

AN OVERVIEW OF THE LAW OF CAUSATION

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Introduction

As counsel, we must frequently grapple with the law of causation, and apply it to our particular factual situation, to see if we can prove that causation, and thus liability, is established. This article is intended to provide a general overview of the law of causation to help you to that end.

While this article focuses on causation as a whole, it has particular relevance to those who are involved in, or are considering, medical negligence cases. Causation is all too often the hidden trap in what otherwise appears to be a solid claim. In cases of failure to diagnose or failure to treat in a timely fashion, claimants and counsel can fail to appreciate that it is not enough to demonstrate that adequate diagnosis and treatment would have afforded a chance of avoiding the unfavourable outcome—that chance must surpass the threshold of more likely than not.

General Principles

The general principles regarding causation are articulated in three leading Supreme Court of Canada cases: *Snell v. Farrell*, [1990] 2 S.C.R. 311, *Athey v. Leonati*, [1996] 3 S.C.R. 458 and, most recently, in *Resurfice Corp. v. Hanke*, [2007] S.C.J. No. 7; 2007 SCC 7; (2007), 278 D.L.R. (4th) 643.

In *Snell v. Farrell*, [1990] 2 S.C.R. 311, the appellant, an ophthalmologist, performed surgery on the respondent to remove a cataract from her right eye. After injecting a local anesthetic into the retrobulbar muscles behind the eyeball, the appellant noticed a small discoloration, which he stated on discovery was a very small retrobulbar bleed. On palpating the eye, he found that it was not hard, and there were no other signs of retrobulbar hemorrhage. After waiting 30 minutes he proceeded with the operation. Following the surgery there was blood in the vitreous chamber of the eye. When the chamber cleared some nine months later the appellant was able to see for the first time that the optic nerve had atrophied, resulting in a loss of sight in the respondent's right eye. One

possible cause of optic nerve atrophy is pressure due to retrobulbar hemorrhage. Neither of the expert witnesses was able to state with certainty what caused the atrophy in this case or when it occurred. The trial judge accepted the expert evidence that where there is bleeding other than the obvious pinprick of a needle, the operation should not be continued. Relying on the decision of the House of Lords in *McGhee v. National Coal Board*, [1973] 1 W.L.R. 1, he concluded that the respondent had *prima facie* proved that the appellant's actions had caused her injury and that the appellant had not satisfied the onus that had shifted to him. The trial judge accordingly found the appellant liable in negligence. The Court of Appeal dismissed the appellant's appeal.

The Supreme Court of Canada upheld the Court of Appeal and further dismissed the appeal. In doing so, it clarified some of the rules regarding causation.

In particular, Sopinka J., writing for the Court, held that while proof of causation in medical malpractice cases is often difficult for the patient, it is unnecessary to adopt either of the alternatives arising out of the *McGhee* case – namely, that the plaintiff simply proves that the defendant created a risk that the injury which occurred would occur, or that the defendant has the burden of disproving causation – since, properly applied, the traditional principles relating to causation are adequate to the task. Adoption of either of the proposed alternatives would have the effect of compensating plaintiffs where a substantial connection between the injury and the defendant's conduct is absent. A plaintiff should not be compensated by reversing the burden of proof for any injury that may very well be due to factors unconnected to the defendant and not the fault of anyone.

In an oft-applied passage,² Sopinka J. stated:

“Causation is an expression of the relationship that must be found to exist between the tortious act of the wrongdoer and the injury to the victim in order to justify compensation of the latter out of the pocket of the former. Is some lesser relationship sufficient to justify compensation? I have examined the alternatives arising out of the *McGhee* case. They were that the plaintiff simply prove that the defendant created a risk that the injury which occurred would occur. Or, what amounts to the same thing, that the defendant has the burden of disproving causation. If I were convinced that defendants who have a substantial connection to the injury were escaping liability because plaintiffs could not prove causation under currently applied principles, I would not hesitate to adopt one of these alternatives. In my opinion, however, properly applied, the principles relating to causation are adequate to the

task . . .”

