IN THE COURT OF APPEAL OF MANITOBA

Coram: Mr. Justice Marc M. Monnin
Mr. Justice William J. Burnett
Madam Justice Janice L. leMaistre

B E T W E E N :

FRIEDA LYNN RUTHERFORD	)	
	)	***M. J. Pollock***
(Plaintiff) Appellant	)	*for the Appellant*
	)	*(via videoconference)*
- and -	)	
	)	***T. J. Hansell** and*
JOHN LEONARD WIENS	)	***D. A. Barchyn***
	)	*for the Respondent*
(Defendant) Respondent	)	*(via videoconference)*
	)	
- and -	)	*Appeal heard:*
	)	***March 17, 2021***
WINNIPEG REGIONAL HEALTH	)	
AUTHORITY and JANE DOE	)	*Judgment delivered:*
	)	***October 7, 2021***
(Defendants)	)	

COVID-19 NOTICE: As a result of the COVID-19 pandemic and pursuant to r 37.2 of the MB, *Court of Appeal Rules*, MR 555/88R, this appeal was heard remotely by videoconference.

On appeal from 2020 MBQB 35

MONNIN JA (dissenting):

[1] This is a medical malpractice appeal. It raises the question of whether the trial judge should have determined the cause in fact of the injury to the plaintiff before deciding if there had been a breach of the standard of care.

[2] For the reasons that follow, I am of the view that, in order to properly assess whether there was a breach of the standard of care in the circumstances, a determination of how the injury occurred was necessary and that the trial judge erred by failing to do so. I am also of the view that the plaintiff has established liability. Accordingly, I would allow the appeal.

Factual Background

[3] In November of 2012, the plaintiff was referred to the defendant, John Leonard Wiens (Dr. Wiens), an orthopedic surgeon, for problems with her left foot. Within a few months, issues she was experiencing with her left knee made that a more urgent cause of concern. Arthroscopic surgery was scheduled and conducted on January 29, 2013 by Dr. Wiens at the Grace Hospital. The surgery was uneventful with no unusual surgical actions performed. However, shortly after the surgery, it was noted that the plaintiff's lower leg did not have the anticipated circulation and she began experiencing pain. An ultrasound revealed that there was a pseudoaneurysm (also known as a false aneurysm) in her popliteal artery. The popliteal artery lies behind the knee and brings blood to the lower extremity. The plaintiff was moved on an urgent basis to the Health Sciences Centre where vascular surgical repair of the pseudoaneurysm was performed later that night by a vascular surgeon, Dr. Koulack. He confirmed that there was a discontinuity of the artery which was caused by direct trauma. The plaintiff continues to suffer pain as a result of the pseudoaneurysm.

The Surgery

[4] Arthroscopic surgery is a minimally invasive procedure whereby small incisions are made to allow the insertion of an arthroscope (essentially,

a camera) to allow the surgeon to visualize what he or she must do internally. Another incision is made to introduce the instruments required to perform the surgery.

[5] Dr. Wiens's preoperative diagnosis, as a result of an MRI, was that there was a tear in the lateral meniscus of the left knee with some degenerative changes. The meniscus is the cartilage in the knee between the two bones of the leg. The operative report prepared on the day of the surgery by Dr. Wiens described what occurred. After introducing a needle trocar (essentially, a tube to allow the scope to be inserted), he found there was effusion of the knee (fluid in the knee cavity) which was drained. On the lateral side of the knee, he noticed a marked tearing of the lateral meniscus which he described as a complex tearing. A large part of the meniscus was removed. A power shaver was then inserted through the needle trocar to do a chondroplasty of the patella (to smooth the surface and to trim back the synovium, a membrane found in the knee). After the chondroplasty of the patella, the knee was irrigated and the wounds closed.

[6] In his evidence at trial, Dr. Wiens explained that the knee joint is encompassed in a form of capsule comprised of soft tissue and a membrane, as well as fat. The popliteal artery lies in the posterior part of the knee outside the capsule. There are only a few millimetres of soft tissue or fat between the capsule and the artery.

