

Causation in Medical Negligence Actions: Understanding and Using the Law

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INTRODUCTION: THE SPECIAL PROBLEM OF CAUSATION

Fault, causation and damages are the three keystones in any action based in negligence. In medical negligence cases, the standard of practice may be a significant issue in an action, but is not always a safe harbour for the defendant since standards are often written down or well understood: the defendant makes a “slow guilty plea” in the face of objective standards of practice. Damages are subject to the usual attack and often do not form the focus of the defendant’s strategy. The real issue and the one that is most amenable to expert opinion is causation. Consequently, plaintiffs can expect to be met with a plethora of creative causation defences.

In non-medical negligence actions, the causes of the plaintiff’s injury are usually well known. *Athey v Leonati*¹ has clarified the law of multiple cause in most cases. In the medical negligence action, there are two distinct types of case: those where the problem did not exist before the plaintiff was treated [the defendant was the cause of the harm- the wrong leg is amputated for example], and those where the harm or problem could have been prevented or improved upon by appropriate intervention by the defendant [failure to diagnose and treat is the classic example]. It is this latter category of loss that creates the most difficulty. The defendant, quite rightly, can point to the disease and claim he or she did not inflict it on the plaintiff. The trajectory of the illness with negligence is known, but without is often only a matter of expert opinion. Timing of the intervention, types of intervention, the plaintiff’s poor ability to give a history and other variables will be thrown up to dissuade the court from finding that the health professional could have effectively intervened.

This is well-recognized by the defence. Thomas Curry wrote:²

Causation in claims alleging medical malpractice is unique in the challenge represented to counsel. For this reason, experienced counsel dealing with a medical negligence claim consider [sic] causation to be one of the most important issues in the case. Many adverse results in

¹ (1996), 140 D.L.R. (4th) 235 (S.C.C.)

² Causation: what does it mean? In *Managing a Medical Malpractice Claim*, May 15 2002, program materials produced by Osgood Hall Law School. Mr. Curry is a representative of health professionals.

medicine are not compensable in law because the breach of the standard of care did not cause the poor outcome.

As can be seen from the cases which follow, aggressive defences have been mounted on causation, making the most of lack of scientific certainty or the inability to know with precision what caused the plaintiff's "poor outcome"³.

FACTUAL CAUSE AND LEGAL CAUSE

- Factual Causation

Factual Causation "deals with the need to establish a causal connection or link between events of legal significance, namely the wrong in question and any detrimental effect on the plaintiff alleged to be the result of that wrong."⁴ It is inexorably tied to damages, requiring the plaintiff to demonstrate not only the injury but the damages were caused by the defendant's wrongful conduct.

Factual cause must be proven on a balance of probabilities. It is usually established by the "but for" test, which is the demonstration that the defendant's wrongful act was a necessary cause of the plaintiff's harm. Where there are multiple causes, or the "but for" test is otherwise inadequate to the task of proving causation, the *Athey* articulation of the test is used. The plaintiff must demonstrate that the harm would not have been caused if the defendant had not acted wrongfully. In the medical context, this means that the standard of care must be well-understood and proven to permit the plaintiff to recover.⁵

There is much debate, primarily as a result of two decisions of the Ontario Court of Appeal,⁶ about the difference between legal and factual cause, and how a trial judge is to handle the order in which issues of negligence, causation and damages are decided. Traditionally, the plaintiff must demonstrate first that the defendant was negligent, that he or she suffered damage and finally that the negligence of the defendant caused the damage. It seems that in Ontario, in medical negligence actions at least, one must demonstrate first what was the cause of the plaintiff's harm – cause in fact – and when that is known only then is there an enquiry into the defendant's negligence. This approach has been

³ I place this in quotes to point out that this is defence talk. Plaintiff's counsel should never fall into the trap of using the language of the defendant. The outcome is not poor, as a result of misadventure or the like. Stronger terms conjuring injury and negligence must be used.

⁴ Cooper-Stephenson, Personal Injury Damages in Canada 1996 Thomson Canada at p. 747

⁵ See generally Klar, Tort Law, 3d Ed., 2003 Chapter 11: Causal Connection. Thomson Carswell

⁶ *Meringolo (Committee of) v. Oshawa General Hospital* [1991] OJ NO 91 (Ont. CA) and *Grass [Litigation Guardian of] v Women's College Hospital* (2001) 144 OAC 298, 200 D.L.R (4th) 242, 5 CCLT (3d) 180 (CA) leave to appeal to SCC refused without reasons [2001] S.C.C.A. No. 372 [2001] 293 NR 194

rejected in at least one other province⁷, after a leave to appeal application to the Supreme Court of Canada was dismissed, thus leaving the issue ripe for the Supreme Court to determine.

The principle was established to the benefit of the plaintiff in the *Grass* action. In a birth trauma case, the trial judge decided the doctor did meet the standard of care so there was no need to enquire into causation or damages. The Court of Appeal disagreed. The Court held that a trial judge should consider causation prior to determining negligence. The resolution of the causation question may have led to different findings of fact about what transpired and to a different conclusion with respect to negligence. The action was sent back for a new trial.

Consequently, the plaintiff will, in Ontario, have to demonstrate what as a matter of fact caused the plaintiff's harm, and then demonstrate that the defendant's actions were negligent and causative. This principle has been watered down by the Court of Appeal in subsequent actions.⁸ In *Liuni v Peters* the trial judge did not make a finding of what caused the cerebral palsy of the infant plaintiff, but was able to find that the doctor met the standard of care. The plaintiffs appealed. The Court of Appeal held that

while it was preferable for a trial judge to determine causation explicitly in a medical malpractice action, there is not absolute rule or prescription to that effect. Whether failure to determine causation will constitute legal error will depend on the facts of each case⁹.

Both *Meringolo* and *Grass* were distinguished on the basis that there were contested issues of causation in both cases, whereas in *Liuni*, the factual cause of the plaintiff's injury was accepted. The only real issue was the timing of the defendant's intervention and standard of care. The timing issue bore only on standard of care, and not causation. While medically the Court of Appeal's view of the matter is somewhat doubtful, the principle is instructive.

- Legal Causation

Legal causation is the enquiry into proximity, remoteness and extent of liability. While factual causation is merely a dispassionate enquiry into what caused the

⁷ It was described as putting the cart before the horse in *McArdle Estate v Cox* (2003) ABCA 106 [AltaCA], but followed in *Jenkins v Knickle* [2003] PEIJ 65

⁸ In another decision of the Court of Appeal, the trial judge's failure to do so did not result in the decision being overturned, because there was apparently no evidence led that the doctor was negligent. Consequently, it may be difficult to argue that the only way a particular harm could have occurred was negligence, in the absence a finding of what caused the loss. See *Locke v. Smith* [2002] O.J. No. 2173

⁹ At paragraph 13

plaintiff's condition, legal cause is the enquiry where issues of policy and limitation on a defendant's liability for the harm are dealt with.¹⁰

The classic statement of causation is from Mr. Justice Sopinka in *Snell v Farrell*¹¹:

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.

