Citation: Tripp v Ross, 2025 MBCA 25
Date: 20250321
Docket: AI24-30-10058

IN THE COURT OF APPEAL OF MANITOBA

Coram: Mr. Justice Marc M. Monnin
Madam Justice Jennifer A. Pfuetzner
Mr. Justice James G. Edmond

***B E T W E E N**:*

LINDSEY SHAUN TRIPP	)	
	)	
(Plaintiff) Appellant	)	
	)	
- and -	)	***R. M. Beamish***
	)	*for the Appellants*
JAMES FARRELL ROSS	)	
	)	
(Defendant) Respondent	)	***G. T. Campbell** and*
	)	***C. A. Frost***
(by original action)	)	*for the Respondent*
	)	
***AND BETWEEN**:*	)	
	)	*Appeal heard:*
BRECK TRIPP, as a representative for the ESTATE OF LINDSEY SHAUN TRIPP	)	***November 26, 2024***
	)	
(Plaintiff) Appellant	)	*Judgment delivered:*
	)	***March 21, 2025***
- and -	)	
	)	
JAMES FARRELL ROSS	)	
	)	
(Defendant) Respondent	)	

On appeal from *Tripp v Ross*, 2023 MBKB 173 [*Tripp*]

PFUETZNER JA

[1] This is an appeal from a judgment rendered after a medical malpractice trial. Prior to the trial, the defendant physician (the defendant) conceded that his negligent performance of a colonoscopy on the plaintiff, Lindsey Shaun Tripp (Mr. Tripp), delayed the diagnosis of Mr. Tripp's colon cancer by a period of eight months. The first main issue for trial was whether the death of Mr. Tripp from colon cancer, which occurred before the trial began, was caused by the defendant's negligence. The second main issue was the calculation of damages.

[2] The trial judge heard expert medical evidence on the extent and nature of Mr. Tripp's disease at the time of its discovery, as well as expert evidence regarding survival rates and the progression of colon cancer. After considering all of the evidence, the trial judge found that the defendant's negligence did not cause Mr. Tripp's death. However, she did find that the delayed diagnosis caused pain and suffering to Mr. Tripp, in respect of which she awarded damages of $75,000.

[3] The plaintiff, Breck Tripp, as a representative for the Estate of Lindsey Shaun Tripp (the plaintiff), appeals, arguing that the trial judge made several errors in finding that he had failed to prove on a balance of probabilities that the defendant caused Mr. Tripp's death. The plaintiff's primary argument is that the trial judge failed to apply the required robust and pragmatic approach to causation and should have drawn an inference against the defendant because his negligence negatively affected the plaintiff's ability to prove causation. The plaintiff does not appeal the trial judge's assessment

of damages for pain and suffering or her provisional assessment of damages in the event that causation was proved.

[4] In my view, the trial judge properly applied the legal principles relating to causation and made no reversible errors in her factual findings. For the reasons that follow, I would dismiss the appeal.

Background

[5] In December 2017, at the age of fifty-three, Mr. Tripp began experiencing abdominal cramps and rectal bleeding. He attended at his physician's office and was referred to the defendant for a colonoscopy, which occurred in January 2018. During the colonoscopy, the defendant observed five polyps, four of which he biopsied and which were later determined to be at risk for developing adenocarcinoma. The defendant advised Mr. Tripp to return for a follow-up colonoscopy in one year.

[6] By August 2018, Mr. Tripp had some flare-ups of episodic abdominal pain and rectal bleeding. When he returned to his physician, he was referred back to the defendant. The defendant ordered a barium enema in September 2018, which showed a tumour in the proximal descending colon. A CT scan performed that same month confirmed a mass involving the spleen.

[7] Mr. Tripp was referred to a surgeon who, in October 2018, removed the tumour, as well as forty per cent of the pancreas, the spleen and all but a foot of Mr. Tripp's lower bowel. At the time of surgery, the cancer was considered to be stage IIIC as it had extended beyond the colon to the pancreas and six lymph nodes were involved. Mr. Tripp received eight cycles of chemotherapy. He experienced post-surgery complications, including a

perforation of the surgical connection between the small bowel and colon, type 1 diabetes and a C. difficile infection.

[8] Mr. Tripp underwent a CT scan in December 2018, which indicated possible liver lesions. He then had an MRI, which showed a liver metastasis over one centimetre in size. Between December 2018 and December 2019, a number of CT scans and MRIs of Mr. Tripp's liver were performed. In January 2020, Mr. Tripp was advised that he had stage IV colorectal cancer with liver metastases. He commenced a further course of chemotherapy. Regrettably, Mr. Tripp died from colorectal cancer in February 2022.