[7] Dr. Wiens was adamant in his direct examination that none of the instruments he used to perform the surgery entered the posterior compartment of the plaintiff's knee such that they may have come into contact with the popliteal artery. However, under cross-examination, he acknowledged answers given on examination for discovery to the effect that, when trimming

the synovium, the instrument would have been close to the artery. He also acknowledged that the artery could be traumatized, such as with a shaver or a grasper, in theory, if either were to come into contact with the artery. In both instances, it would require the instrument to stray out of the knee capsule.

Expert Evidence

[8] The plaintiff called as an expert Dr. Jordan Leith, an orthopedic surgeon since 1999 with over 4,000 knee arthroscopies performed over the past 20 years.

[9] In his written report, Dr. Leith described an arterial pseudoaneurysm as follows:

> . . .
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> An arterial pseudoaneurysm, also known as a false aneurysm, is caused by damage to the arterial wall, resulting in locally contained hematoma. This results in a collection of blood that forms between the two outer layers of the artery wall. It is usually caused by a penetrating injury to the vessel, which then bleeds, but forms a space between the vessel wall layers and expands since the blood does not exit the vessel.
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> . . .

[10] Dr. Leith described how the injury could occur if one of the instruments used in this case—either the shaver, the biter or the trocar—had penetrated the posterior capsule of the knee during the course of the surgery. In his view, none of those instruments were required to be used within the posterior compartment of the knee. He concluded as follows:

> . . .

> In this matter, for the popliteal artery to be injured and cause a pseudoaneurysm, either the shaver or the meniscus biter was used or entered the posterior compartment and shaved or cut into the posterior capsule including the popliteal artery wall. This would have been the most likely cause of the pseudoaneurysm. This event would be a breach of the standard of care for this procedure.
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> . . .
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> [emphasis added]

He added that, in Dr. Wiens's examination for discovery, he admitted to having trimmed the synovium posteriorly in order to see the meniscus using the shaver and the biter. In his view, this aspect of the procedure was the most likely time of the vascular injury. He then discussed other less likely causes, being penetration with the trocar when entering the knee or as a result of the manipulation of the knee during the surgery.

[11] In his subsequent written report in response to that of Dr. Wiens's expert, Dr. Leith stated that a popliteal artery injury during an arthroscopy, while recognized as a possible complication, was exceedingly rare. It was his opinion that, in the modern era of orthopedic surgery, a popliteal artery complication following a meniscectomy should not occur at all or be considered to be within the standard of care. He reinforced that opinion during his oral testimony, referring to it as a "theoretical risk" given its low incidence.

[12] In cross-examination, Dr. Leith admitted that his view that the complication should not happen during a simple arthroscopy was the reason he reached the conclusion that the care was not according to standard.

[13] Dr. Wiens called Dr. Beavis as an expert. Dr. Beavis was also qualified as an expert in arthroscopic knee surgery, having been in an

independent orthopedic practice with a subspecialty in arthroscopic surgery since 2008. Dr. Beavis did not express an opinion on how the injury occurred other than to indicate that, while it is a rare but described complication of arthroscopic knee surgery, it may or may not be related to the surgery. In his view, the true incidence is unknown and it is more likely to have occurred than the incidences reported in the literature. He concluded that Dr. Wiens acted in a manner that met the reasonable standards of care expected of an orthopedic surgeon as it related to the care of the plaintiff, including the performance of the surgery.

[14] In his supplementary report, Dr. Beavis concurred that the potential causes outlined in Dr. Leith's report could be possible, but they were all standard components of the procedure and did not represent a deviation from the expected standard of care. In short, the plaintiff developed a rare but recognized complication and standards of care were met during the performance of the procedure.

Trial Judgment

[15] The trial judge, after reviewing the evidence of Dr. Wiens and the two experts, dealt first with the question of whether, on a balance of probabilities, Dr. Wiens's conduct during the surgery fell below the required standard of care.

