

BRIEFING NOTE

***Armstrong v Ward*: The importance of presenting non-negligent avenues to injury**

I. Introduction

The case of *Armstrong v Ward*, 2021 SCC 1, raises the importance to advance or raise alternative non negligent causation arguments to assist the Court in looking at the issues of causation from the defence perspective in a negligence case.

In *Armstrong*, the Court considered whether damage to the plaintiff's ureter following a laparoscopic surgery constituted negligence, despite the surgeon's routine practice of taking steps to avoid injury to the ureter in the course of such a procedure. The Supreme Court of Canada adopted the reasons of Justice van Rensburg (Ontario Court of Appeal dissent, indexed at 2019 ONCA 963) in holding that a failure to *meet* the goal of care may be determined to be negligent, despite steps taken to avoid that outcome.

II. Background

The plaintiff, Karen Armstrong, had her colon removed in a colectomy performed by Dr. Colin Ward, a general surgeon, in February 2010. The plaintiff's colon was structurally normal. The surgery was performed laparoscopically and was done through the use of a LigaSure medical device.

Medical expert opinion for both parties testified at trial that the standard of care (SOC) of the surgeon was to identify the position of a patient's ureter, protect it during a colectomy, and avoid operating within a 1-2 millimeter proximity of the patient's ureter when using the LigaSure as injury could result if there was either direct contact with the ureter with the LigaSure or use of the LigaSure 1-2 millimeters due to the heat from the device.

The plaintiff experienced persistent abdominal and flank pain after the surgery and it was later determined that her left ureter was blocked and as a result, she suffered injury to her left kidney, which had to be removed.

III. Legal Analysis

Trial Decision

The trial judge found that a breach would be established if Dr. Ward either touched the plaintiff's ureter with the LigaSure or came within 1-2 millimeters of the ureter.

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The trial judge accepted that Dr. Ward took steps to identify and protect the ureter, with his evidence being that he always stayed at least 5 centimeters away from the ureter and further accepted that Dr. Ward likely did not make direct contact while using the LigaSure. However, given the expert evidence of the plaintiff's delayed complications and eventual ureter blockage, the trial judge found that Dr. Ward had breached the SOC by coming too close (within 1-2 mm) to the ureter while using the LigaSure, thus leading to a breach of the SOC.

Ontario Court of Appeal

The appellant (Dr. Ward) successfully appealed the trial judge decision. A majority of the Ontario Court of Appeal (OCA) overturned the trial decision on the basis that the trial judge erred by imposing an incorrect SOC. The OCA majority found that the trial judge determined Dr. Ward's liability in terms of the goal or result that a prudent surgeon would have had in conducting the surgery, rather than the steps that a prudent surgeon would take in the course of the surgery.

The OCA majority found that while it was acceptable for the trial judge to state the SOC in the form of a goal or result, he ought to have identified the steps that Dr. Ward *failed to take* in order to prevent the LigaSure from coming too close (within 1-2 mm) to the ureter; in other words, the SOC is to be measured by the required behavior of the relevant prudent person, rather than the results that a prudent person would seek to attain or avoid.

The OCA majority held that the trial judge erred when he accepted Dr. Ward took appropriate steps to avoid injury, but still found that Dr. Ward had breached the SOC by coming within 1-2 mm of the ureter, despite there being no finding of fact that he did, in fact, come too close to the ureter. In effect, they said that an injurious outcome does not equate to a breach of the SOC, without more.

In dissent (and adopted by the SCC), van Rensburg JA held that the trial judge made no error in law. She identified that the central issue relating to the standard of care on appeal was whether the evidence supported the determination that Dr. Ward breached the SOC by bringing the LigaSure within 1-2 mm of the ureter.

In applying the SOC, van Rensburg JA found that while the trial judge accepted that Dr. Ward took steps to identify and protect the ureter, the trial judge did not accept that Dr. Ward had *actually* maintained the appropriate distance from the ureter in the course of the surgery; i.e., although Dr. Ward took some steps to protect the ureter, he inadvertently did not maintain the distance of 5 centimeters as he thought given that the injury resulted and there was no evidence to suggest that a surgeon exercising reasonable care could not have maintained that distance. Of importance is that van Rensburg JA stated there is no requirement for a trial judge to consider possible non-negligent causes not raised in evidence.

She found that the trial judge's assignment of liability to Dr. Ward was supported by the evidence available at trial and would have dismissed the appeal. In an oral decision, the Supreme Court of Canada overturned the appeal ruling and adopted the dissenting reasons of van Rensburg JA.

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IV. What does this mean?

Armstrong raises important considerations in the context of defence in medical malpractice claims, but also other negligence claims. In this case, although the steps taken by health care professionals can provide key insights into the standard of care in a given case, the desired goal or result of care *will also* be a relevant consideration by a court in terms of whether those steps were properly executed by the professional.

The causation analysis in *Armstrong* is also of interest. At trial, Dr. Ward had raised causative theory of how the injury could have occurred in a non negligent manner, **but**, the trial judge found that Dr. Ward's theory had no evidentiary foundation. The absence of evidence to support an alternative source of the injury contributed to the trial judge's findings both in terms of the standard of care and causation.

This case highlights the importance of defence to raise, and also provide some evidence to the court that support non-negligent avenues by which an injury in question may have occurred. The failure to do so can prove fatal to the defence.

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