MULTIPLE TORTFEASORS, MULTIPLE CAUSES AND PRE-EXISTING CONDITIONS

- The Limits to But-For: *Athey v Leonati*

In Personal Injury Damages in Canada, the author succinctly describes the causal inquiry as follows:

*And the inquiry does not involve apportionment or allocation between “wrongful” causes and “other” causes, because the “other” causes are merely the factual background for the relevant causal inquiry. The Defendant must have been a cause of “compensable loss”, and this only occurs if and insofar as the plaintiff’s condition is worse than it would have been had his or her “normal” life been lived, which is, for the purposes of this inquiry, the life as it would have been without wrongful events impinging on it. Not only does this understanding of loss provide a proper guide to cases involving thin skulls and deteriorating health, but it provides the clue to the essential distinction between the case of two “wrongful” sufficient causes, by contrast with the case where one event was not “wrongful” and would by itself have been sufficient to cause the plaintiff the detriment of which complaint is made. In most cases the causal inquiry is determinable by common sense and a relatively straightforward application of “but for” reasoning; but in others, particularly where sufficient causes overlap, it is extremely complex and must make reference to the legal definition of “loss” as indicated.*¹²

It follows, according to the author, that nothing would ever be described as causing something else in the absence of some alternative cause; the enquiry can go to ridiculous lengths, hence the sensible maxim that the defendant takes the plaintiff as he finds him.

¹⁰ See various texts on Tort Law for eg Fleming on the Law of Torts, Klar Tort Law, *supra* note 5. See also *John v Eaton Yale et al* –[2001] O.J. No. 2578, 54 OR (3d) 774 where the Court of Appeal held that although an employer's failure to supervise an employee's drinking on the job may be causative of a latter car crash, as a matter of legal cause, the employer's liability stopped at the business's gates.

¹¹ 1990, 72 DLR(4th) 289 at 298-99

¹² *supra* note 4 p 748-9

The “but for” test has been criticized for being too all-encompassing to be useful in many cases. Professor Klar illustrates it as follows:

For example, a two car collision occurs. There are thousands of causal factors which could be considered... As Williams, {Causation in the Law, [1961] Cambridge L.J. 62} at 64 asks: “What is the use of defining cause so widely that it goes back to the primeval slime?”

The now classic statement for dealing with multiple causes and tortfeasors is found in *Athey v Leonati*:

A. *General Principles*

¶ 13 *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, [1990] 2 S.C.R. 311; McGhee v. National Coal Board, [1972] 3 All E.R. 1008 (H.L.).*

¶ 14 *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: Horsley v. MacLaren, [1972] S.C.R. 441.*

¶ 15 *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: Myers v. Peel County Board of Education; [1981] 2 S.C.R. 21, Bonnington Castings, Ltd. v. Wardlaw, [1956] 1 All E.R. 615 (H.L.); McGhee v. National Coal Board, supra. A contributing factor is material if it falls outside the de minimis range: Bonnington Castings, Ltd. v. Wardlaw, supra; see also R. v. Pinsky (1988), 30 B.C.L.R. (2d) 114 (B.C.C.A.), aff'd [1989] 2 S.C.R. 979.*

¶ 16 *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; as Lord Salmon stated in Alphacell Ltd. v. Woodward, [1972] 2 All E.R. 475, at p. 490, 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.*

¶ 17 *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. To borrow an example from Professor Fleming (The Law of Torts (8th ed. 1992) at p. 193), a "fire ignited in a wastepaper basket is . . . caused not only by the dropping of a lighted match, but also by the presence of combustible material and oxygen, a failure of the cleaner to empty the basket and so forth". As long as a 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.*

....

¶ 19 *The law does not excuse a defendant from liability merely because other causal factors for which he is not responsible also helped produce the harm: Fleming, supra, at p. 200. It is sufficient if the defendant's negligence was a cause of the harm: School Division of Assiniboine South, No. 3 v. Greater Winnipeg Gas Co., [1971] 4 W.W.R. 746 (Man. C.A.), at p. 753, aff'd [1973] 6 W.W.R. 765 (S.C.C.), [1973] S.C.R. vi; Ken Cooper-Stephenson, Personal Injury Damages in Canada (2nd ed. 1996), at p. 748.*

¶ 20 *This position is entrenched in our law and there is no reason at present to depart from it. If the law permitted apportionment between tortious causes and non-tortious causes, a plaintiff could recover 100 percent of his or her loss only when the defendant's negligence was the sole cause of the injuries. Since most events are the result of a complex set of causes, there will frequently be non-tortious causes contributing to the injury. Defendants could frequently and easily identify non-tortious contributing causes, so plaintiffs would rarely receive full compensation even after proving that the defendant caused the injury. This would be contrary to established principles and the essential purpose of tort law, which is to restore the plaintiff to the position he or she would have enjoyed but for the negligence of the defendant.*

The Supreme Court articulated the principles and their application to the facts as follows:

The applicable principles can be summarized as follows. If the injuries sustained in the motor vehicle accidents caused or contributed to the disc herniation, then the defendants are fully liable for the damages flowing

from the herniation. The plaintiff must prove causation by meeting the "but for" or material contribution test. Future or hypothetical events can be factored into the calculation of damages according to degrees of probability, but causation of the injury must be determined to be proven or not proven. This has the following ramifications:

- 1. If the disc herniation would likely have occurred at the same time, without the injuries sustained in the accident, then causation is not proven.*
- 2. If it was necessary to have both the accidents and the pre-existing back condition for the herniation to occur, then causation is proven, since the herniation would not have occurred but for the accidents. Even if the accidents played a minor role, the defendant would be fully liable because the accidents were still a necessary contributing cause.*
- 3. If the accidents alone could have been a sufficient cause, and the pre-existing back condition alone could have been a sufficient cause, then it is unclear which was the cause-in-fact of the disc herniation. The trial judge must determine, on a balance of probabilities, whether the defendant's negligence materially contributed to the injury.*

The last-mentioned issue was the focus of attention in the recent decision of the Court of Appeal in *Cottrelle*.¹³ The Court of Appeal set out the issue as follows:

[1] Darlene Cottrelle, one of the respondents, suffered from diabetes for more than 30 years. In April 1993, at the age of 54, she developed a sore between the toes of her left foot. That sore eventually became infected and by mid-July, the appellant's leg was gangrenous and needed to be amputated below the knee. Examination of the amputated limb revealed severe atherosclerosis (obstruction of the arteries) that inhibited the respondent's ability to fight the infection.

[2] The trial judge found that the appellant, Dr. Alexander Gerrard, the respondent's family physician, was negligent in the treatment of the sore that became infected. The trial judge found that the appellant failed to examine the respondent's foot when she visited his office on July 2nd, and that he failed to ensure an appropriate follow-up procedure to monitor the condition of her foot thereafter.