Snell v. Farrell is most frequently applied for the following passage³:

“I am of the opinion that the dissatisfaction with the traditional approach to causation stems to a large extent from its too rigid application by the courts in many cases. Causation need not be determined by scientific precision. It is, as stated by Lord Salmon in *Alphacell Ltd. v. Woodward*, [1972] 2 All E.R. 475, at p. 490:

. . . essentially a practical question of fact which can best be answered by ordinary common sense rather than by abstract metaphysical theory.”

Further, in *Snell v. Farrell*, Sopinka J. made it clear that there was no evidentiary burden shift to the defendant, when he stated:⁴

“The legal or ultimate burden remains with the plaintiff, but in the absence of evidence to the contrary adduced by the defendant, an inference of causation may be drawn although positive or scientific proof of causation has not been adduced. If some evidence to the contrary is adduced by the defendant, the trial judge is entitled to take account of Lord Mansfield’s famous precept. This is, I believe, what Lord Bridge had in mind in *Wilsher* when he referred to a “robust and pragmatic approach to the . . . facts”.

Athey v. Leonati, [1996] 3 S.C.R. 458, is a decision of the Supreme Court of Canada per Major J. which expanded upon the principles of causation. In this case, the appellant, John Athey had a history of back problems. He suffered back and neck injuries in an accident in February 1991 and, while still recovering from those injuries, he suffered further injury in a second accident which occurred that April. That autumn, his doctor suggested, in light of his improved condition, that he resume his regular exercise routine. He suffered a herniated disc while “warming up” and required surgery. The results were good but not excellent. The appellant obtained other employment that required no heavy physical duties at a reduced salary.

All of the parties in the lawsuit proceeded as if there was only one defendant and only one accident, and no attempt was made to apportion fault between the respondents or between the accidents. The

respondents admitted negligence. There was no allegation of contributory negligence with respect to the accidents, or negligence by the appellant or his doctor in resuming the exercise program. The only issue was whether the disc herniation was caused by the injuries sustained in the accidents or whether it was attributable to the appellant's pre-existing back problems.

The trial judge held that although the accidents were "not the sole cause" of the disc herniation, they played "some causative role" and awarded 25 percent of the global amount of damages assessed. This was upheld by the Court of Appeal. At issue before the Supreme Court of Canada was whether the trial judge's apportionment of causation was reversible error, and whether the Court of Appeal wrongly limited the scope of judicial review by declining to consider the appellant's theory of liability.

The Supreme Court of Canada granted the appeal, and in doing so established foundational governing principles with respect to causation. Major J. stated,⁵ as follows:

"Causation is established where the plaintiff proves to the civil standard on a balance of probabilities that the defendant caused or contributed to the injury: *Snell v. Farrell* . . .

The general, but not conclusive, test for causation is the "but for" test, which requires the plaintiff to show that the injury would not have occurred but for the negligence of the defendant: . . .

The "but for" test is unworkable in some circumstances, so the courts have recognized that causation is established where the defendant's negligence "materially contributed" to the occurrence of the injury: . . . A contributing factor is material if it falls outside the *de minimus* range: . . .

In *Snell v. Farrell*, *supra*, this Court recently confirmed that the plaintiff must prove that the defendant's tortious conduct caused or contributed to the plaintiff's injury. The causation test is not to be applied too rigidly. Causation need not be determined by scientific precision . . . and as was quoted by Sopinka J. at p. 328, it is "essentially a practical question of fact which can best be answered by ordinary common sense". Although the burden of proof remains with the plaintiff, in some circumstances an inference of causation may be drawn from the evidence without positive scientific proof.

It is not now necessary, nor has it ever been, for the plaintiff to establish that the defendant's negligence was the sole cause of the injury. There will frequently be a

myriad of other background events which were necessary preconditions to the injury occurring . . . As long as the defendant is part of the cause of an injury, the defendant is liable, even though his act alone was not enough to create the injury. There is no basis for a reduction of liability because of the existence of other preconditions: defendants remain liable for all injuries caused or contributed to by their negligence . . .

The law does not excuse the defendant from liability merely because other causal factors for which he is not responsible also helped produce the harm: . . .”

