Kobe ter Neuzen v. Korn

[1995] 3 S.C.R. 674, [1995] S.C.J. No. 79

Country: Canada
Region: Americas
Year: 1995
Court: Supreme Court
Health Topics: HIV/AIDS, Infectious diseases, Medical malpractice, Sexual and reproductive health

Facts

The plaintiff was infected with HIV through an artificial insemination (â€œAIâ€•) procedure performed by the defendant physician in 1985, before the various methods of HIV transmission were widely known.

The physician performed 35 AI procedures on the plaintiff between 1981 and January 1985. The physician did not warn the plaintiff about the possibility of HIV infection. He claimed to have been unaware that HIV could be transmitted via AI, although there had been events within the medical community that pointed to this connection. In 1983, a letter was published in the New England Journal of Medicine that hypothesized a risk of transmitting sexually transmitted diseases through AI. In 1984, all AI clinics in Australia were closed due to the significant risk of HIV infection. The physician maintained that he was unaware of the risk until September 1985, when he read a journal article that documented the first confirmed case of infection via AI. Upon learning of this danger, he immediately suspended his AI practice.

At the time the plaintiff became infected, there was no HIV test for bodily fluids available in Canada. The physician relied on an interview process to screen out high-risk patients based on reported medical history, sexual activity, sexual orientation, and a general physical examination.

At trial, the jury was instructed that they could find the physicianâ€™s actions negligent if he failed to comply with the standard medical practice at that time. Alternatively, they could find that the standard medical practice itself was negligent. The jury found the physician negligent and awarded the plaintiff $883,800. On appeal, the British Columbia Court of Appeal set aside the juryâ€™s verdict and ordered a new trial.

Decision and Reasoning

The Supreme Court upheld the decision of the Court of Appeal and granted a new trial. It reasoned that there were two separate aspects to the claim of professional negligence: (1) breach of duty arising from the failure to be aware of the risk of HIV infection through the use of AI; and (2) breach of duty with respect to the screening and follow-up of donors. The Court decided that a jury acting judicially could not have found the defendant negligent on the first aspect as he had exercised the degree of skill of an average medical specialist given the limited state of knowledge about HIV transmission at the time he performed AI on the plaintiff. Furthermore, the instructions given to the jury were deficient, as a jury would not have the expertise to find that the standard of medical practice itself was negligent. It was impossible to elucidate on what grounds the jury found the defendant negligent.

The Court found that the semen used was not under warranty to be free of HIV contamination for the following three reasons: (1) there was no indication of contractual liability; (2) the Sale of Goods Act did not apply as the primary purpose of the contract was for professional medical services and not the sale of semen; and (3) in the context of providing medical services, it would not be appropriate for medical professionals to be held strictly liable under warranty. The action should thus be restricted to negligence.

The Court also held that the non-pecuniary damages awarded by the jury were excessive. It decided that the upper limit of $100,000 established in Andrews v Grand & Toy Alberta Ltd. (1978) should apply. Trial judges should inform juries of this limit only when they believe that the jury may be inclined to award non-pecuniary damages that exceed it. The trial judge should be empowered to reassess awards that exceed this limit, in order to avert unnecessary appeals.

In her concurring judgement, Lâ€™Heureux-DubÃ© J argued that it was improper for the trial judge to counsel the

jury on the amount of damages, and that the limit should not apply to the present case as the injury sustained was a different type than those sustained in Andrews. While agreeing that excessive awards should be reduced by the trial judge, she maintained that, generally, the juryâ€™s decision should be respected.

Decision Excerpts

â€œIt is well settled that physicians have a duty to conduct their practice in accordance with the conduct of a prudent and diligent doctor in the same circumstances. In the case of a specialist, such as a gynaecologist and obstetrician, the doctor's behaviour must be assessed in light of the conduct of other ordinary specialists, who possess a reasonable level of knowledge, competence and skill expected of professionals in Canada, in that field.â€• Para. 46.

â€œâ€¦as a general rule, where a procedure involves difficult or uncertain questions of medical treatment or complex, scientific or highly technical matters that are beyond the ordinary experience and understanding of a judge or jury, it will not be open to find a standard medical practice negligent. On the other hand, as an exception to the general rule, if a standard practice fails to adopt obvious and reasonable precautions which are readily apparent to the ordinary finder of fact, then it is no excuse for a practitioner to claim that he or she was merely conforming to such a negligent common practice.â€• Para. 64.

â€œMoreover, the evidence established that the state of medical knowledge about AIDS and HIV was highly variable even between highly qualified scientists. There were differences of opinion between public health authorities and practitioners in different medical communities. In our judgment, this was not the kind of case where a judge could properly instruct the jury that it could decide that a practice that conformed to what other practitioners similarly situated were following was negligent.â€• Para. 70.