COURT FILE NO.: 38906

SUPERIOR COURT OF JUSTICE - ONTARIO

BETWEEN:

SUSAN MARGARET LIEBIG, BERNIE LIEBIG,
VICTORIA LIEBIG and KEVIN LIEBIG by their litigation guardian
Susan Margaret Liebig, Hildegard Liebig as Personal Representative
of THE ESTATE OF WALTER LIEBIG, deceased, HILDEBARD LIEBIG,
STEVE LIEBIG, GERRY LIEBIG,
JIM NEMET, EVA NEMET, KATHY NEMET, TAMMY GRAHAM

Plaintiffs

- and –

GUELPH GENERAL HOSPITAL,
DR. BENJAMIN AYANDABEJO, DR. ROGER PERRON,
DR. DONALD HUBAND, NURSES
JEAN MCLEAN, LAURA LOBO, DEB RENDALL
and AMY FORSYTHE TETTMAN

Defendants

BEFORE: JUSTICE W. U. TAUSENDFREUND

COUNSEL: Barbara L. Legate and J. Dobson, for the Plaintiffs

Harry C. G. Underwood and Cecilia Hoover, for the defendant doctors, Ayandabejo, Perron and Huband

Carole G. Jenkins, for the Defendants Guelph General Hospital, Jean McLean, Laura Lobo, Deb Randall, and Amy Forsythe Tettman

HEARD: August 31, 2009

ENDORSEMENT

Overview

[1] The plaintiffs bring this motion for a declaration before trial that the defendants owed a duty of care to the plaintiff, Kevin Liebig ("Kevin") in relation to his delivery. The defendants deny that they owe such a duty of care and state that, in any event, this is not a question which should be resolved as a Rule 21 motion, but should be left to the trial judge.

Facts

[2] The plaintiffs are Kevin, his parents, siblings, and other family members.

[3] Kevin was born March 12, 2001 at Guelph General Hospital. The defendants are the physicians, the hospital and nursing staff who provided maternal-fetal care to Kevin's mother and the fetus up to and including Kevin's delivery.

[4] Kevin was diagnosed shortly after birth with hypoxic-ischemic encephalopathy. He has since been diagnosed to have cerebral palsy. The plaintiffs allege that Kevin's injuries were caused by the negligence or, in the alternative, breach of contract of the defendants.

[5] The plaintiffs served the following Request To Admit:

1. The defendants owed a duty of care to Kevin Liebig in relation to his delivery

[6] The defendants responded by denying that such a duty of care exists in law.

[7] The plaintiffs then brought this motion under Rule 21.01 for a declaration before trial that the defendants owed a duty of care to Kevin in relation to his delivery.

Analysis

[8] In support of their position that the defendants did not owe a duty of care to Kevin during the course of the maternal-fetal care they provided to both mother and fetus, the defendants rely on the two recent Ontario Court of Appeal decisions of *Bovingdon v. Hergott,* [2008] O.J. No. 11 released January 7, 2008 and *Paxton v. Ramji*, [2008] O.J. No. 3964, released October 14, 2008.

[9] In *Bovingdon*, the appellant physician prescribed a fertility drug to the respondent mother. This drug led to the conception of twins, a premature birth and damage caused to the twins as a result of their premature birth. The action against the appellant physician was based on his failure to provide all the necessary information to allow the mother to make an informed decision whether to take the fertility drug, the extent of the increased risk of having the twins by taking the drug, the potential for the premature birth of the twins, and the consequent injury that the premature birth might cause them. One of the issues for the court was whether the appellant doctor owed a duty of care to the future children. Feldman, J.A. speaking for the court concluded that he did not:

> 70 I conclude that in this case, the appellant had no duty of care to the future children not to cause them harm in prescribing Clomid to the mother. The doctor owed a duty of care only to the mother, which duty consisted of ensuring that she possessed knowledge sufficient to make an informed decision whether to take Clomid....
>
> 71 I also believe that a policy analysis supports the conclusion that where the standard of care requires a doctor to give a woman the information to make an informed decision about taking a drug or undergoing a procedure, the doctor cannot owe a co-extensive duty to a future child. Where the standard of care on the doctor is to ensure that the mother's decision is an informed one, a co-extensive duty of care to a future child would create a potential conflict of interest with the duty to the mother....