The principles of causation have also been summarized by the Ontario Court of Appeal, per Osborne J.A., in *Hock (Next Friend of) v. Hospital for Sick Children*, [1998] O.J. No. 336⁶ as follows:

“In summary:

- “causation need not be determined with scientific precision and an inference of causation may be drawn without scientific proof.
- causation is a practical question of fact which can best and usually be answered by ordinary commonsense.
- where, in a particular case, evidence of causation is in the hands of the defense, relatively little affirmative evidence on the plaintiff’s part will be required to justify drawing an inference of causation, in the absence of evidence to the contrary.
- the trier of fact must weigh all the evidence, and having done so, determine whether an inference adverse to the defense on causation should be drawn. In this regard, in *Snell*, Sopinka J. distinguished the functions of the trier of fact who deals in probabilities and the medical experts who tend to deal in certainties.”

The Supreme Court of Canada has also issued another leading decision on causation in *Laferriere v. Lawson*, [1991] 1 S.C.R. 541, per Gonthier J. on behalf of Lamer C.J. and L’Heureux-Dubé, Sopinka, Cory and McLachlin J.J., for the majority. In that case, a biopsy revealed breast cancer, but the physician failed to notify or treat the patient. She eventually died of the cancer.

This case dealt with the “lost chance” argument – *i.e.*, that the plaintiff has lost an opportunity of recovery by virtue of a late diagnosis or treatment. The case held that “lost chance” was an

inappropriate means of determining causation, at least in cases in which death or sickness has already occurred:

“45 In the end, I conclude that the loss of chance analysis recommended by the respondent is inappropriate, at least in cases where death or sickness has already occurred. In such cases, classical principles of causation suffice, and, further, are essential in order for individual responsibility to attach.⁷”

The Supreme Court went on to summarize the appropriate principles governing determination of causation in such a case:

- The rules of civil responsibility require proof of fault, causation and damage.
- Both acts and omissions may amount to fault and both may be analyzed similarly with regard to causation.
- Causation in law is not identical to scientific causation.
- Causation in law must be established on the balance of probabilities, taking into account all the evidence: factual, statistical and that which the judge is entitled to presume.
- In some cases, where a fault presents a clear danger and where such a danger materializes, it may be reasonable to presume a causal link, unless there is a demonstration or indication to the contrary.
- Realistic evidence may be helpful as indicative but it is not determinative. In particular, where statistical evidence does not indicate causation on the balance of probabilities, causation in law may nonetheless exist where evidence in the case supports such a finding.
- Even where statistical and factual evidence do not support a finding of causation on the balance of probabilities with respect to particular damage (e.g. death or sickness) such evidence may still justify a finding of causation with respect to lesser damage (e.g. slightly shorter life, greater pain).
- The evidence must be carefully analyzed to determine the exact nature of the fault or breach of duty and its consequences as well as the particular character of the damage which has been suffered, as experienced by the victim.

- If after consideration of these factors a judge is not satisfied that the fault has, on his or her assessment of the balance of probabilities, caused any real damage, then recovery should be denied.⁸

Any doubt regarding the application of the *Laferriere* case outside of Quebec has been resolved by *Sohal v. Brar* (1998), 211 A.R. 81, [1999] 3 W.W.R. 553 (Q.B.), aff'd by (1998), 223 A.R. 141, [1999] 7 W.W.R. 345 (C.A.), at para. 5, and *Cottrelle v. Gerrard* (2003) 67 O.R. (3d) 737, [2003] O.J. No. 4194, (2003) 20 C.C.L.T. (3d) 1 (Ont. C.A.), leave to appeal to S.C.C. dismissed [2003] S.C.C.A. No. 549.

In *Sohal*, the plaintiff diabetic had to have his foot amputated after a cut became infected. Justice McBain of the Alberta Court of Queen's Bench held that the doctor had been negligent in his treatment of the patient, but the expert evidence did not establish that the amputation would not have been necessary had he received immediate medical treatment when a cut became infected:

"179 No evidence was given that it was likely that earlier admission to hospital might have saved the foot of Mr. Sohal. I conclude therefore that the expert evidence in this trial only indicates that earlier admission to hospital by a few days may have saved Mr. Sohal's foot. It follows that earlier admission to hospital may not have saved Mr. Sohal from the amputation that was performed."