[16] After a review of the medical literature cited by the experts, the trial judge concluded that the percentage of risk for a vascular complication was higher than suggested by the plaintiff. However, she noted that the rarity of a resulting injury should not be the determinative factor in finding negligence. She referred to the then recent decision of the Ontario Court of Appeal in

Armstrong v Royal Victoria Hospital, 2019 ONCA 963, where the majority overturned a trial decision, in part, on the basis that a standard of perfection had been used to assess the physician's care.

[17] The trial judge found that, on the evidence, arthroscopic knee surgery was the correct course of action to have been taken by Dr. Wiens and that he used appropriate instruments and procedures. She stated that there was no evidence that he had used any instruments in an abnormal or inappropriate way during the surgery. She also found Dr. Leith's conclusion that there was a breach because the injury occurred was contrary to *Armstrong*, which held that the conduct is not to be looked at in hindsight, nor is the Court to demand a standard which amounts to perfection.

[18] Relying on the decision in *Hocaluk v Gittens*, 1996 CarswellBC 2739 at para 16 (SC), aff'd 1999 BCCA 112, the trial judge also concluded that, if a surgical instrument caused the injury, the inadvertent movement of an instrument did not amount to a breach of the standard of care but, rather, was an unfortunate misadventure.

[19] Given her findings on the standard of care, the trial judge did not address causation other than to say that the plaintiff had not shown that Dr. Wiens did anything, or failed to do anything, to cause the injury to the artery. She dismissed the action with costs.

Issues

[20] The two issues raised on this appeal are:

1. Did the trial judge err in proceeding to determine whether there was a breach of the standard of care without determining how the incident occurred?

2. Did the trial judge err in her assessment of whether there was a breach of the appropriate standard of care?

[21] On this appeal, Dr. Wiens does not dispute that the pseudoaneurysm occurred as a result of the surgery, but says that the exact cause of the injury is unclear and that it did not result from any breach of the standard of care on his part. There is no issue that the post-surgical care given to the plaintiff was appropriate and was not the cause of any of her current injuries. The parties have resolved the issue of damages if there is liability, but liability remains at issue.

Standard of Review

[22] The standard of review applicable to the first issue is correctness, and the standard of review applicable to the second issue is palpable and overriding error. If the trial judge failed to perform the correct legal analysis, her factual findings are only entitled to deference absent palpable and overriding error and provided they were not affected or tainted by any legal error.

Issue One—Cause in Fact

[23] The trial judge proceeded by first determining whether Dr. Wiens's conduct in the surgery fell below the required standard of care. She did not address, until later and in a cursory fashion, whether or not the plaintiff had

met her burden of proof of showing that Dr. Wiens did something, or failed to do something, to cause the injury.

[24] The elements of a negligence claim require a "plaintiff demonstrate (1) that the defendant owed him a duty of care; (2) that the defendant's behaviour breached the standard of care; (3) that the plaintiff sustained damage; and (4) that the damage was caused, in fact and in law, by the defendant's breach" (*Mustapha v Culligan of Canada Ltd*, 2008 SCC 27 at para 3).

[25] This traditional approach has been endorsed by a number of decisions of the various appellate courts across the country (see *McArdle (Estate of) v Cox*, 2003 ABCA 106 at para 25; and *Bafaro v Dowd*, 2010 ONCA 188 at para 35). However, there are some exceptions. In *Meringolo v Oshawa General Hospital*, 1991 CarswellOnt 1078 (CA), leave to appeal to SCC refused, 22409 (29 August 1991), a patient went into cardiac arrest and was resuscitated, but was deprived of oxygen for an extended period, and he suffered brain damage. An issue at trial was whether the damage was caused by a pulmonary embolism and not by the negligence of the anesthetist. Osborne JA, writing for the Court, stated (at para 56):

> The critical causation issue to which I have referred above is, in my view, preliminary to the traditional negligence causation question, that is, whether it has been established that a tortfeasor's conduct (breach of duty) caused a plaintiff's injury. In this case, before the breach of duty issue can be appropriately addressed, what happened in the operating room on May 10, 1983 must be determined in order to provide an answer to the question, what caused the appellant's brain damage, or, to put it more broadly, how did the appellant sustain brain damage. It is only after that issue is examined that the issue of the respondents' alleged negligence should be considered.