The Trial

[9] The defendant conceded prior to trial that his performance of the colonoscopy fell below an acceptable standard of care. As observed by the trial judge: "It appears that, once [the defendant] found the five polyps, he assumed that he had found the source of Mr. Tripp's bleeding and did not continue the colonoscopy" (*Tripp* at para 8).

[10] The defendant's position at trial was that earlier diagnosis of Mr. Tripp's cancer would not have changed the ultimate outcome. However, he admitted that the plaintiff should be compensated for increased pain and suffering caused by the delayed diagnosis.

[11] Each party called an oncologist as an expert witness on the issue of causation. The trial judge found both witnesses to be impressive and forthright "with no appearance of bias in favour of the party that retained them" (*ibid* at para 19). The trial judge wrote, "for the most part, their evidence was consistent" and that any differences "appeared to be due more

to the way the questions were put to them than to any real difference of opinion" (*ibid*).

[12] The trial judge found that there was no question that Mr. Tripp's colon cancer was present in January 2018 and would have been detected if the colonoscopy had been properly performed by the defendant. The stage of Mr. Tripp's cancer at the time of surgery in October 2018 was also not in dispute.

[13] Unfortunately, because the tumour was not removed at the time of the colonoscopy, there was no evidence as to the cancer's stage in January 2018. However, both experts provided their opinion as to the stage of the cancer and Mr. Tripp's prognosis at that time. They agreed that colon cancer is slow-growing, that the tumour found in October 2018 had been there for a long time, and that once colon cancer metastasizes, it becomes fatal.

[14] A key issue for causation at trial was determining whether the cancer had already metastasized to Mr. Tripp's liver in January 2018. The trial judge wrote: "If so, even if the colon tumour had been detected at that time, it would not likely have changed the outcome" (*ibid* at para 23).

[15] The experts agreed that liver metastases cannot be detected on a CT or MRI scan until the cancer has doubled many times from its original size.

[16] The defendant's expert, Dr. Moore, said that it would take fifteen to thirty months for the liver metastasis to reach the size that it was in December 2018, such that there was a "reasonable likelihood" (*ibid* at para 25) that the liver metastasis was present before January 2018. His opinion was that even

if Mr. Tripp had been diagnosed in January 2018, his chance of being cured would "be in the region of 30%" (*ibid*).

[17] The plaintiff's expert, Dr. Schipper, did not address in his report the possibility that the liver metastasis was present in January 2018. However, he did agree in cross-examination that the liver metastasis would have "been there for many months if not years."

[18] The trial judge accepted Dr. Moore's opinion that the liver metastasis was likely present in January 2018, finding that his opinion was based "not only on statistics but on what is known about the progression of the disease in Mr. Tripp's case and on the nature of his colon cancer" (*ibid* at para 33). She noted that the plaintiff had "not led evidence that [the liver metastasis] was probably not present" in January 2018 (*ibid* at para 34).

[19] Ultimately, the trial judge found that the plaintiff was unable to meet the standard of proof, which required him to "show that Mr. Tripp would have had a greater than 50% chance of survival" if his cancer had been diagnosed in January 2018 (*ibid* at para 37). As a result, she concluded that the defendant's negligence did not cause Mr. Tripp's premature death.

Analysis

Issues and Positions of the Parties

[20] The plaintiff asserts that the trial judge made several errors that led to her finding that he had not proven causation on a balance of probabilities. He argues that she made palpable and overriding errors by equating the legal burden of proof with statistics on five-year survival rates of different types

and stages of colon cancer. He also submits that the trial judge erred by failing to draw an adverse inference against the defendant because the negligence of the defendant precluded proof of causation to a scientific certainty.

[21] The defendant maintains that the trial judge made no errors in finding that his negligence did not legally or factually cause Mr. Tripp's death. He argues that the trial judge's conclusion reflected the medical evidence that Mr. Tripp's colon cancer had already metastasized to his liver at the time of the colonoscopy and that, even if the tumour had been detected at that time, his likelihood of survival did not meet the legal burden of proof on a balance of probabilities.

Standard of Review

[22] For questions of law, the standard of review is correctness, and for questions of fact or of mixed fact and law, the standard is palpable and overriding error (see *Housen v Nikolaisen*, 2002 SCC 33 at paras 8, 10, 19). The Supreme Court of Canada in *Benhaim v St-Germain*, 2016 SCC 48 [*Benhaim*] reiterated that "[c]ausation is a question of fact, and so the trial judge's finding on causation is owed deference on appeal" (at para 36).