Justice McBain then considered whether the plaintiff had established causation in the manner traditionally applied by common law courts:

"184 The question that I have on causation, can, I believe, be accurately stated as follows - Would earlier admission to hospital on the 10th rather than the 12th have saved Mr. Sohal from the partial amputation of his left foot for it was the negligence of Dr. Brar that caused this delay?"

185 The evidence before me does not prove to the civil standard on a balance of probabilities that the Defendant caused the injury nor does it in my opinion establish on a balance of probabilities that the delay by the Defendant doctor materially contributed to the injury.

186 Does the evidence meet the "but for" test, that the amputation would not have occurred but for the negligence of Dr. Brar in not recognizing the seriousness of Sohal's complaints which resulted in a delay in having Mr. Sohal admitted to

hospital. In my opinion the evidence does not show that the amputation would not have occurred but for the negligence of the Defendant.

187 Did Dr. Brar's negligence which caused the delay materially contribute, to the occurrence of the amputation? The evidence in my opinion does not establish that the delay caused by the doctor materially contributed to the necessity of the amputation being performed, it may have - it may not have. Such evidence does not establish a material contribution by the Defendant even in the *de minimus* range.”

Finally, Justice McBain carefully reviewed the leading authorities, including the *Snell* and *Athey* cases, as well as *Hotson v. East Berkshire Health Authority*, [1987] 1 A.C. 750, (H.L.), and concluded that loss of chance doctrine must be rejected in favour of the traditional rules of causation:

“197 I am satisfied that the weight of authority would be against my applying loss of chance doctrine to this case and I will not do so. Were I to do so the evidence before me would not allow for a calculation of actual loss of chance with any certainty.”

In short reasons by the Court of Appeal, it was held that it could discern no error in law that would justify the late filing of an appeal.

This result is consistent with the earlier Alberta Court of Appeal case of *Cranwill (Next Friend of) v. James* (1997), 193 A.R. 204 *per curiam*. This case involved an appeal by the plaintiff from a decision dismissing a negligence action. The infant plaintiff was born with two congenital heart defects. Although there were no alarming symptoms at birth, the defendant pediatrician noticed some suspicious signs and ordered an electrocardiogram. The electrocardiogram was taken but the report was subsequently lost. The symptoms disappeared and the baby was discharged. After a week at home he was returned to hospital to be treated for heart failure resulting from the closure of the ductus arteriosus. After two operations, there was evidence of brain damage. A year and a half later a third operation was required, followed by permanent and significant brain damage.

The pediatrician was found negligent for failing to notice the loss of the electrocardiogram report. However, the trial judge found that the negligence did not cause or contribute to the brain damage. The appeal was based on the argument that if the pediatrician had followed up on the lost report, the baby would have been treated before being discharged from the hospital.

In the end result, the appeal was dismissed. It was held that the plaintiff's argument assumed that the report would have been issued in time for a diagnosis before the normal time for discharge. In any case, there was no proof that postponing the discharge would have made a difference. The heart conditions were caused by nature rather than by negligence.

The Alberta Court of Appeal stated:⁹

“Since the trial judgment, the Supreme Court of Canada has decided *Athey v. Leonati* . . . It does not appear to us to contradict *Snell v. Farrell* in any way. It does say that if two or more causes contribute to the same injury, the plaintiff recovers his full loss if the defendant's negligence was one of the causes. There is no question of apportionment, so long as the *de minimus* range is exceeded. We could not say that the trial judge said or did anything to the contrary here. He found that the negligence of the remaining respondent defendant did not contribute to the injuries sued for. And he found that they would have occurred the same way and to the same extent even if the negligence had not occurred.”