[3] Both the appellant's and the respondent's expert witnesses testified that had Ms. Cottrelle received an aggressive form of treatment when the

¹³ *Cottrelle v Gerard* [2001] O.J. No. 5472, rev [2003] O.J. No. 4194, leave to appeal dismissed without reasons [2003] S.C.C.A. No. 549

condition of her foot deteriorated, she might not have suffered the loss of her leg. However, in light of the pre-existing medical condition of her leg, no witness was prepared to say that it was more likely than not that with proper treatment of the sore, the leg could have been saved. In the end, the trial judge found that Dr. Gerrard's negligence was a material cause of the loss of the leg and found him liable.

Justice Sharpe went on to say that the trial judge misdirected herself on the law of causation. At paragraph 23 of the decision, he states:

Simply put, there was no evidence that, on a balance of probabilities, but for the appellant's negligence, the respondent would not have lost her leg. Indeed, counsel for the respondent conceded in oral argument that there was no evidence suggesting that it was more likely than not that had the appellant lived up to the standard of care, the respondent's leg would have been saved. He submitted, however, that the evidence of a possibility, lower than a probability, that the respondent's leg might have been saved satisfied the test in *Athey*, and it seems likely that the trial judge proceeded on that same basis. I am unable to accept the correctness of that proposition.

[24] As explained in *Athey* at para. 13, causation is established when the plaintiff proves on a balance of probabilities, that the defendant caused or contributed to the injury. The generally applicable test is the "but for" test. This test "requires the plaintiff to show that the injury would not have occurred but for the negligence of the defendant" (*Athey*, at para.14).

[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."

This test, if correctly stated, skips over the fact that there are two potentially contributing causes to the plaintiff's current condition: one the injury which precedes the treatment, and the other the absence of timely and appropriate treatment. Deconstructing the facts in *Athey* principles in light of a medical negligence action we have this:

- There is a pre-existing condition that has a known outcome;

- The defendant can change the outcome by intervention.
- The timing of the intervention is often important
- Not all interventions will change the outcome in a material way

In most failure to diagnose and treat cases, the defendant will be able to demonstrate that the plaintiff's outcome was inevitable, if one ignores the opportunity to treat. As in *Cottrelle*, the plaintiff is sure to lose her leg if it goes untreated. What the plaintiff must prove is that there would have been an *effective or material* intervention.

The challenge then is for the Plaintiff to fit the case within the *Athey* principles by demonstrating that:

1. it is more likely than not that the defendant's conduct could change the outcome for the plaintiff
2. that change in outcome is material

The evidence in *Cottrelle* was not crystal clear. However it appears that the trial judge found that the defendant could have intervened, and that the intervention would have made a material difference to the plaintiff. The Court of Appeal did not consider it material and indeed found that it would have made no difference at all. This therefore is not a restatement of law, but a difference of opinion on the facts. This is borne out by this passage from the judgment in *Cottrelle*:

[31] In my view, the principle followed in this line of cases does not assist the respondent. In the case at bar, there is no practical uncertainty as to the impact of the appellant's wrongful conduct upon the plight of the respondent. It was clearly established that the respondent lost her leg because of an infection. The question was whether the appellant could have prevented an outcome that was unquestionably caused by the infection and the respondent's pre-existing vascular condition. The evidence demonstrated that it is more likely than not that even if the appellant had lived up to the standard of care, the respondent would have lost her leg.

In that respect, *Cottrelle* does not represent an change in the law as expressed in *Athey*, and in my view ,the trial judge did not get the law wrong. Rather, the Court of Appeal did not agree with her assessment of materiality¹⁴. The testimony was that there was an opportunity to intervene, a "window of opportunity" not taken by the defendant doctor. However, due to the overall condition of the plaintiff and the inferior vascularization of her leg, it was likely that she was going

¹⁴ in concluding the discussion on causation, Justice Sharpe stated that the trial judge either erred in law in her appreciation of the appropriate legal test for causation, or she made a palpable and overriding error in her appreciation of the evidence

to lose her leg in any event. Consequently, although on a balance of probabilities the doctor could have changed the plaintiff's outcome, it was not a material change and hence not a material contribution.

- **Divisible and indivisible Harm/ Divisible and indivisible Cause**

Important to the discussion is the concept of indivisible harm and indivisible cause. In a recent case involving sexual abuse of persons who had pre-existing conditions, and/or were subjected to abuse by multiple tortfeasors, the Court had to determine how to divide up responsibility for damages when not all tortfeasors were before the court. *Athey* principles assisted the plaintiffs where non-tortious causes mixed with tortious causes to create the outcome. Where the outcome suffered by the plaintiff could not be teased out according to cause, the tortfeasor paid 100% of the plaintiff's damages.

The traditional "but for" test of causation has reached the limits of its ability to deal with an increasingly complex and subtle world, in particular in the area of personal injury and medical negligence. The response by the law is to supplement this test with a material contribution test, shifting burdens of proof, and the concept of divisible/indivisible harm. It occurs in Canada, the UK and Australia with differing approaches. In the UK, the House of Lords released a decision that may have far-reaching implications in complicated or multiple-defendant actions: *Fairchild v Glenhaven*¹⁵. The Canadian approach is somewhat more flexible with a focus on damage, not tortfeasor, but leading to a similar result. The Supreme Court of Canada has adopted, since *Athey v Leonati*¹⁶, a material contribution test which included the concept of indivisible damage, while *Fairchild* focuses on one type of damage being caused by potentially a number of tortfeasors. Either way, the law of causation is racing to catch up with modern life and science under the rubric of *material cause or contribution*.

I compare the House of Lord's approach in *Fairchild*¹⁷ to a recent decision of the S.C.C. in *E.D.G.*¹⁸: it appears that the courts have taken two different approaches to achieve similar ends. Where there are multiple actors all of whom did bad things, the court either finds them all liable without finding a causal link [the *Fairchild* route], or finds the harm done is indivisible [the *E.D.G./Athey* route]. A negligent act that is associated with a risk which materializes will increasingly be associated with a finding of liability for damages. In Canada, it is predicted that the defendant will have to demonstrate that the damages are divisible and several, in order to escape liability. The *E.D.G./Athey* route will prove a more flexible tool for multiple cause cases, than the more restrictively- applied *Fairchild*

¹⁵ infra note 17

¹⁶ [1996] 3SCR 458

¹⁷ *Fairchild v Glenhaven Funeral Service*, [2002] 3WLR 89, [2002] 3 All ER 305

¹⁸ [2003] SCC 52

method which is better suited to single cause, multiple actor situations in any event.

Recall the factual background of each of these cases, and the *Walker v York Finch Hospital* case:

Athey v Leonati

The plaintiff had a pre-existing back problems. He was involved in a motor vehicle collision. While recuperating from that collision, he was in a second collision. He suffered a herniated disc while starting a program of exercise on his doctor's recommendation, and required surgery. The trial judge awarded 25% of the damages to the plaintiff finding that the accidents had some causal role. The S.C.C. held that the plaintiff had proven that the collisions were a material contribution to his condition and therefore he was entitled to 100% of his damages.