[26] A similar conclusion was reached in *Grass (Litigation Guardian of) v Women's College Hospital* (2001), 200 DLR (4th) 242 (Ont CA), where Catzman JA stated (at para 12):

> As set out in the concluding portion of his reasons in para. 7, above, the trial judge in the present case disposed of the action by finding that the appellants had failed to establish negligence on the part of Dr. Weisberg and thereby finding it unnecessary to assess the conflicting theories relating to causation. In doing so, he fell into the error articulated in *Meringolo*. The resolution of the question of causation might have led to different findings of fact with respect to what transpired in the labour room and to a different conclusion with respect to negligence. As in *Meringolo*, the appellants were entitled to the benefit of the trial judge's findings with respect to causation or to his determination, on the basis of a consideration of all of the evidence, that such findings could not be made, before he came to address the issue of negligence.
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> [emphasis added]

[27] The rationale behind proceeding in such a fashion was explained as follows by Benotto JA in *Shantry v Warbeck*, 2015 ONCA 395 (at para 32):

> In both *Meringolo* and *Grass*, the trial judge had not resolved the factual disputes surrounding causation, and this court held that findings of fact about causation, had they been made, could have influenced the determination of whether the standard of care had been breached.

[28] Benotto JA further explained (at para 33):

> The concerns expressed in *Meringolo* and *Grass* are fact-specific and, in any event, are not at issue in this case. In each of those cases, the plaintiff's theory of causation was a crucial component to a determination of the standard of care. In each of those cases, the trial judge, having first considered the standard of care, failed to address or make findings on causation. This is not such a case.

> The trial judge here considered causation and rejected the appellants' theory in relation to it.

[29] Thus, in some cases, where the plaintiff's theory of causation is a crucial component to the determination of the applicable standard of care, factual causation ought to be addressed before making a decision on the standard of care.

[30] The most recent example of this sequence of analyzing the facts of the case is in *Armstrong*, referred to by the trial judge to support her conclusion that the plaintiff was incorrectly seeking to apply a standard of perfection to Dr. Wiens's conduct by looking at the results.

[31] In *Armstrong*, on the issue of whether the trial judge incorrectly applied a results-oriented approach and erred in dealing with the standard of care and causation in the wrong order, the majority found that he had. In her dissenting opinion, which was endorsed by the Supreme Court of Canada (see *Armstrong v Ward*, 2021 SCC 1), van Rensburg JA explained why, in her view, the trial judge properly conducted the causation analysis to determine whether a breach of the standard of care had taken place. Reviewing the jurisprudence I referred to above, she stated as follows (at paras 138-39):

> I agree with my colleague, at paras. 59 to 63, that typically, it makes sense for the trier of fact to consider causation only after finding a breach of the standard of care: see, for example, *Bafaro v. Dowd*, 2010 ONCA 188, 260 O.A.C. 70, at paras. 35-36. Determining standard of care before causation ensures that the trial judge does not wrongly reason backwards from the fact of the injury to determine that the standard of care has been breached. However, I also agree with my colleague's observation that at times the court will need to determine "what happened" (that is, the factual cause of the plaintiff's injury) in order to resolve whether the standard of care has been breached. Determining factual (and not "but-for") causation is sometimes necessary

> before a conclusion can be reached on whether there has been a breach of the standard of care.
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> Indeed, this court has determined that, in some cases, it will be an error for the trial judge to fail to determine "how the injury occurred" before assessing standard of care.