A similar conclusion was reached in the case of *Lindahl Estate v. Olsen* (2004), 360 A.R. 310, a decision of Watson J. of the Alberta Court of Queen's Bench. In this case, the estate of Lindahl sued Dr. Olsen and Dr. Hasinoff alleging malpractice and breach of contract of medical services, which caused his death. Lindahl was afflicted with colon cancer in 1997, which manifested itself through rectal bleeding, dizzy spells, diarrhea and blood in his stool. The doctors were Lindahl's family physicians. They concluded that the bleeding was caused by hemorrhoids, which Lindahl suffered from chronically. Lindahl maintained that the bleeding must be from something else. The disease progressed and was finally diagnosed in 1998, leading to Lindahl's death in 1999 when the cancer spread throughout his body.

His estate alleged that the doctors breached their duty of care to Lindahl because they failed to properly diagnose his medical problems, failed to perform or order proper clinical tests and procedures, failed to refer him to specialists, failed to advise him properly and failed to treat his medical problems in an appropriate and timely manner. The estate alleged that the proper handling of Lindahl's case would have led to diagnosis, or further tests leading to diagnosis and appropriate treatment of the cancer.

The doctors submitted that they did not breach the standard of care of the reasonable family physician and that the steps taken were reasonable and prudent in the circumstances. They submitted, in the alternative, that there was no loss of a significant chance of cure resulting from the breach because the onset and spread of the disease was unusually rapid. The doctors further submitted that the estate failed to prove causation within the context of liability by the conduct of the doctors in relation to the onset of the cancer condition and the resulting death.

Ultimately, the action against Dr. Olsen was allowed and the action against Dr. Hasinoff was dismissed. The court found that Dr. Olsen's dealing with the recurrent complaint by Lindahl about rectal bleeding fell short of the reasonable standard of care that could be expected of a young family physician. He was too rapidly persuaded that Lindahl's symptoms were caused by hemorrhoids without proper diagnosis. Further, he should have referred Lindahl for further treatment and testing, and yet discouraged him from doing so. His incomplete and inaccurate notes gave Dr. Hasinoff an inaccurate picture of the state of Lindahl's health. Had Dr. Olsen not discouraged and deflected Lindahl, there was a probability that Dr. Hasinoff would have referred Lindahl for testing which would have been more informative as to Lindahl's condition. Notwithstanding the finding of negligence as against Dr. Olsen, the damages against Dr. Olsen were discounted to reflect Lindahl's weakened condition prior to Dr. Olsen's negligence.

Dr. Hasinoff was also found to have breached his standard of care by failing to promptly refer Lindahl to an expert and assigning an inordinately low priority to Lindahl's treatment when he finally referred him to an expert. However, the chances of a successful recovery by Lindahl at that point were so well below probable that it could not be said that any negligence found against Dr. Hasinoff was a significant contributor to Lindahl's decline and death. Therefore, Dr. Hasinoff was not found to be liable.

A similar approach was adopted by the British Columbia Court of Appeal in *De la Giroday v. Brough*, [1997] 6 W.W.R. 585; (1997), 33 B.C.L.R. (3d) 171 per Madame Justice Southin, leave to appeal to S.C.C. dismissed [1997] S.C.C.A. No. 381. In this case, a plaintiff was not diagnosed with a serious case of necrotizing fasciitis until his illness was severe. The Court of Appeal noted that if a

patient is already moribund, he cannot suffer a loss of opportunity if he is misdiagnosed

“[39] Cases in which there is a loss of opportunity from a breach of contract must be distinguished from cases in which, whether because of an antecedent or supervening event, there is no opportunity lost. For instance, if a patient, when he arrives at a hospital, is already moribund, a failure of correct diagnosis causes no loss of opportunity.

[42] For the loss of chance approach to apply in this country in actions of tort would require either a legislative amendment or a decision to that effect of the Supreme Court of Canada.”

A leading case in this area is the *Cottrelle* case. There, the Ontario Court of Appeal addressed the issue of whether loss of chance is an appropriate approach to the determination of causation, and in so doing relied upon the *Sohal* case. In *Cottrelle*, a diabetic developed a sore on her foot. Her doctor examined it on a few occasions, but it developed gangrene and had to be amputated. She had vascular disease which inhibited her circulation to her legs. The pathologist's examination of the amputated limb determined that the anterior and posterior tibial arteries were totally occluded and the peroneal artery was 80 per cent occluded. The limited circulation of blood to her leg significantly inhibited the respondent's ability to fight the infection in her foot, with or without the help of an antibiotic.