The Law—Adverse Inferences of Causation

[23] The decision of the Supreme Court in *Benhaim* is the blueprint for analyzing the issues of causation raised in this appeal. *Benhaim* involved the negligence of a physician in following up on a routine chest x-ray, leading to a delayed diagnosis of terminal lung cancer. Similar to the present case, the trial judge in *Benhaim* did not find that the plaintiff had proven on a balance of probabilities that the physician's negligence caused the patient's death.

[24] Justice Wagner concisely stated the legal issue at the heart of the appeal in *Benhaim* at para 1:

> In some professional liability cases, the defendant's negligence may undermine the plaintiff's ability to prove causation. The plaintiff may nonetheless lead some affirmative evidence of causation. In these circumstances, is the trier of fact required to draw an adverse inference of causation against the defendant?

[25] Prior to *Benhaim* reaching the Supreme Court, the Quebec Court of Appeal (the QCCA) held that the trial judge erred in law in not drawing an adverse inference of causation (see *St-Germain c Benhaim*, 2014 QCCA 2207). The QCCA concluded that such an inference should have been drawn because two prerequisite conditions were met; namely, that the defendants' negligence undermined the plaintiff's ability to prove causation and that the plaintiff "led some affirmative evidence that the cancer was at an early stage" (*Benhaim* at para 30) with a cure rate of seventy per cent when the negligence occurred.

[26] The QCCA accepted that it was open to the defendants to lead evidence to rebut the adverse inference. However, it rejected the evidence of the defendants' expert (which had been accepted by the trial judge) as being speculative and unreliable. Based on the slow progression of lung cancer and his retrospective reading of the chest x-ray, the defendants' expert was of the view that the patient's lung cancer was already incurable at the time of the defendants' negligence.

[27] The Supreme Court reversed the QCCA, clarifying that the drawing of an adverse inference of causation is not mandatory once certain criteria are met but is discretionary. The Supreme Court noted that the trial judge's

decision not to draw the adverse inference "although she was aware that it was available . . . is a question of fact and deserves deference" absent palpable and overriding error (*ibid* at para 42). Further, Wagner J wrote, "the decision to draw an adverse inference must be based on an evaluation of all of the evidence. To do otherwise has the same effect as impermissibly reversing the burden of proof" (*ibid* at para 44).

[28] Turning to the question of legal causation, the Supreme Court distinguished it from scientific causation, confirming that the standard for legal causation requires proof only on a balance of probabilities, "whereas scientific or medical experts often require a higher degree of certainty before drawing conclusions on causation" (*ibid* at para 47).

[29] As indicated, in the present case, the plaintiff argues that the trial judge erred by not taking a "robust and pragmatic" approach in her causation analysis. While oft-repeated in the jurisprudence, there is no particular magic to this phrase.

[30] In the decision of the House of Lords in *Wilsher v Essex Area Health Authority*, [1987] UKHL 11 (BAILII) [*Wilsher*], Lord Bridge indicated that a prior decision of the House of Lords (see *McGhee v National Coal Board*, [1972] UKHL 7 (BAILII)) reaffirmed the basic principle that the onus of proving causation in medical malpractice cases lies on the plaintiff. He wrote: "Adopting a *robust and pragmatic approach* to the undisputed primary facts of the case, the majority concluded that it was a legitimate inference of fact that the defenders' negligence had materially contributed to the pursuer's injury" (*Wilsher* at 11) [emphasis added].

[31] In *Snell v Farrell*, [1990] 2 SCR 311, 1990 CanLII 70 (SCC) [*Snell*], the Supreme Court described the English jurisprudence as "promoting a *robust and pragmatic approach* to the facts to enable an inference of negligence to be drawn even though medical or scientific expertise cannot arrive at a definitive conclusion" (at 324) [emphasis added].

[32] Simply put, "[c]ausation need not be determined by scientific precision" (*ibid* at 328; see also *Benhaim* at para 54) and courts "may draw inferences of causation on the basis of 'common sense'" (*ibid*).

Negligently Created Causal Uncertainty

[33] At the hearing of this appeal, the plaintiff asserted that the present case was one of "negligently created causal uncertainty". As noted in *Benhaim*, such a case raises the issue of how the resultant difficulty in establishing facts should be distributed between plaintiffs and defendants (see *ibid* at para 66). Justice Wagner noted that the Court in *Snell* "struck a balance by clarifying that an adverse inference may be available in such circumstances, while leaving the decision on whether to draw that inference to the trial judge as part of the fact-finding process" (*Benhaim* at para 66).

[34] Moreover, in *Benhaim*, the Supreme Court rejected the notion that cases of negligently created causal uncertainty should be "recognized as an exception for which a rebuttable legal inference . . . is warranted" and instead concluded that "[s]hifting the consequences of causal uncertainty in this manner risks turning defendant professionals into insurers" (*ibid* at para 68).