[32] She then endorsed (see para 143) the comments of Gravely J in *Kennedy v Jackiewicz*, 2003 CarswellOnt 1755 (Sup Ct J), where he stated (at para 6):

> My inquiry then is to focus on what Dr. Jackiewicz did or failed to do and whether that was acceptable for a reasonably prudent and diligent surgeon in the same circumstances. The inquiry must not be outcome-oriented. It is nonetheless open to experts and to the court to draw inferences of fact. It may be appropriate, then, for an expert or the court to infer from the nature of the injury what it was the surgeon did. In this exercise the outcome to the patient is irrelevant. Once having determined on all the evidence what the surgeon did, the inquiry shifts to the question of whether what was done falls below the standard.
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> [emphasis added]

[33] She summarized the jurisprudence as follows (at para 144):

> As in these three cases, the trial judge in the present case had to determine "what happened", that is, how Ms. Armstrong's left ureter had been damaged, before he could reach any conclusion on whether Dr. Ward had breached the standard of care. He did not conflate standard of care and causation, or reason backwards from causation to conclude that Dr. Ward must have been negligent simply because he considered evidence as to the mechanism of the injury in his analysis of the breach of standard of care. While *Bafaro* tells us that the "but for" question of causation cannot be answered until the standard of care analysis is done, *Meringolo*, *Grass* and *Kennedy* tell us that in some cases it will be necessary to determine "what happened" before analyzing whether there has been a breach of the standard of care.

[34] She concluded by stating: "In conclusion, I am not persuaded that the trial judge erred in conflating 'but for' causation and the standard of care, or in dealing with standard of care and causation in the wrong order, or that he applied a results-oriented approach" (at para 145).

[35] In his report and during his testimony, the plaintiff's expert, Dr. Leith, provided his opinion on what was the likely cause of the trauma to the artery. In his view, the most likely cause was that the shaver or biter cut into the posterior capsule, including the popliteal artery wall.

[36] A second possible cause, less likely in his opinion, would be penetration with the trocar at the outset of the surgery. Finally, another possible cause, which he deemed to be the least likely, would be the manipulation of the knee during surgery. He disagreed with Dr. Beavis that this injury is a rare complication of surgery. In Dr. Leith's view, this injury should not occur at all.

[37] While Dr. Wiens testified that, in his view, he did not go outside the knee capsule with any of his instruments, he acknowledged that he would have been in close proximity with the shaver and biter. He was of the view that nothing unusual occurred during the manipulation of the knee which could have led to the result of a tear in the wall of the artery.

[38] Dr. Beavis expressed no view as to how the incident occurred. He acknowledged that Dr. Leith's possible causes were plausible, but stated that Dr. Wiens's conduct fell within the acceptable standard of care.

[39] In my view, this is a case where a determination of how the injury occurred would be relevant in determining whether the standard of care was met. Despite Dr. Wiens's evidence that he did not leave the knee capsule, a

reasonable inference could be drawn from the evidence of Dr. Leith that the most likely cause of the injury was an excursion out of the knee capsule. Dr. Leith opined that this would be a breach of the standard of care and Dr. Wiens agreed that this is something which should not occur.

[40] I am therefore of the view that the trial judge erred in not determining the cause in fact before proceeding to assess whether the standard of care had been met.

[41] Other than to state that the plaintiff had not shown that Dr. Wiens did anything, or failed to do anything, to cause the injury to the artery, the trial judge made no further analysis of the cause in fact.

[42] On this appeal, Dr. Wiens did not dispute that the pseudoaneurysm occurred as a result of the surgery. His position was only that the exact cause of the injury was unclear. The evidence establishes that trauma was caused to the artery during the course of the surgery. Dr. Wiens's position is that he does not know how the injury occurred but that he did nothing which can be considered as negligent.

[43] The plaintiff's evidence, through Dr. Leith, provides cogent evidence as to how the injury most likely occurred as a result of one of the instruments used by Dr. Wiens coming into contact with the artery. This could only have occurred if the instrument had strayed from the knee's capsule to the posterior of the knee. He denied that he did so. However, that remains the likely explanation for how the injury occurred.

[44] It is a reasonable inference to draw that the most likely cause of the injury was the presence of an instrument in the posterior aspect of the knee, outside the capsule, where it hit the artery.

[45] In my view, the plaintiff provided sufficient evidence to establish the cause in fact of the injury. That should have been considered as part of the determination of whether the standard of care had been met.

[46] I will do so now.