Fairchild v. Glenhaven Funeral Services et al

The plaintiffs were all exposed to asbestos and contracted a form of cancer, mesothelioma. They had multiple employers over the exposure period. Given the state of science at the time of trial, they could prove that the exposure caused the cancer. They could not prove which employer was responsible, since the effective was not cumulative, but more akin to a switch being thrown and the disease triggered. The House of Lords found all employers liable.

***Walker Estate v. York Finch General Hospital*¹⁹**

In *Walker*, tainted blood was transfused into the plaintiff and he died of AIDS. It was found as a matter of fact that the Red Cross was negligent in its screening of donors, but had it acted without negligence it was found at trial that the donor would have donated in any event and the tainted blood provided to the plaintiff. The trial judge found no causation. The SCC found that the Red Cross materially contributed to the AIDS transmission.

E.D.G. v. Hammer

In *E.D.G. v. Hammer*, a child was sexually assaulted by a school janitor for years. After the defendant was transferred away, seven other men similarly assaulted the child. The trial court found that 90% of the damages occasioned by the child were indivisible – and the janitor who was sued was liable for all of them.

¹⁹ [2001] 1 S.C.R. 647

In Canada the material cause or contribution test is used broadly and not within a strictly-defined set of circumstances. In a recent article, Professor Vaughn Black persuasively states:

“It is not an unfair description of Canadian law post-*Walker* to say that whenever causation on the but-for standard is seriously disputed and is at all complex or cloudy, a court may resort to the material contribution test.”²⁰

The Court’s commentary is in fact much more direct²¹:

With respect to negligent donor screening, the plaintiffs must establish the duty of care and the standard of care owed to them by the CRCS. The plaintiffs must also prove that the CRCS caused their injuries. The unique difficulties in proving causation make this area of negligence atypical. **The general test for causation in cases where a single cause can be attributed to a harm is the "but-for" test. However, the but-for test is unworkable in some situations, particularly where multiple independent causes may bring about a single harm.**

It would be rare to have an uncomplicated causation issue in a medical negligence action. Except for the rare case where the wrong body part is removed or operated on, causation is likely to be the focus of much attention in virtually every serious medical negligence action.

The *Fairchild* test of material contribution is more restrictively applied. Generally, it appears to be applicable when the limits of scientific knowledge would *inevitably thwart* the plaintiff’s ability to prove causation. It is a subsidiary to the standard which remains the “but- for” test.

Not so in Canada: it stands as an equal partner to the but-for test. Professor Black describes the material cause or contribution test this way: it “is no mere surrogate to be resorted to *faut de mieux* when the but-for test is, due to the limits of knowledge impossible ever to satisfy. Rather, it stands on its own feet as an independently justified causal standard.”²²

A recent decision of the Supreme Court confirms this view. In *E.D.G. v. Hammer*²³.

²⁰ Black, V. The Transformation of Causation in the Supreme Court: Dilution and “Policyization”, 187 at p. 204

²¹ supra note <> at para 87

²² supra note <> at page 206

²³ supra note <>

Vickers J. held Mr. Hammer liable for the sum total of these damages, stating that "[a]s long as he [Mr. Hammer] is a part of the cause of the injury, even though his acts alone did not create the entire injury, his responsibility for the [entire] damage that flows from the injury is established" (paras. 57). As an authority for this proposition, Vickers J. cited Major J.'s claim in *Athey, supra*, at paras. 17, that "[a]s long as a 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" (emphasis in original).

¶ 30 In the Board's submission, Vickers J. was incorrect in applying this principle to the case at bar. The principle applies, the Board claims, only where the other cause is non-tortious and is a precondition of the injury, not where it is tortious and occurs subsequently.

¶ 31 In my view, the Board's reading of the principle articulated in *Athey* is overly narrow. After making the claim cited above, Major J. further expanded upon his reasoning, stating at paras. 19 that:

The law does not excuse a defendant from liability merely because other causal factors for which he is not responsible also helped produce the harm ... It is sufficient if the defendant's negligence was a cause of the harm... [First emphasis added; second emphasis in original.]

This principle is not confined to cases involving non-tortious preconditions. It applies to any case in which the injuries caused by a number of factors are indivisible.

Consequently, if the tortfeasor before the court materially contributed to the harm, which it held to be indivisible, then that tortfeasor was liable for all [or in this case, 90%] of the plaintiff's damages.

Is it indivisible damage? Each act of sexual abuse could be analogized to a flake of asbestos dust, each with the capacity, standing alone, to cause the harm complained of by the plaintiff. How could it be said that, once she suffered harm at the hands of the first defendant, did anyone add to that harm? The case is a good one to analyze opposite *Fairchild*, since the dilemma is really the same. Each wrongful act by each separate perpetrator had the capacity to cause the harm experienced. Where is the proof that any one of them *added* to the harm that could have been sufficiently caused by any of them?

The concept of indivisible harm appears to lie at the heart of the *Fairchild* decision. In a lengthy examination of the case and its antecedents, Professor Jane Stapleton makes a number of observations about its role:

The evidentiary gap in Fairchild existed because the mechanism by which asbestos fibre precipitates mesothelioma is unknown. Three matters are clear. First, there is no other known agent that causes mesothelioma: it is a 'single type of agent' injury. Secondly, each inhaled fibre of asbestos increases the risk of the disease. Thirdly, once contracted the progress of the disease isn't affected by the concentration of past or future exposure to asbestos. But it is not known whether the disease is triggered when the accumulation of fibres in the lungs reaches a critical concentration, whether it is caused by one fibre alone or by some other mechanism. This means that **there is as yet no means of telling whether the mesothelioma of a person subjected to a sequence of asbestos exposures was due to all exposures, only some or one, let alone which one.** Importantly, there is no direct basis for saying that longer, more intense exposures are more likely to have been the cause of a case of mesothelioma than much shorter exposures, nor is there any basis for saying that earlier exposures are more likely to have been the cause than later exposures.²⁴

Professor Stapleton goes on to describe the traditional approach which ought to be uncontroversial. Where injuries are indivisible, the defendant is liable for all, or the total state, of the plaintiff's damages. Where they are divisible, the defendant is liable for only that which he caused.²⁵ In *Fairchild*, it became controversial and problematic because "no one could tell if the tortious conduct of the defendant, let alone any other exposures to asbestos, materially contributed to the claimant's total state at trial."²⁶ Once the disease was triggered, it would not vary in severity according to the victim's exposure history.

I wonder, as I read the cases noted above, if the characterization of damages as indivisible as in the E.D.G. case is just another way of doing what the court did in *Fairchild*, although in the latter rather more directly and openly. In E.D.G. there were 8 tortfeasors. Who can say which if any or all added to the harm suffered? If we leap to the conclusion that each assault must have caused some damage, that does not get us around potential *de minimis* arguments. Certainly, any assault is worthy of censure, but in the allocation of damages and assessment of harm, how can it be said with any certainty that a particular defendant's actions added to the plaintiff's total state at trial? In *Fairchild*, what is impossible is dividing out causes of the harm, which is one-dimensional. In *Fairchild*, it was really only the cause that was indivisible on the evidence, not the harm.