The trial judge found that the appellant fell below the appropriate standard of care in two aspects: first, on July 2, 1993, he should have physically examined the respondent's foot; and second, he should have followed-up or monitored the respondent's condition after that date. The appellant doctor argued that the negligence was not the cause of the injury. The plaintiff's expert testified that aggressive treatment “might” have saved the leg, but could not say that with a more aggressive form of treatment, it was more probable than not that the leg could have been saved. The trial judge found that the appellant's negligence denied the respondent a "window of opportunity" to save her leg, and that his negligence was therefore a cause of her loss sufficient to ground liability.

The Court of Appeal held that the plaintiff had not established causation, and outlined the test to be applied in medical malpractice cases as follows:

“[25] I agree with the appellant's submission that in an action for delayed medical

diagnosis and treatment, a plaintiff must prove on a balance of probabilities that the delay caused or contributed to the unfavourable outcome. In other words, if, on a balance of probabilities, the plaintiff fails to prove that the unfavourable outcome would have been avoided with prompt diagnosis and treatment, then the plaintiff's claim must fail. It is not sufficient to prove that adequate diagnosis and treatment would have afforded a chance of avoiding the unfavourable outcome **unless that chance surpasses the threshold of "more likely than not"**. [per Justice Sharpe, emphasis added].”

The Court of Appeal distinguished the S.C.C. decision of *Athey*. In *Athey*, the evidence established that “but for” the defendants' negligence, the plaintiff would not have suffered a herniated disc, although other problems contributed to the injury. There was no need in that case to determine lost chances as there was direct causation:

“[26] In *Athey*, the plaintiff proved on a balance of probabilities that the defendants' negligence caused the loss. The defendants sought to escape liability by pointing to other more significant causes for which they were not responsible. It was in that context that *Athey* held that if the defendant's negligence materially contributed to the occurrence of the injury, the defendant could not escape liability by pointing to other causes. However, *Athey* does not excuse the plaintiff from proving on a balance of probabilities that but for the defendant's negligence, the plaintiff would not have suffered the loss.

[27] . . . Writing for a unanimous court, Major J. identified the issue on the appeal, at para. 1, as being "whether the loss should be apportioned between tortious and non-tortious causes where both were necessary to create the injury". In *Athey*, the evidence clearly established that but for the defendants' negligence, the plaintiff would not have suffered a herniated disc. The issue was instead whether the defendants could escape liability because the plaintiff's back problems were also caused by his pre-existing condition. Major J. held that the answer to that question was "no", so long as the negligence of the defendants materially contributed to the loss.”

Thus, in cases where there is no uncertainty over why the injury occurred, and the defendant is in no better position to say why that injury occurred, it is not sufficient to show that the plaintiff might have had a chance if not for the negligence of the defendant. The plaintiff must show that there would have been a better than not chance of survival but for the defendant's negligence:

“[33] The "robust and pragmatic" approach to proof of causation utilized in *Snell v.*

Farrell does not assist the respondent. In the case at bar, there is no uncertainty over why Darlene Cottrelle suffered the amputation of her leg and this is not a case where the appellant is in a better position to say what happened. Here, the issue is not whether the appellant created a situation that might have caused the respondent's loss. Instead, the issue is whether the appellant could have prevented the loss of the respondent's leg in any event. In this case, the experts agree that it is more likely than not that even if the appellant had met the appropriate standard of care, the respondent still would have lost her leg

...

[36] In my view, the respondent established no more than the loss of a less than 50 per cent chance of salvaging her leg had the appellant not been negligent. Unfortunately for the respondent, under the current state of the law, loss of a chance is non-compensable in medical malpractice cases: see *Laferrrière v. Lawson*, [1991] 1 S.C.R. 541, 6 C.C.L.T. (2d) 119; *St-Jean v. Mercier*, [2002] 1 S.C.R. 491, 2002 SCC 15; *Hotson v. East Berkshire Area Health Authority*, [1987] A.C. 750, [1987] 2 All E.R. 909 (H.L.).