Use of Statistical Evidence

[35] The Supreme Court in *Benhaim* considered and rejected the QCCA's conclusion that the trial judge had committed a palpable and overriding error in her appreciation of the facts by relying on the evidence of the defence expert rather than certain general statistical evidence. The statistical evidence at issue was a pure statistical generalization to the effect that "78 percent of [lung] cancers discovered fortuitously are at stage I" and thus are curable (*ibid* at para 73). The QCCA found that this statistic "established that [the patient]'s cancer was likely at stage I" (*ibid* at para 71) when his routine chest x-ray occurred.

[36] Justice Wagner wrote that "statistical evidence of this sort should be approached with some caution" because "[s]tatistical generalizations are not determinative in particular cases" (*ibid* at para 74). The reason why such pure or naked statistics are of limited value in determining causation in individual cases is because they represent "accidental groupings" and are not linked to the actual circumstances of the patient in question (*ibid*). As Wagner J observed, "[w]ithout an evidentiary bridge to the specific circumstances of the plaintiff, statistical evidence is of little assistance" (*ibid* at para 75).

[37] Ultimately, in *Benhaim*, the Supreme Court found that the trial judge made no palpable and overriding error in relying on "statistical cure rates to determine the point at which [the patient's] chances of survival would have dropped below 50 percent" (at para 77). As explained by Wagner J, "[t]he probative value of statistics will vary according to several factors", including "the resemblance between their underlying conditions and the position of the plaintiff" (*ibid*).

Discussion

[38] In her thorough reasons for decision, the trial judge correctly stated the legal test for causation in negligence and applied the relevant principles from *Benhaim*. She also carefully reviewed the evidence, including that of the medical experts, which she found (reasonably in my view) to be "for the most part . . . consistent" (*Tripp* at para 19).

[39] I am not persuaded that the trial judge made a palpable and overriding error in accepting Dr. Moore's testimony that "the likelihood that the cancer was there in the liver in January [2018] I think is -- is, you know, more than 50 percent." Dr. Moore based his opinion on the size of the liver metastasis found in December 2018, the type of cancer suffered by Mr. Tripp and the doubling rate of colon cancer cells. Dr. Schipper agreed that the liver metastasis "may have been present at the time of the colonoscopy in January of 2018".

[40] Further, relying on the widely accepted statistical survival rates for colon cancer (also relied on by Dr. Schipper), Dr. Moore's opinion was that Mr. Tripp had a thirty per cent chance of survival in January 2018 due to his colon cancer being metastatic.

[41] On the other hand, the trial judge noted that Dr. Schipper opined that Mr. Tripp's best-case scenario in January 2018 was no involvement of the pancreas, no metastatic spread and only two or three lymph nodes involved. Even so, his chance of survival would only have been approximately forty-two per cent.

[42] The trial judge found, as she was entitled to do, that the liver metastasis was most likely present at the time of the defendant's negligent colonoscopy. Having done so, it was open to her to find that the defendant's negligence did not cause Mr. Tripp's death, as he would not "have had a greater than 50% chance of survival" if his cancer had been detected in January 2018 (*Tripp* at para 37). This was not an impermissible reliance on naked statistics as there was an "evidentiary bridge" from the statistics described by the expert witnesses "to the specific circumstances" of Mr. Tripp (*Benhaim* at para 75).

[43] The trial judge was well aware of the plaintiff's argument that she should draw an adverse inference of causation against the defendant because his negligence created causal uncertainty. However, as indicated in *Benhaim*, the drawing of such an inference is discretionary as part of the fact-finding process. There is no justification to interfere with the trial judge's refusal to draw an inference of causation. The record reasonably supports the trial judge's key factual findings that Mr. Tripp had a liver metastasis and a thirty per cent chance of survival at the time of the January 2018 colonoscopy. She made no palpable and overriding errors.

[44] The plaintiff characterizes the trial judge's findings as legal errors in failing to apply a robust and pragmatic approach to the facts and applying a "causation analysis reliant completely on prognostic statistics". I do not agree. In my view, the plaintiff is attempting to have this Court usurp the fact-finding role of the trial judge, as was improperly done by the QCCA in *Benhaim*. That is not our role.

[45] To conclude, I am not persuaded that there is any basis to intervene in the decision of the trial judge. She applied the correct legal principles, and her findings of fact are entitled to deference.

[46] I would dismiss the appeal with costs.

Pfuetzner JA

I agree: Monnin JA

I agree: Edmond JA