²⁴ infra note 29 at p 280-81

²⁵ ibid p. 282

²⁶ ibid p. 285

Where the aetiology of a victim's condition is unknown this will raise the possibility that the claimant can leap the evidentiary gap using the McGhee/Fairchild "material contribution to risk" principle.²⁷

If the distinction I draw between *E.D.G.* [indivisible damage] and *Fairchild* [indivisible cause] is a correct one, then there is room in Canadian law for at the very least the consideration of a *Fairchild/McGhee* formulation of causation and liability.

INCREASING THE RISK OF HARM

The decision in *Fairchild*, stands for this proposition:

"...a defendant whose tortious conduct had made a material contribution **to the risk** of the indivisible injury from which the claimant suffers should be held liable for that entire injury, whether or not there were any other tortfeasors who similarly contributed to the risk."²⁸

The *ratio* in *Fairchild* is described by Stapleton as follows:

This approach, hereafter the "McGhee/Fairchild principle" states that in certain circumstances the claimant need not prove on the balance of probabilities that the defendant's tortious conduct caused or materially contributed to the claimant's injury but that the claimant can jump the evidentiary gap concerning cause-in-fact merely by **proof on the balance of probabilities that the defendant materially contributed to the risk of the injury the claimant suffered.**²⁹

This is not a new issue. In *Haag v. Marshall*³⁰, decided before *Snell v Farrell*,³¹ but referred to by Supreme Court of Canada in its reasons in *Snell* as properly dealing with inferences of cause, liability was imposed where the

²⁷ *ibid* p. 304

²⁸ *ibid* p. 286

²⁹ Stapleton, J., Lord's A'leaping Evidentiary Gaps, in Tort Law Journal, [2002] volume 10, part 3 p. 276

³⁰ (1989), 61 D.L.R. (4th) 371, (B.C.C.A.) at p. 213 per Lambert J.A.

³¹ *Snell v Farrell* [1990] SCR 311 at para 24 and 25: Decisions in Canada after Wilsher accept its interpretation of McGhee. In the circumstances in which McGhee had been previously interpreted to support a reversal of the burden of proof, an inference was now permissible to find causation, notwithstanding that causation was not proved by positive evidence: see *Rendall v. Ewert* (1989), 38 B.C.L.R. (2d) 1 (C.A.); *Kitchen v. McMullen* (1989), 100 N.B.R. (2d) 91 (C.A.); *Westco Storage Ltd. v. Inter-City Gas Utilities Ltd.*, [1989] 4 W.W.R. 289 (Man. C.A.); and *Haag v. Marshall*, [1990] 1 W.W.R. 361 (B.C.C.A.).

risk of harm was within the realm of the defendant's duty of care and the risk was realized:

Where a breach of duty has occurred, and damage is shown to have arisen within the area of risk which brought the duty into being, and where the breach of duty materially increased the risk that damage of that type would occur, and where it is impossible, in a practical sense, for either party to lead evidence which would establish either that the breach of duty caused the loss or that it did not, then it is permissible to infer, as a matter of legal, though not necessarily logical, inference, **that the material increase in risk arising from the breach of duty constituted a material contributing cause of the loss and as such a foundation for a finding of liability.**

In *Snell*, the court was concerned about the inability of a plaintiff to prove its case on causation and deserving malpractice cases being dismissed on that basis:

The question that this Court must decide is whether the traditional approach to causation is no longer satisfactory in that plaintiffs in malpractice cases are being deprived of compensation because they cannot prove causation where it in fact exists.³²

The Court examined the state of affairs in Europe, England and the US, ostensibly rejecting an outright reversal of the burden of proof in medical negligence cases. This may lead to a crisis of insurability as was apparently the case in the US. Rather, it favoured a pragmatic approach to the level or amount of evidence that would put the defendant to an explanation for the outcome which ensued. This was described as raising an inference of causation that the defendant would have to dispel. It was not a new burden on the defendant, but merely a tactical burden that did not warrant a new name:

32 These references speak of the shifting of the secondary or evidential burden of proof or the burden of adducing evidence. I find it preferable to explain the process without using the term secondary or evidential burden. It is not strictly accurate to speak of the burden shifting to the defendant when what is meant is that evidence adduced by the plaintiff may result in an inference being drawn adverse to the defendant. Whether an inference is or is not drawn is a matter of weighing evidence. The defendant runs the risk of an adverse inference in the absence of evidence to the contrary. This is sometimes referred to as imposing on the defendant a provisional or tactical burden. See Cross, *op. cit.*, at p. 129. In my opinion, this is not a true burden of proof, and use of

³² *Snell* note 12 at para 25.

an additional label to describe what is an ordinary step in the fact-finding process is unwarranted.

¶ 33 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" (p. 569).

¶ 34 It is not therefore essential that the medical experts provide a firm opinion supporting the plaintiff's theory of causation. Medical experts ordinarily determine causation in terms of certainties whereas a lesser standard is demanded by the law. As pointed out in *Louisell, Medical Malpractice*, vol. 3, the phrase "in your opinion with a reasonable degree of medical certainty," which is the standard form of question to a medical expert, is often misunderstood. The author explains, at p. 25-57, that:

Many doctors do not understand the phrase ... as they usually deal in "certainties" that are 100% sure, whereas "reasonable" certainties which the law requires need only be more probably so, i.e., 51%.

¶ 35 In *Harvey, Medical Malpractice* (1973), the learned author states at p. 169:

Some courts have assumed an unrealistic posture in requiring that the medical expert state conclusively that a certain act caused a given result. Medical testimony does not lend itself to precise conclusions because medicine is not an exact science.

Accordingly, while stopping short of establishing a reverse onus where the plaintiff cannot definitively prove causation, the Court found the raising of an inference left the defendant with the task of responding to that inference, or failing to do so at his peril. The response would of course be to disprove causation.

Fairchild and *Walker* appear to establish that causation will be made out if the defendant increased the risk of harm by his negligent conduct. In *Walker*, the Court starts with a bold statement of the issue, but in the end, in my view, takes the safer route of finding different facts from those of the trial judge or the Court of Appeal and reaches a just result.

The Court stated the causation issue before it as follows:

¶ 61 Did the Court of Appeal err in finding that the necessary causal link in the Walker appeal **was presumptively established once it was shown that the CRCS had failed in its duty to implement adequate donor screening** measures at the time of Robert M.'s donation and that it **was not open to the CRCS to dislodge that presumptive causal link?**

...

88 In cases of negligent donor screening, it may be difficult or impossible to prove hypothetically what the donor would have done had he or she been properly screened by the CRCS. The added element of donor conduct in these cases means that the but-for test could operate unfairly, highlighting the possibility of leaving legitimate plaintiffs uncompensated. Thus, the question in cases of negligent donor screening should not be whether the CRCS's conduct was a necessary condition for the plaintiffs' injuries using the "but-for" test, but whether that conduct was a sufficient condition. The proper test for causation in cases of negligent donor screening is whether the defendant's negligence "materially contributed" to the occurrence of the injury. In the present case, it is clear that it did. "A contributing factor is material if it falls outside the de minimis range" (see *Athey v. Leonati*, [1996] 3 S.C.R. 458, at para. 15). As such, the plaintiff retains the burden of proving that the failure of the CRCS to screen donors with tainted blood materially contributed to Walker contracting HIV from the tainted blood.