Issue Two—Standard of Care

[47] The trial judge approached the issue of the standard of care by reciting a number of basic principles which are not disputed by the parties. They include the comment in *ter Neuzen v Korn*, [1995] 3 SCR 674 at para 33, that doctors have a duty to conduct their practices in accordance with the conduct of a prudent and diligent doctor in the same circumstances and with the same level of expertise. Therefore, in this case, the standard of care should be looked at from the point of view of an orthopedic surgeon performing an arthroscopic surgery on the knee.

[48] The trial judge also confirmed that a doctor is not a guarantor of an outcome and is not to be judged in hindsight (see *Matheson v Pirani et al*, 2008 MBQB 95) and, quite properly, "the conduct of a doctor is not to be measured by the result" (*Johnston v Hader*, 2009 ABQB 424 at para 112). A bad medical outcome does not, by itself, compel a finding of negligence. Determining negligence solely on the basis of the result would be to impose a standard of excellence or perfection (see *Hocaluk* and *Armstrong*).

[49] After further reviewing the conduct of the surgery, the trial judge found that Dr. Wiens had used appropriate instruments and procedures and that there was no evidence that he had used any instruments in an abnormal or inappropriate way during the surgery.

[50] The trial judge also found Dr. Leith's evidence—that, because the injury had occurred, it was a breach of the standard of care—was contrary to the principle that a court is not to judge the conduct by the use of hindsight, nor demand a standard of perfection.

[51] In my view, the expert evidence of Dr. Leith goes too far when he concludes that, in this day and age of modern orthopedic surgery, the incident should not happen. I agree that this can result in a finding of negligence on the basis of a result. However, there is another aspect of Dr. Leith's evidence, which was not commented upon by the trial judge in her reasoning as to the standard of care, namely, the evidence concerning how the damage to the artery likely happened. As explained earlier, Dr. Leith's evidence is that it likely occurred as a result of one of the instruments used by Dr. Wiens straying from the knee capsule and striking the artery in the posterior of the knee. In his view, that amounted to a breach of the standard of care.

[52] To rephrase the evidence and the expert commentary, the standard of care in the circumstances was not to allow the instruments to enter the posterior aspect of the knee unless it was necessary to do so. Dr. Beavis concurred that Dr. Leith's causes were possible, but stated that the use of the instruments were all standard components of a knee arthroscopy. He did not comment on the instruments straying from the knee capsule. Dr. Wiens agreed that the instruments should not, in the usual course, leave the knee capsule.

[53] In short, when taking all of Dr. Leith's evidence into consideration, in my view, the standard of care with respect to this procedure included the requirement that the surgeon not allow instruments to stray from the knee capsule and strike the artery.

[54] It is similar to the standard set in *Armstrong* where, in that case, it was held that, according to the acceptable standard of care, a prudent surgeon would not allow a cauterization instrument within a certain distance of a vulnerable part of a patient's body.

[55] In my view, the trial judge did not consider an important aspect of the standard of care with respect to this procedure. In light of the established standard of care relating to the procedure, the evidence of Dr. Leith raises a reasonable inference that the standard was breached and, therefore, that negligence did occur.

[56] I agree that the fact that a complication, which is discussed in the literature, occurs does not mean that the surgery was performed carelessly or negligently. However, by the same token, the fact that it is a recognized complication does not mean that, if it occurred as a result of conduct which falls outside of the standard of care, it is <u>not</u> negligence.

[57] The trial judge, in her reasons, also found that, even if the plaintiff showed that a surgical instrument had caused the injury, the inadvertent movement of an instrument did not amount to a breach of the standard of care, but fell within the category of an unfortunate misadventure. She relied on *Hocaluk* at para 16.

[58] I disagree. An unfortunate misadventure, as in *Hocaluk*, occurs when an unexpected event takes place during the surgery (see also *Johnston*). In both of those cases, an instrument shifted in the course of surgery, causing the patient injury. In both cases, the doctors were found not to have been negligent in the manner in which they set up and placed the instruments.

[59] In this case, it is the method by which the surgeon used his instrument and failed to properly contain it within a discrete area as the standard of care requires him to do. Inadvertent misadventure does not apply in this case.