[37] The exclusion of recovery for the loss of a chance in medical malpractice cases has been criticized as being unduly rigid and harsh: see, Klar, *supra*, at pp. 403-05; John G. Fleming, "Probabilistic Causation in Tort Law" (1989) 68 Can. Bar Rev. 661; S.M. Waddams, "The Valuation of Chances" (1988) 30 Can. Bus. L.J. 30; S.M. Waddams, *The Law of Damages*, looseleaf (Toronto: Canada Law Book, 2002) at 13.260-13.370; Salvatore Mirandola, "Lost Chances, Cause-in-Fact and Rationality in Medical Negligence" (1992) 50 U. T. Fac. L. Rev. 258. Recovery based upon the loss of a chance would require substantial reduction of the damages to reflect the value of the less than 50 per cent chance that was lost. In any event, the authorities cited in para. 36 preclude us from considering such an award."

The Ontario Court of Appeal relied upon *Cottrelle* in its later decision of *Armstrong v. Centenary Health Centre*, [2005] O.J. No. 2386 (Ont. C.A.). In this case, a woman's doctor allegedly missed an early diagnosis of ovarian cancer. By the time it was detected, the cancer had progressed incurably. The Court of Appeal sent the matter back to trial once the Appeal Court determined that the trial judge had not addressed the vital issue of causation in keeping with the *Cottrelle* doctrine:

"[93] I agree that the issue the trial judge was required to determine was whether it was more likely than not that Mrs. Armstrong would have survived for more than five years if the appellants had detected her cancer. There was no issue at trial that the medical standard for a cancer cure is survival for five years. Moreover, the causation issue in this case is governed by *Cottrelle et. al. v. Gerrard* 2003 CanLII 50091 (ON C.A.), (2003), 67 O.R. (3d) 737 (C.A.), leave to appeal to S.C.C. refused,

[2003] S.C.C.A. No. 549, in which this court confirmed at para. 25 that “it is not sufficient to prove that adequate diagnosis and treatment would have afforded a chance of avoiding the unfavourable outcome unless that chance surpasses the threshold of ‘more likely than not.’

The Federal Court of has followed *Cottrelle*, in *Levasseur v. Canada*, [2004] F.C.J. No. 1197; 2004 FC 976:

“[73] In order to establish such a causal link in an action arising out of an alleged delay in medical treatment, a plaintiff must establish on a balance of probabilities that the delay caused or contributed to the unfavourable outcome. If, on a balance of probabilities, the plaintiff fails to prove that the unfavourable outcome would have been avoided with prompt diagnosis and treatment, then the claim must fail: *Cottrelle et al. v. Gerrard*, 67 O.R. (3d) 737 (Ont. C.A.).

[74] It is not enough for a plaintiff to demonstrate that adequate diagnosis and treatment would have afforded him a chance of avoiding the unfavourable outcome, unless that chance surpasses the threshold of "more likely than not": *Cottrelle*, supra.”

Cotrelle continues to be followed and applied in Ontario and elsewhere in Canada.

The Supreme Court of Canada has recently addressed the law governing causation in *Resurfice Corp. v. Hank*, [2007] S.C.J. No. 7; 2007 SCC 7; (2007), 278 D.L.R. (4th) 643. In this case Hanke was badly burned when hot water overfilled the gasoline tank of the machine, releasing vapourized gasoline which was then ignited by an overhead heater. An explosion and fire resulted. Hanke sued Resurfice Corp. and LeClair Equipment Ltd., the manufacturer and distributor of the machine, alleging that the gasoline and water tanks were similar in appearance and placed too close together, making it easy to confuse the two.

The action was dismissed on the basis that causation had not been established. The Court of Appeal ordered a new trial, but this was overturned by the Supreme Court of Canada, which restored the trial judgment.