It appears that the Court is confirming what it said earlier in *Athey*: if the negligent act is a sufficient cause of the harm, albeit there is another cause of harm that may also be sufficient, then the contribution is material and the case for damages is made out.

But the vexing question is this: shouldn't the finding that the CRCS proved that the donor would still have donated and the blood still used, even if CRCS had achieved the standard of care end the matter? A careful reading of the Court's reasons in my view leads to the conclusion that they were of the view that the trial judge used the wrong standard and that had he applied the correct standard, it would have been found as a matter of fact that the tainted blood would not have been donated. In that regard, I find myself in disagreement with those who argue that this case stands for the proposition that a defendant will be found liable in the face of disproof of causation.³³

³³ See Black supra note 20

The SCC concluded the appeal by restating Sopinka J's statement on the law of causation and clarifying the factual muddle:

100 Although the trial judge rejected Robert M.'s evidence and found that he tried his best to avoid acknowledging that he received, and read, the CRCS May 1984 pamphlet available in the Montreal clinic, that was the wrong question for the trial [page686] judge to ask. **The proper question is whether Robert M. would have been excluded had he been shown the ARC 1983 pamphlet, which meets the appropriate standard of care.** It is worth noting that there is no suggestion of malicious conduct on the part of Robert M. such that he was incapable of being screened as a blood donor.

So, although other commentators suggest that *Walker* would find liability in the face of proof of no causation, in my view it falls short of that. In Canada, we have not yet achieved the direct response to causation that has been done in the UK with *Fairchild*.

Fairchild was commented upon by the Ontario Court of Appeal in *Cottrelle*. It suggests that it is only applicable where the precise cause of the harm cannot be known. More accurately, it is the precise cause which is known, but not the party who caused the injury.³⁴

- APPLICATION OF CAUSATION PRINCIPALS IN A SPECIFIC CASE

How the *Fairchild* and *Athey* principles can assist in a particular medical negligence context are illustrated by comparing the speeches to the ACOG statements on causation in case of HIE and cerebral palsy.

1. Absence of Clarity in the Scientific Literature

As counsel for the defendants submitted, the principle in *McGhee* involves an element of rough justice, since it is possible that a defendant may be found liable when, **if science permitted the matter to be clarified completely**, it would turn out that the defendant's wrongdoing did not in fact lead to the men's illness. That consideration weighed with the Court of Appeal ([2002] 1 W.L.R. 1052 at 1080E-H, para. 103). It must be faced squarely. The opposing potential injustice to claimants should also be addressed squarely. **If defendants are not held liable in such circumstances, then claimants have no claim, even though, similarly,**

³⁴ The court said "The more recent House of Lords decision in *Fairchild v. Glenhaven Funeral Services Ltd. and Others*, [2002] 3 All E.R. 305 (H.L.) also reflects this same tendency to depart from the "but for" standard, but only where the precise cause of the injury is unknown." At paragraph 30.

if the matter could be clarified completely, it might turn out that the defendants were indeed the authors of the men's illness.³⁵

The Task Force:

Only with more complete understanding of the precise origins and pathophysiology of neonatal encephalopathy and cerebral palsy can logical hypotheses be designed and tested to reduce their occurrence. As such, we recommend several important areas of research that are detailed in the text of the full document. We encourage those engaged in research to pursue these areas, and others to exert influence to the degree possible to propel this to a high priority for funding and study.³⁶

Perinatal asphyxial events clearly can cause newborn neurologic damage and cerebral palsy. The difficulty lies in identifying this causal factor reliably, accurately, and independent of other causal factors.³⁷

Some of the research recommendations are telling. A sampling:

Carefully define and separate antenatal clinical conditions reported to be associated with neonatal encephalopathy and CP to ensure the relationships are valid.³⁸

Basic research is needed into the initiators and mediators of neonatal encephalopathy and cerebral palsy and their long-term sequelae.³⁹

2. Exposure to the very risk of harm that eventuated

Other considerations colour the picture. **The men did nothing wrong, whereas all the defendants wrongly exposed them to the risk of developing a fatal cancer, a risk that has eventuated in these cases. At best, it was only good luck if any particular defendant's negligence did not trigger the victim's mesothelioma.**

The defendants, in effect, say that it is because they are all wrongdoers that the claimants have no case. In other words: **the greater the risk that the men have run at the hands of successive negligent employers, the smaller the claimants' chances of obtaining damages. In these circumstances, one might think, in dubio the law should favour the**

³⁵ Fairchild at para 155

³⁶ Task Force note 4 page xix

³⁷ supra note 4 at p. 7

³⁸ ibid at 81

³⁹ ibid at 82

claimants. Moreover, in McGhee the House did nothing more than set the requirement of proof at the highest that the pursuer could possibly attain--hardly a relaxation in any real sense. **He had proved all that he could and had established that the defenders' wrongdoing had put him at risk of the very kind of injury which befell him. To require more would have been to say that he could never recover for his injury--unless he achieved the impossible.**

Assume that the patients under consideration, the mothers, cannot be said to have done something wrong. They have presented themselves at a hospital for delivery of a child. There is at least a real and substantial risk that if hypoxic encephalopathy ensues, it was caused or contributed to by an intrapartum event. It would be difficult to avoid a finding that the cause was material, and therefore liability for all of the plaintiff's damages follow, if the harm was what one would predict based on an event which occurred during delivery. If the doctor was negligent in the delivery, and the child probably suffered hypoxia, and the risks associated with that ensued, then there would be liability.

What is the risk? The Task Force's view:

Perinatal asphyxial events clearly can cause newborn neurologic damage and cerebral palsy. The difficulty lies in identifying this causal factor reliably, accurately, and independent of other causal factors...

Neonatal encephalopathy and cerebral palsy rarely are caused by perinatal asphyxia. More often, perinatal asphyxia **may be a step in a sequence of events** in perhaps more than one causal pathway leading to neonatal encephalopathy and cerebral palsy.⁴⁰

3. Material Cause or Contribution to Indivisible harm

Recall the principles in *Athey* in light of the immediately preceding statements on causality in the Task Force Report:

If it is necessary to have both the incident and the pre-existing medical condition for the injury to occur, then causation is proven, since the injury would not have occurred but for the incident. Even if the incident played a minor role, the defendant would be fully liable because the incident was still a necessary contributing cause. [i.e., Related Intervening Cause]

⁴⁰ 7/8

Either way, if it “clearly can cause neurologic damage and cerebral palsy”, or it “may be a step in a sequence of events”, it is part of the causal picture and meets the test set out in *Athey*.

4. As a matter of policy, negligent behaviour should not be encouraged by setting too high a standard of proof of causation once breach of standard relevant to the risk of harm is established.