[10] *Paxton* was an appeal by the infant plaintiff from a decision dismissing her claim in negligence against the respondent physician. He had prescribed to the appellant mother an acne drug that carried the risk of causing fetal malformation. The physician had prescribed that drug on the understanding that the mother would not become pregnant while taking the drug. That understanding was based on the mother's representation to him that the infant appellant's father had had a vasectomy some years earlier which had been successful to that date. Unfortunately, the vasectomy failed, the appellant was conceived and was born with considerable damage caused by the acne drug.

[11] Speaking for the court, Feldman, J.A. stated:

> 53 ...I believe it is fair to say that there is no settled jurisprudence in Canada on the question whether a doctor can be in a proximate relationship with a future child who was not yet conceived or born at the time of the doctor's impugned conduct...

[12] To determine whether there was a legal basis for the alleged duty of care, the court in *Paxton* applied the test articulated by the House of Lords in *Anns v. Merton London Borough Council*, [1978] A.C. 728, thereafter known as the "*Anns* test".

[13] The *Anns* test is one that identifies whether or not a new duty of care ought to be recognized.

[14] The *Anns* test requires a consideration of:

(a) The existence of reasonable forseeability of possible harm;

(b) The existence of sufficient proximity in the relationship between the plaintiff and the defendant;

(c) Any policy factors that mitigate against a finding that a duty of care exists.

[15] After applying the *Anns* test, the court in *Paxton* concluded that the physician, when prescribing the acne drug, did not owe a duty of care to a child not then conceived.

[16] The defendants submit that the ratio in *Bovingdon* and in *Paxton* extends to the maternal-fetal care scenario of this case with the result that the defendants do not owe a duty of care to Kevin in relation to his delivery.

[17] The plaintiffs take the position that the ratio in *Bovingdon* and *Paxton* relates to alleged negligent conduct in the treatment of or information provided to a female patient for her sole benefit. The plaintiffs further state that the health of the fetus, conceived or not at the time of the alleged negligence, in any event, was not the object of the care then provided. The ratio in *Bovingdon* and *Paxton,* the plaintiffs state, should be distinguished from this case where maternal-fetal care was provided to both mother and fetus which care raised neither a potential nor an actual conflict of interest.

[18] When stating in *Paxton:*

> 25 The issue whether a child born with birth defects should be entitled to successfully assert a negligence claim against a doctor or other health-care provider for harm suffered before birth has tested the mettle of many courts both in this country and internationally...

the Court of Appeal in endnote 4 in para. 25 lists a number of cases. The negligent conduct in those cases includes:

(a) Failure to detect pre-natal defects depriving the mother of the opportunity to terminate the pregnancy.

(b) Failure to fully inform the mother of all material risks to the fetus associated with an illness contracted during pregnancy depriving the mother of the opportunity to terminate the pregnancy.

(c) Failure to fully inform and advise the mother of risks associated with a genetic deficiency depriving the mother of the opportunity to terminate or avoid the pregnancy.

(d) Allowing the mother to abort a fetus.

I note that this list of cases to which the Court of Appeal referred in stating that these cases have "tested the mettle of many courts" does not include any claims arising out of alleged negligence in the exercise of maternal-fetal care.

[19] There is a long legal history in this country recognizing the duty of care owed to a child, born alive, whose damages on birth arise from injuries sustained while in the uterus.

[20] In 1933, the Supreme Court of Canada, in recognizing that duty of care stated:

> ...it is but natural justice that a child, if born alive and viable, should be allowed to maintain an action in the courts for injuries wrongfully committed upon its person while in the womb of its mother.
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> *Montreal Tramways Co. v. Léveillé*, [1933] S.C.R. 456 at 8

[21] In 1973, the Ontario Court of Appeal in *Duval v. Seguin*, [1973] O.J. No. 2185 holding that a *tort feasor* is liable to a child who has suffered pre-natal injury and is entitled to recover damages upon becoming a living person stated at pp. 2-3:

> The most recent decision upon this point is *Watt v. Rama*, [1972] V.R. 353, a judgment of the Superior Court of Victoria. In that case it was held that a plaintiff who at and after birth suffers injuries caused by the neglect of the defendant in driving his motor vehicle, this act of neglect preceding the birth of the plaintiff in point of time, has a cause of action in negligence against the defendant in respect of those injuries. The reasoning in that case is most persuasive and it is evident that great weight was given to it by the learned trial judge. We do not feel that we can usefully add anything to what has been so well and clearly stated by the learned trial judge in support of his conclusion that at common law the infant plaintiff is entitled to recover damages in the present case. We adopt that conclusion and the reasons upon which it is founded.