Here are the key passages:

"20 Much judicial and academic ink has been spilled over the proper test for causation in cases of negligence. It is neither necessary nor helpful to catalogue the various debates. It suffices at this juncture to simply assert the general principles that emerge from the cases.

21 First, the basic test for determining causation remains the "but for" test. This applies to multi-cause injuries. The plaintiff bears the burden of showing that "but for" the negligent act or omission of each defendant, the injury would not have occurred. Having done this, contributory negligence may be apportioned, as permitted by statute.

22 This fundamental rule has never been displaced and remains the primary test for causation in negligence actions. As stated in *Athey v. Leonati*, at para. 14, *per* Major J., "[t]he general, but not conclusive, test for causation is the 'but for' test, which requires the plaintiff to show that the injury would not have occurred but for the negligence of the defendant." Similarly, as I noted in *Blackwater v. Plint*, at para. 78, "[t]he rules of causation consider generally whether 'but for' the defendant's acts, the plaintiff's damages would have been incurred on a balance of probabilities."

23 The "but for" test recognizes that compensation for negligent conduct should only be made "where a substantial connection between the injury and defendant's conduct" is present. It ensures that a defendant will not be held liable for the plaintiff's injuries where they "may very well be due to factors unconnected to the defendant and not the fault of anyone": *Snell v. Farrell*, at p. 327, *per* Sopinka J.

24 However, in special circumstances, the law has recognized exceptions to the basic "but for" test, and applied a "material contribution" test. Broadly speaking, the cases in which the "material contribution" test is properly applied involve two requirements.

25 First, it must be impossible for the plaintiff to prove that the defendant's negligence caused the plaintiff's injury using the "but for" test. The impossibility must be due to factors that are outside of the plaintiff's control; for example, current limits of scientific knowledge. Second, it must be clear that the defendant breached a duty of care owed to the plaintiff, thereby exposing the plaintiff to an unreasonable risk of injury, and the plaintiff must have suffered that form of injury. In other words, the plaintiff's injury must fall within the ambit of the risk created by the defendant's breach. In those exceptional cases where these two requirements are satisfied, liability may be imposed, even though the "but for" test is not satisfied, because it would offend basic notions of fairness and justice to deny liability by applying a "but for" approach.

26 These two requirements are helpful in defining the situations in which an exception to the "but for" approach ought to be permitted. Without dealing exhaustively with the jurisprudence, a few examples may assist in demonstrating the twin principles just asserted.

27 One situation requiring an exception to the "but for" test is the situation where it is impossible to say which of two tortious sources caused the injury, as where two shots are carelessly fired at the victim, but it is impossible to say which shot injured him: *Cook v. Lewis*, [1951] S.C.R. 830. Provided that it is established that each of the defendants carelessly or negligently created an unreasonable risk of that type of injury that the plaintiff in fact suffered (i.e. carelessly or negligently fired a shot that could have caused the injury), a material contribution test may be appropriately applied.

28 A second situation requiring an exception to the "but for" test may be where it is impossible to prove what a particular person in the causal chain would have done had the defendant not committed a negligent act or omission, thus breaking the "but for" chain of causation. For example, although there was no need to rely on the "material contribution" test in *Walker Estate v. York Finch Hospital*, this Court indicated that it could be used where it was impossible to prove that the donor whose tainted blood infected the plaintiff would not have given blood if the defendant had properly warned him against donating blood. Once again, the impossibility of establishing causation and the element of injury-related risk created by the defendant are central."

Conclusion

While every element in a negligence claim must be addressed and proven, causation remains perhaps the most critical. In situations where sympathies may lie with the other party, causation can often be the fatal flaw. It is important to assess causation at the outset, particularly when experts are involved. From the beginning the restated law of causation should be explained to the experts and they should be thinking of the results in terms of 51% or bust.

ENDNOTES

¹ With thanks to Bill Wagner for his initial research on this paper.

² at para. 26

³ at para. 29

⁴ at para. 33

⁵ at paras. 13 - 19

⁶ at para. 120

⁷ per Gonthier, J.

⁸ at para. 161 [per Justice Gonthier at page p. 608]

⁹ at para. 5

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