Conclusion

[60] For these reasons, I have concluded that the plaintiff has established that Dr. Wiens breached the required standard of care and that she suffered injury as a result. Liability is established and the damages will be as agreed to between the parties.

[61] I would order costs in favour of the plaintiff throughout.

Monnin JA

BURNETT JA

[62] I am in general agreement with my colleague's summary of the factual background, the surgery, the trial judgment, the applicable standards of review and the issues raised in this appeal. With respect to the issues, if the trial judge erred by determining whether there was a breach of the standard of care before deciding how the incident occurred, it is then necessary to consider whether actual causation has been proven to the civil standard.

[63] While I also agree with my colleague that determining factual causation is sometimes necessary before a conclusion can be reached on whether there has been a breach of the standard of care (see dissenting opinion of van Rensburg JA in *Armstrong v Royal Victoria Hospital*, 2019 ONCA 963 at para 138, which opinion was endorsed in *Armstrong v Ward*, 2021 SCC 1), I am not persuaded that it was necessary to do so in this case. Moreover, even if causation had been addressed first, on a careful consideration of all of the evidence, that finding could not be made (see *Grass (Litigation Guardian of) v Women's College Hospital* (2001), 200 DLR (4th) 242 at para 12 (Ont CA); and *Armstrong* at para 141).

[64] There is no dispute that there was injury to the popliteal artery following surgery. To be clear, the difficulty in this case is not in relation to legal principle, it is purely a question of fact or, more precisely, the weight to be given to the evidence adduced.

[65] The trial judge did consider causation, albeit briefly, and she concluded that the plaintiff failed to prove that the defendant, John Leonard Wiens (Dr. Wiens), did anything, or failed to do anything, to cause the injury to the popliteal artery. I agree. On a careful consideration of

all of the evidence, I have not been persuaded that the trial judge erred when she came to that conclusion.

[66] As the trial judge observed (at para 39):

> The medical literature attached to Dr. Leith's first report, an article from 2003 and another from 2013 (the year of [the plaintiff's] surgery), did not identify a specific cause for the cases of injuries to the popliteal artery discussed. The 2003 article noted that a ". . . (p)seudoaneurysm formation after knee arthroscopy can also appear without a history of penetration of the knee capsule or vessel wall", possibly because of ". . . the shear stress on the knee structures and arteries during surgery and specifically during arthroscopy."
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> [footnotes omitted and emphasis added]

[67] In my view, Dr. Wiens's evidence, together with the evidence of his expert (Dr. Beavis), rebuts the inference drawn by my colleague that "the most likely cause of the injury was an excursion out of the knee capsule" (at para 39 herein). (See *O'Neill-Renouf and Renouf v Ibrahim*, 2019 ONSC 4369 at paras 13-14, and the authorities referred to therein.) Dr. Wiens was clear that he did not enter the posterior compartment of the plaintiff's knee and that he did not trim the synovium against the posterior capsule. In his post-operative report, prepared immediately after the surgery, Dr. Wiens noted: "There was no complication during the procedure."

[68] Significantly, each of the experts agreed that an injury to the popliteal artery is "a rare but recognized complication following knee arthroscopy" that can occur without negligence.

[69] I am also not convinced that Dr. Wiens breached the standard of care. As Dr. Beavis testified, the operation performed by Dr. Wiens appeared

to be "a routinely performed procedure in the standard manner" and the causes described by Dr. Leith "[were] all standard components of a knee arthroscopy and [did] not represent a deviation from the standard of care."

[70] In my view, the only basis for a finding of negligence on the present evidentiary record is to reweigh the evidence, to utilize a results-oriented approach and to reason backwards from causation. Such an approach is clearly impermissible, reverse thinking.

[71] For these reasons, I am satisfied that the trial judge came to the correct conclusions, namely, that Dr. Wiens did not breach the appropriate standard of care and that it has not been established that he did, or failed to do, anything to cause the injury.

[72] I would therefore dismiss the appeal with costs.

Burnett JA

I agree: leMaistre JA