[22] In 1997, the Supreme Court of Canada confirmed that a child may sue for injuries caused before birth and resulting in damages as of the date of birth:

> *Winnipeg Child and Family Services v. D.F.G.*, [1997] 3 S.C.R. 925 at para. 21.

[23] The existence of the duty of care owed by physicians and nurses to a fetus has been recognized by numerous trial decisions across Canada. Some examples are:

> **Ontario**
>
> A. In *Crawford v. Penney*, [2003] O.J. No. 89, the trial judge undertook the *Anns* analysis and found proximity between the plaintiff child and the defendant physician who delivered her based on a previously recognized category. The baby suffered hypoxic-ischemic encephalopathy. The delay during her delivery resulted in acute near total asphyxia and she was ultimately diagnosed with cerebral palsy. In finding that a recognized category of relationship giving rise to a duty existed, the court stated:
>
> > 210 Regardless of whether the relationship between Drs. Penney and Healey, on the one hand, and Mrs. Crawford and Melissa, on the other, is defined as a contractual or a fiduciary one, there is a sufficient proximity between them to justify a duty of care. This sufficient proximity, or relationship, is a well-established one. Therefore, I need not inquire further into the relationship.

B. In *Commisso v. North York Branson Hospital,* [2003] O.J. No. 20, the Court of Appeal agreed with the trial judge's reasoning and conclusion and stated:

> 23 The standard of care adopted by the trial judge was "where a fetus is at risk...the doctor must move as expeditiously as possible to deliver the baby, having due regard for the safety of both patients – baby and mother".

C. In *Tsur-Shofer v. Grynspan,* [2004] O.J. No. 2361, the trial judge held that an obstetrician owed a duty of care to any patient requiring obstetrical care, including both mother and fetus.

D. Morissette J. in *Milne v. St. Joseph's Health Centre*, [2009] O.J. No. 4004, stated:

> 63 There is no question but that Nurse Planques owed a duty of care to both mother and fetus. Indeed, Nurse Planques did not argue otherwise.
>
> 64 There is a long line of cases evidencing judicial recognition of a medical caregiver's duty of care to a fetus, a duty which crystallizes upon the live birth of the infant.

Alberta

[24] In *Keys v. Mistahia Regional Health Authority,* [2001] A.J. No. 461, as confirmed by the Alberta Court of Appeal, the Alberta Court of Queen's Bench recognized the duty of care owed by both a physician and nurse to the fetus during labour and delivery. The court stated:

> 87 The defendant owed a duty of care to Liam while in his foetal state. As such, he was well within the area of potential danger which they were required to foresee and to take reasonable care to avoid. Such rights as Liam had while *en ventre sa mere* were inchoate and incomplete and only upon his birth did the relationship with the defendants crystallize. It was then that such cause of action and rights as he might have against them for their failure to exercise reasonable care and for such loss or damage as he now, as a human being will suffer, became complete... it was then that the defendants were in breach of that duty.

British Columbia

[25] In *Lotocky v. Markle,* [2006] B.C. J. No. 1976, the British Columbia Supreme Court acknowledged duties owed by physicians and nurses to the fetus and to the mother in a case in which a child alleged negligence after he suffered prolonged, partial hypoxia-ischemia over three days prior to his birth resulting in brain damage.

[26] An obstetrician's duty of care owed to a fetus was recognized where the fetus suffered a stroke before birth leading to atrophy to part of his brain:

Cleugh v. Jones, [2001] B.C.J. No. 1274 at para. 23.

[27] The duty nurses owe to the fetus during delivery was recognized in *Guerineau v. Seger*, [2001] B.C.J. No. 333 at para. 54.

