CITATION: Liebig v. Guelph General Hospital, 2010 ONCA 450
DATE: 20100617
DOCKET: C51224

COURT OF APPEAL FOR ONTARIO

Goudge, Feldman, Sharpe, Gillese and LaForme JJ.A.

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, Hildegard Liebig, Steve Liebig, Gerry Liebig, Jim Nemet, Eva Nemet, Kathy Nemet, Tammy Graham

Plaintiffs/Respondents

and

Guelph General Hospital, Dr. Benjamin Ayanbadejo, Dr. Roger Perron, Dr. Donald Huband, Nurses Jean McLean, Laura Lobo, Deb Randall and Amy Forsythe Tettman

Defendants/Appellants

Harry Underwood and Darryl R. Ferguson, for the appellant Dr. Benjamin Ayanbadejo

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

Barbara L. Legate, Joni M. Dobson and Carrie Lynn Simmons, for the respondents

Richard Halpern, for the intervenor Ontario Trial Lawyers Association

Heard: May 20, 2010

On appeal from the order of Justice W.U. Tausenfreund, dated October 14, 2009, determining a Rule 21 motion, with reasons reported at 2009 CanLII 56297 (ON S.C.)

By the Court:

[1] This appeal arises from a rule 21.01 order to determine a point of law on the pleadings in relation to the claim brought by the infant plaintiff Kevin Liebig.

[2] There is no evidentiary record and the facts are those alleged in the fresh as amended statement of claim, which may be briefly summarized as follows. Kevin Liebig was born in 2001. The other plaintiffs are his parents and other family members. The defendants are the hospital, the physicians and the nurses who provided maternal-fetal care up to and including delivery. Kevin Liebig suffered hypoxic-ischemic encephalopathy during childbirth resulting in cerebral palsy. The plaintiffs allege that Kevin Liebig's injuries were caused by the negligence (or breach of contract) of the defendants immediately before and during the delivery process.

[3] The motion arose following a request made by the plaintiffs to the defendants to admit that they owed a duty of care to the infant plaintiff in relation to his delivery. The defendants refused to give an affirmative response to the request to admit and gave the following reason for their refusal: "No such duty of care exists in law".

[4] The plaintiffs then moved for a declaration before trial, pursuant to Rule 21, that the defendants owed a duty of care to Kevin in relation to his delivery. The motion judge reviewed the relevant case law and granted the plaintiffs the declaration they sought.

[5] For the following reasons, we dismiss the appeal.

ANALYSIS

[6] In our view, this appeal may be properly decided on the basis of the very long and well-established line of cases, duly cited by the motion judge, holding that an infant, once born alive, may sue for damages sustained as a result of the negligence of health care providers during labour and delivery: see *Crawford v. Penney* (2003), 14 C.C.L.T. (3d) 60 (ON S.C.) at para. 210, aff'd (2004), 26 C.C.L.T. (3d) 246 (C.A.); *Commisso v. North York Branson Hospital* (2003), 48 O.R. (3d) 484 (C.A.) at para. 23.

[7] These cases follow from the general principle that "a child may sue in tort for injury caused before birth", although the legal status to sue arises "only when the child is born" and "damages are assessed only as at the date of birth": see *Winnipeg Child and Family Services (Northwest Area) v. G. (D.F.)*, [1997] 3 S.C.R. 925 at para. 21*; Montreal Tramways Co. v. Léveillé*, [1933] S.C.R. 456; *Duval v. Seguin* (1973). 1 O.R. (2d) 482 (C.A.); *Family Law Act*, R.S.O. 1990, c. F.3, s. 66.

[8] As the facts alleged in the present case clearly fall within an established category where a duty of care exists, it is not necessary to engage in a *Cooper-Anns* analysis: see *Mustapha v. Culligan*, [2008] 2 S.C.R. 114 at para. 5; *Hill v. Hamilton-Wentworth Regional Police Services Board*, [2007] 3 S.C.R. 129 at para. 25; *Childs v. Desormeaux*, [2006] 1 S.C.R. 643 at para. 15.

[9] The central point of contention before both the motion judge and this court arises from the defendants' contention that two recent decisions of this court – *Bovingdon v.*

Hergott (2008), 88 O.R. (3d) 641 and *Paxton v. Ramji* (2008), 299 D.L.R. (4th) 614 – introduced a fundamental change to the law that requires us to depart from this established line of authority and to hold that Kevin Liebig has no cause of action against them. The plaintiffs dispute this proposition and add that if *Bovingdon* and *Paxton* do go that far, they should be overruled.

[10] Both *Bovingdon* and *Paxton* dealt with the situation of a doctor prescribing drugs to a woman who was not pregnant at the time. In *Bovingdon*, the drug was a fertility drug that increased the likelihood of bearing twins and, by extension, the risk of complications associated with the birth of twins. In *Paxton*, the drug was intended to treat the woman's acne, but could harm a foetus if conception were to occur while it was being taken. Both the doctor and the woman believed that the woman could not become pregnant because her husband had undergone a vasectomy years earlier.

