

Case Name:

Askar (Litigation guardian of) v. Morton

Between

Almis-Houssein Askar, a minor by his litigation guardian, Fozia Aboubaker Houssein, Fozia Aboubaker Houssein in her personal capacity, Ahmed Askar, Nadia Askar, Idile Askar, Hanane Askar and Ahlane Askar, minors by their litigation guardian, Fozia Aboubaker Houssein, Plaintiffs (Appellants), and James Morton, Bruce Hamilton, Krikor Greg Tatiossian, U-Need-A-Cab Limited, Lloyd's, Lloyd's of London, Lloyd's Lloyd's of London, and Lloyd's Montreal Quebec, Defendants (Respondents)

[2009] O.J. No. 854

2009 ONCA 200

Docket: C49380

Ontario Court of Appeal
Toronto, Ontario

**W.K. Winkler C.J.O., S.T. Goudge and G.J. Epstein
J.J.A.**

Heard: February 13, 2009.

Judgment: March 5, 2009.

(8 paras.)

Civil procedure -- Civil evidence -- Opinion evidence -- Expert evidence -- Admission of reports -- What constitutes special knowledge and experience -- Appeal by plaintiffs from dismissal of personal injury action dismissed -- Judge was entitled to rely on defendants' expert evidence to the effect that motor vehicle accident involving plaintiff's mother did not cause injuries sustained by unborn child -- Plaintiff's expert evidence from pediatrician who admitted that his opinion was outside his expertise did not survive a good hard look.

Tort law -- Negligence -- Causation -- Causal connection -- Appeal by plaintiffs from dismissal of personal injury action dismissed -- Judge was entitled to rely on defendants' expert evidence to the effect that motor vehicle accident involving plaintiff's mother did not cause injuries sustained by unborn child -- Plaintiff's expert evidence from pediatrician who admitted that his opinion was outside his expertise did not survive a good hard look.

Appeal by the Askar family from the dismissal of their action against several parties seeking damages for personal injuries sustained in a motor vehicle accident. Askar was an infant whose mother was in the accident while pregnant. Askar suffered from serious medical problems that the Askar family sought to attribute to a taxi driver, the taxi company and their insurers. Their action had been dismissed because the judge found no genuine issue as to causation. No expert medical opinion was adduced by the family to support their assertion that Askar's medical condition was caused or contributed to by the accident. Only one pediatrician found a likely link between Askar's condition and the accident, but this expert acknowledged that his view was peripheral to his area of expertise.

HELD: Appeal dismissed. The judge was entitled to rely on the expert evidence adduced by the defendants, which showed no causal link between the accident and Askar's condition. The pediatrician's opinion did not survive the good hard look required to establish causation.

Appeal From:

On appeal from the final summary judgment of Justice S. Rogin of the Superior Court of Justice dated July 30, 2008.

Counsel:

Khalid I. Baksh and Sharon Hassan, for the appellants.

Ian F. Leach, for the respondents Bruce Hamilton, Krikor Greg Tatirossian & Lloyd's.

Kerri Kamra, for the respondent, U-Need-A-Cab Limited.

Morgan A. MacDonald, for the respondent, James Morton.

ENDORSEMENT

The following judgment was delivered by

1 THE COURT:-- This is a tragic case. There is no doubt that the infant appellant suffers from a very serious medical condition that poses enormous hardships on his family. However, to succeed in recovering damages from the respondents for that condition, the appellants must show that the condition is their fault. To do that, the appellants must show that the condition was more probably than not caused or contributed to by a motor vehicle accident in which the infant appellant's mother was involved while she was pregnant and which involved vehicles for which the respondents are legally responsible.

2 This is an appeal from the dismissal of the action on a motion for summary judgment. The motion judge found that the appellants had shown no genuine issue as to causation that required a trial.

3 The appellants argue in this court that the expert opinions provided by the respondents count for little because they were not sworn and were merely exhibits to an affidavit of their solicitors. We cannot accede to that argument at this stage. The appellants did not seek to test these opinions by way of examination at any point in the proceedings. Even now what is contested is only their weight not their admissibility. This ground of appeal must fail.

4 As to the causation question, counsel for the appellants concede that they have no expert medical opinion saying that the infant appellant's medical condition was probably caused or contributed to by the motor vehicle accident or even some other external trauma to the mother during her pregnancy. All the expert medical opinions relied on by the appellants put that at no more than one possibility along with others, such as a spontaneous occurrence.

5 Only one doctor, a behavioural paediatrician, who acknowledges his view to be somewhat peripheral to his own expertise, felt there was likely an association between the child's condition and the accident. This view does not survive the good hard look required on such a motion, particularly when it appears that on the motion, counsel acknowledged that this opinion, alone, was not enough.

6 Nor can the epidemiology in the medical literature referred to by the appellants serve to establish causation in this case.

7 Regrettably, the appeal must be dismissed. The tragic circumstances of the infant appellant simply cannot be shown to be the fault of the respondents.

8 No costs are sought or ordered.

W.K. WINKLER C.J.O.

S.T. GOUDGE J.A.

G.J. EPSTEIN J.A.

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