Finally, as was recognised in [McGhee \(\[1973\] 1 W.L.R. 1 at 9B-C](#) per Lord Simon, 12G per Lord Salmon), **if the law did indeed impose a standard of proof that no pursuer could ever satisfy, then, so far as the civil law is concerned, employers could with impunity negligently expose their workmen to the risk of dermatitis--or, far worse, of mesothelioma. The substantive duty of care would be emptied of all practical content so far as victims are concerned.** In my view considerations of these kinds justified the House in developing the approach of Viscount Simonds and Lord Cohen in [Nicholson](#) to fashion and apply the principle in McGhee. *A fortiori* they justify the application of that principle in the present case where the risk to the men was so much worse.

Policy considerations involved in achieving appropriate level of and standard of care are clearly one of the foci of the Task Force Report. As noted above, research is needed to better understand the pathogenesis so that this tragic outcome can be avoided. As a matter of policy, I would argue that the Courts should be a participant in requiring conduct that is in keeping with the standard of care where a failure of that conduct is identified as putting a child at risk for NE and CP.

5. Where the contribution to the risk of harm is not insignificant, the court should err on the side of the victim where neither side can prove or disprove causation.

42 So long as it was not insignificant, each employer's wrongful exposure of its employee to asbestos dust and, hence, to the risk of contracting mesothelioma, should be regarded by the law as a sufficient degree of causal connection. This is sufficient to justify requiring the employer to assume responsibility for causing or materially contributing to the onset of the mesothelioma **when, in the present state of medical knowledge, no more exact causal connection is ever capable of being established. Given the present state of medical science, this outcome may cast responsibility on a defendant whose exposure of a claimant to the risk of contracting the disease had in fact no causative effect. But the unattractiveness of casting the net of responsibility as widely as this is far outweighed by the**

unattractiveness of the alternative outcome.⁴¹

Not only is it sound policy to discourage negligent conduct, it is sound policy to ensure potentially deserving plaintiffs are compensated, in the limited circumstances set out by the Court in *Fairchild*.

6. Which test, *Fairchild* or *E.D.G./Athey* will be the preferred route for the Plaintiff?

Clearly, the law in *Fairchild* has yet to develop in Canada. The question is whether it needs to do so. In the discreet and unusual circumstances posed by the set of facts in that case, if they were to occur here, likely yes it does. But for cases of multiple cause, Canadian law has demonstrated itself to be adequate to the task. The greater importance of *Fairchild* lies in its strong policy statements about who is to win or lose in the difficult area of causation. Where the plaintiff is blameless, and the defendant is not, the desire is to overcome the limitations of the law and ensure appropriate recovery. This dilemma has been faced by the courts in Canada and the UK for decades, and will no doubt continue.

In the case of birth asphyxia, there is no one more innocent than a new born infant. The motivation to assist will rightly be high, where the plaintiff can demonstrate a breach of the standard and the realization of the risk associated with the breach of that standard.

The *Athey* approach will be the more flexible route. The courts do not require a *Fairchild* approach which is really more amenable to groups of negligent actors, as opposed to various tortious and non-tortious causes of harm. The Task Force statement does not and cannot go so far as to say that birth trauma is not a cause of CP. Rather, it feeds into material cause or contribution by its statement that it is a cause and may be a step in a sequence of events all of which are needed to cause this tragic outcome.

INFORMED CONSENT

In the companion paper on Standard of Care, it is described that there is a duty to obtain informed consent from a patient.⁴² Where a doctor failed to provide informed consent, whether the provision of sufficient information would have changed the course taken by the plaintiff and avoided the loss suffered is the issue.

Previously, lack of informed consent was treated as an action in battery. While actions in battery still survive, they are not related to issues surrounding consent but rather sexual assault or other overt, non-medical assaults on the patient.

⁴¹ *Fairchild* at para 42

⁴² See The Standard of Care in Medical Negligence Actions.

*Reibl v Hughes*⁴³ established the principle respecting the standard of care, but held that the assessment of causation would be an objective standard: what would the reasonable person in the plaintiff's position have done? In 1997 this was re-stated and substantially softened, in *Arndt v Smith*⁴⁴. Mr. Justice Cory spoke for the majority in this 9 member panel, Iacobucci J and Sopinka J dissenting [McLaughlin concurring in the result of the majority although expressing similar views on the test to be applied as the dissenting opinions]:

Reibl is a very significant and leading authority. It marks the rejection of the paternalistic approach to determining how much information should be given to patients. It emphasizes the patient's right to know and ensures that patients will have the benefit of a high standard of disclosure. At the same time, its modified objective test for causation ensures that our medical system will have some protection in the face of liability claims from patients influenced by unreasonable fears and beliefs, while still accommodating all the reasonable individual concerns and circumstances of plaintiffs. The test is flexible enough to enable a court to take into account a wide range of the personal circumstances of the plaintiff, and at the same time to recognize that physicians should not be held responsible when the idiosyncratic beliefs of their patients might have prompted unpredictable and unreasonable treatment decisions.

The Reibl test has had the desired effect of ensuring that patients have all the requisite information to make an informed decision regarding the medical procedure they are contemplating. Members of the medical and legal professions are familiar with its requirements. It strikes a reasonable balance, which cannot be obtained through either a purely objective or a purely subjective approach. A purely subjective test could serve as an incitement for a disappointed patient to bring an action. The plaintiff will invariably state with all the confidence of hindsight and with all the enthusiasm of one contemplating an award of damages that consent would never have been given if the disclosure required by an idiosyncratic belief had been made. This would create an unfairness that cannot be accepted. It would bring inequitable and unnecessary pressure to bear upon the overburdened medical profession. On the other hand, a purely objective test which would set the standard by a reasonable person without the reasonable fears, concerns and circumstances of the particular plaintiff would unduly favour the medical profession.

The minority decisions suggest this is not over yet. Justices Iacobucci and Sopinka would state the test as follows:

⁴³ [1980] 2 S.C.R. 880

⁴⁴ [1997] 2 S.C.R. 539 at para 15 and 16

...the appropriate test of causation in the present circumstances is not to ask what the "reasonable person" would have done in the position of the plaintiff Ms. Arndt, but rather the appropriate test is to ask what Ms. Arndt herself would have done had she been fully apprised of the risks to the fetus resulting from her chickenpox.

Commenting on the importance of the subjective evidence of the plaintiff in assessing causation in the objective-subjective test:

Even if it is held that the trial judge did apply a subjective test, the failure to consider the testimony of the plaintiff would constitute an error of law. As set out above, while disregard for the plaintiff's testimony may be consistent with an objective test for causation, it is not consistent with the subjective test, a test which seeks to ascertain how this plaintiff would have acted if fully informed of the relevant risks. Of course, a trial judge need not accept the plaintiff's evidence, but he or she must at least consider it in determining whether this particular plaintiff would have acted differently had the negligence not occurred. Therefore, in our view, even if the trial judge applied a subjective test, he erred in refusing to consider Ms. Arndt's testimony.