[28] The British Columbia Court of Appeal in *Cherry v. Borsman,* [1992] B.C.J. No. 1687 at p. 20 stated:

> The law is clear that while the foetus has no cause of action as such, a cause of action arises on its live birth. This is the case here.

Nova Scotia

[29] The Nova Scotia Supreme Court in *Anderson v. Salvation Army Maternity Hospital,* [1989] N.S.J. No. 339 held that the defendant obstetrician owed a duty to the mother and her fetus. The court stated at p. 19:

> Dr. Wrixon consulted and took charge of Mrs. Anderson as a patient and therefore owed her a legal duty and, additionally, owed a legal duty to the soon to be born child who is in the foreseeable risk of an obstetrical case.

[30] I also note that the right to recovery for pre-natal injuries is legislatively recognized in the *Family Law Act,* R.S.O. 1990, R.S.O. 1990 c.F.3:

> S. 66 No person is disentitled from recovering damages in respect of injuries for reason only that the injuries were incurred before his or her birth.

[31] I further note that many of the maternal-fetal care cases refer to incidents of fetal auscultation. Rhetorically, I must ask why the medical profession would see the need for such fetal monitoring, but for the recognition of the obligation to both mother and the fetus during the labour and delivery process?

[32] Feldman J.A. speaking for the court in *Paxton* at para. 59 states:

> To summarize, I consider the proposed duty to be a novel one. The court must therefore proceed with the two stage *Anns* test to determine whether the proposed duty of care should be recognized in law.

[33] In view of the legion of reported decisions at least in this country on the duty owed to both mother and fetus in a maternal-fetal care situation, the Court of Appeal could surely not have meant the maternal-fetal care scenario when referring to "the proposed duty" as "a novel one".

[34] The court in *Paxton* felt compelled to proceed with the *Anns* test analysis to determine whether the proposed duty of care before it should be recognized in law. In contrast, I note the following comment by the authors of Linden and Feldthusen, Canadian Tort Law, 8th Ed., referring to *Burke v. Hobart,* [2001] 3 S.C.R. 537 (S.C.C.) at p. 302:

> Most important, courts should not cancel existing duties with the *Cooper* analysis, for that was never the intention of the Supreme Court which did not want to dismantle tort law, but only to ensure its orderly and responsible development...
>
> > In considering whether the duty being challenged is a novel one and subject to the new *Anns* analysis, it should first, "as a preliminary point", be determined whether it is within one of the categories that have been established or within a category analogous to an established category. If that is so, it is not necessary to go on at all, since the *prima facie* duty is "posited" and overriding policy reasons for denying such a duty do not normally exist. It was not the goal of the Supreme Court to overrule all of its carefully developed body of negligence law nor even to re-evaluate all existing categories of duties it had established over the years.

[35] In summary, I find that the court in both *Bovington* and in *Paxton* did not include in its consideration the maternal-fetal care cases such as the one before me. The duty to both mother and fetus in the maternal-fetal care scenario has been long established in Canadian jurisprudence.

Rule 21 Test

[36] Rule 21.01 provides:

> (1) A party may move before a judge,
>
> (a) for the determination before trial of a question of law raised by a pleading in an action where the determination of the question may dispose of all or part of the action, substantially shorten the trial, or result in a substantial savings of costs; or
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> (b) to strike out a pleading on the ground that it discloses no reasonable cause of action or defence;
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> (2) No evidence is admissible on a motion,
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> (a) under clause (1)(a) except with leave of a judge or on consent of the parties; and
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> (b) under clause (2)(b).

[37] The test to be met by the plaintiffs as the moving parties is to show that it is "plain and obvious" that the defence cannot succeed: *Hunt v. Carey Canada Inc.*, [1990] S.C.J. No. 93 at para. 33 and *Gauthier v. Toronto Star*, [2003] O.J. No. 2622 at para. 9. I find that the plaintiffs have met that test.

[38] In my view, there is no good and valid reason why the question of law raised in this motion should have been left to the trial judge. It is likely to shorten the trial with related cost savings to both sides.

[39] In summary, an order will go for a declaration that the defendants owed a duty of care to Kevin in relation to his delivery.

[40] In the normal course and absent any Rule 49 offers, costs of this motion would go to the plaintiffs.

Justice W. U. Tausendfreund

DATE: October 14, 2009.