[11] Cases in the vein of *Bovingdon* and *Paxton*, which involve claims made by infants yet to be conceived at the time the alleged negligence occurred, have been characterized as and rejected by other courts as claims for "wrongful life": see *Lacroix (Litigation guardian of) v. Dominique* (2001), 202 D.L.R. (4th) 121 (Man. C.A) leave to appeal denied [2001] S.C.C.A. No. 477; *McKay v. Essex Area Health Authority*, [1982] 1 Q.B. 1166 (Eng. C.A.). In *Bovingdon* and *Paxton*, however, this court held that the "wrongful life" approach ought not to be used. The court proceeded not by determining whether to recognize a claim for "wrongful life", but by conducting an analysis of whether a doctor

owed a separate duty of care to a future child. Both *Bovingdon* and *Paxton* hold that there is no duty of care to a future child if the alleged negligence by a health care provider took place prior to conception.

[12] At various points in the *Paxton* judgment, the court cast the issue in terms of a duty of care to a child "not yet conceived *or born*" or "*conceived* or not yet conceived" [emphasis added]: see paras. 53 and 76. The defendants adopt a strictly literal reading of those passages and submit that *Paxton* governs the present case and precludes recovery for the damages arising from the alleged negligence in the delivery of Kevin Liebig.

[13] We do not read those passages as governing the issue raised on this appeal. In accordance with the tradition of the common law and the doctrine of precedent, *Paxton* and *Bovingdon* must be read in the light of their precise facts, the issues they addressed, and in a proper legal context: see Rupert Cross, *Precedent in English Law*, 2nd ed. (Oxford: OUP, 1968) at pp. 39-43. In our view, the authority of the labour and delivery cases remains intact and is unaffected by *Bovingdon* and *Paxton*.

[14] We recognize that, in the future, the reasoning in *Bovingdon* and *Paxton* may be brought to bear in other cases involving post-conception negligence. Indeed, in written and oral argument, counsel ventured opinions on a wide range of issues and possible scenarios extending well beyond the narrow compass of the facts of this case.

[15] However, in our view, it is neither necessary nor desirable for this court in this case to attempt to set out comprehensively the duties owed and the potential liability of

heath care providers in relation to all manner of injuries to infants arising from negligence before birth.

[16] It is unnecessary as the facts of this case fall within the familiar and well-established category of labour and delivery cases where it has never been seriously questioned that negligent health care providers are liable. As we can decide this case on the basis of this body of case law, we need not venture into less familiar territory or speculate as to how the law might evolve with respect to other scenarios.

[17] It is undesirable for us to do so since all that we have before us is a sparse record consisting only of the pleadings in what, in law, amounts to a routine case easily decided on the basis of a well-established principle.

[18] Our refusal to engage in making the kind of sweeping statements requested by the parties does not amount to an abdication of our duty as an appellate court to provide the guidance required to ensure that the law of Ontario is administered in an orderly and consistent fashion. Difficult cases are bound to arise in this area of the law. When such cases do arise, the courts will be guided by certain established legal principles that have evolved in this contentious area of law. We have already mentioned one of those principles, namely, that a child born alive may sue in tort for injury caused before birth. Other relevant principles were canvassed in written and oral argument before us, including:

- "[T]he law of Canada does not recognize the unborn child as a legal or juridical person": *Winnipeg Child and Family Services* at para. 11; *Tremblay v. Daigle* [1989] 2 S.C.R. 530 at p. 553.
- The primacy of maternal autonomy concerning choices made regarding pre-conception and pre-natal medical treatment: *Winnipeg Child and Family Services* at paras. 37-39.
- Maternal immunity from suit by the infant after birth for pre-natal injuries: *Dobson v. Dobson*, [1999] 2 S.C.R. 753.

[19] Cases may well arise that do not fit neatly under any of the established principles and, on occasion, the established principles may appear to be in conflict. This situation is characteristic of the common law, which does not provide a comprehensive, over-arching theory of liability that is capable of deciding every case or dealing with every possibility or contingency. Principles emerge, take shape and are reconciled on the basis of fact and context-specific judicial decisions, aided by scholarly commentary. A common law court should be cautious about laying down principles or rules that are not required to decide the case before it and ordinarily should limit itself to the requirements of the case at hand: see G. Williams, *Salmond on Jurisprudence*, 11th ed, (London: Sweet and Maxwell, 1957), at p. 224; *Watkins v. Olafson*, [1989] 2 S.C.R. 750 at pp. 760-61.

[20] As we can decide this case on the basis of established case law, in keeping with the tradition and spirit of the common law, we refrain from doing any more.

DISPOSITION

[21] Accordingly, the appeal is dismissed. If the parties are unable to agree as to costs we will receive brief written submissions in that regard.

"S.T. Goudge J.A."
""K. Feldman J.A."
"Robert J. Sharpe J.A."
"E.E. Gillese J.A."
"H.S. LaForme J.A."

RELEASED: June 17, 2010