Senior Program Analyst, Technical Policy Advisor, and Policy Analyst with the CRA's Charities Directorate, Ms. Rains completed her articles with the Department of Justice's Tax Litigation Section and CRA Legal Services.



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