¶ 28 *To illustrate the importance of testimony in this context, suppose a hypothetical plaintiff is negligently ill-informed of the risks of a particular medical treatment and the treatment goes awry, causing injury to the plaintiff. Suppose further that there is evidence that almost every patient in the plaintiff's situation would not take this treatment if fully informed. While other evidence suggests that the plaintiff should succeed, if the plaintiff testifies that she would have gone ahead with the treatment even if informed and the trial judge accepts this testimony, the plaintiff cannot succeed. Conversely, if there is evidence indicating that almost every patient would have taken the treatment despite the risks, but the plaintiff testifies that she would not have done so and the trial judge accepts this testimony, the plaintiff should succeed. Testimonial evidence, while tested against other available evidence, may be pivotal in each case.*

¶ 29 *In our view, the trial judge in the present case, by refusing to consider the plaintiff's testimony, misdirected himself and the judgment he reached therefore cannot stand. As an additional reason for this conclusion, the trial judge considered factors such as the plaintiff's preference for homeopathic medicine and the fact that the pregnancy was planned which, in our view, are of dubious assistance in determining what the plaintiff would have done had she been fully informed. It is not at all inconsistent either with a planned pregnancy or with a preference for*

homeopathic medicine for the plaintiff to claim that she would have had an abortion had she been fully informed of the risks. By basing his conclusion in part on these factors, in our view the trial judge cast further doubt on his finding on causation.

Madame Justice McLaughlin framed the test as a purely subjective one, although was with the majority since she found that on that test, on the evidence, the plaintiff would fail.⁴⁵

¶ 32 *I conclude that the test for causation is what, on a balance of probabilities, the particular plaintiff at bar would have done having regard to all the evidence bearing on the issue, including the medical recommendations she would have received at the time.*

In *Felder v Vein*⁴⁶ the Ontario Court of Appeal explained the *Arndt* decision. In doing so the Court quoted extensively from Justice McLaughlin's decision. Indeed it appears that the court has adopted the reasoning of the now Chief Justice:

[28] In her concurring reasons, McLachlin J. explained the modified objective test at pp. 573-74:

Having rejected both a purely subjective and a purely objective approach, Laskin C.J. crafted a test that fell between the two, the "modified objective" test. While approaching the issue of what the patient would have done objectively, the judge should take into account "special considerations affecting the particular patient" (p. 898). This would, in his view, avoid the problem of leaving the matter of causation entirely in the surgeon's hands: "The patient's particular situation and the degree to which the risks of surgery or no surgery are balanced would reduce the force, on an objective appraisal, of the surgeon's recommendation" (p. 899). At the same time, consideration of all factors that might have "reasonably" affected the decision avoids exclusive reliance on the plaintiff's assertion at trial.

While "the patient's particular concerns" at the time should be considered (pp. 899-900) (for example, the judge might consider specific questions which the

⁴⁵ The test as stated sounds subjective, but is described as "modified objective".

⁴⁶ [2003] 68 O.R. (3d) 97 (C.A.)

patient may have asked, evincing specific concerns (p. 899)), they must be "reasonably based" to avoid excessive subjectivity. Thus "fears which are not related to the [undisclosed] material risks would not be causative factors". Summing up, Laskin C.J. stated (at p. 900):

In short, although account must be taken of a patient's particular position, a position which will vary with the patient, it must be objectively assessed in terms of reasonableness.

There is little profit in debating whether the test Laskin C.J. had in mind should be labeled objective or subjective. Suffice it to say it contains elements of both the subjective and objective and has been read in different ways. Two assertions can, however, be ventured. First, the Court was concerned to ensure that the plaintiff's particular concerns and circumstances be considered. To hold otherwise would be to virtually place the outcome of the causation inquiry in the hands of the physician. Second, the Court was concerned to ensure that the plaintiff's subjective assertion of what she would have done had she been properly advised be tested "in terms of reasonableness". To hold otherwise would give undue weight to the plaintiff's hindsight assertion that she would have acted in a way that supports her claim for damages. The approach suggested above -- that causation is a question of fact for the trial judge to determine on all the evidence including the plaintiff's assertion at trial examined in the light of her circumstances, mind-set and the medical advice she would have received at the time -- satisfies both these concerns [emphasis added].

The Court of Appeal puts significant emphasis on the views and particular circumstances of the plaintiff:

[29] In my view, it is significant that both Reibl and Arndt recognize that "special considerations affecting the particular patient" may play a significant role in the causation analysis. Indeed, in Reibl, as pointed out by Laskin C.J., the relatively short time in which Mr. Reibl's pension would vest constituted a special consideration that properly led the court to conclude that had Mr. Reibl been adequately informed of the risks of the surgery, he would not have opted for it at the time that it was performed.

In order to understand how to apply this test, one can turn to the Court of Appeal's reasoning in the *Felde* case. The plaintiff's specific and special circumstances were critically important:

As I will explain, in this case the trial judge recognized that there were special circumstances unique to Ms. Felde that led her to conclude that had Ms. Felde been adequately informed of the risks of surgery, "a reasonable person in Ms. Felde's circumstances would not have proceeded on January 6".

Once it is appreciated that the door is opened wide to consider *the reasonable person in the plaintiff's circumstances*, it is clear that plaintiff's counsel has the obligation to explore the plaintiff's circumstances in depth and to take care in preparing the plaintiff for discovery and trial testimony. It is not enough for the plaintiff to state "I never would have done this had I known" but rather the plaintiff must be able to explain, with reference to his or her life experience, precisely why not.

PRACTICAL CONSIDERATIONS

It is recommended that you set up a systematic approach to the analysis of the causation issues you will face. Here are some suggestions:

- Identify which type of causation problem you face

Other papers in this series will address how to interview your client, analyze medical records and evaluate your damages. At some early point, you have to determine if the doctor caused the injury or failed to improve the plaintiff's condition. If the former, the focus will be on demonstrating what the defendant did and how that can cause the harm suffered by the plaintiff. If the latter, the focus will be on the type of intervention, timing of the intervention, and the most likely trajectory of the condition with appropriate and timely intervention.

This exercise will lead you to anticipating the defences and permit you to prepare for them early in your investigation.

- Identify what problems are caused by the neglect

This is not as easy or as straightforward as it sounds in every case.

- Address causation with your client

An educated client is the best client. Early on, even at the first interview, ensure that you have communicated to your client the concepts of fault, causation and damages and their inter-relationship. If you are facing a failure

to intervene to improve type of action, ensure as well that your client is aware of the importance of the timing of the intervention. Clarification of the issues will permit the client to provide you with better information about the sequence of events. They will better-accepting of your opinion to proceed or not.

- Obtain experts early on

Throughout this program you will hear many times that it is critical to obtain expert opinions on a preliminary basis early, before you issue your claim, if you have the luxury of time. Causation opinions must be obtained from the best source you can locate. While a tertiary care expert cannot necessarily opine on the standard of care of a rural practitioner, such an expert will be required on the issue of causation.

- Expect and plan for an Aggressive Defence Approach

You and your client must face the potential defences directly and bluntly. If your expert does not address those that you have thought of you must raise them. Ask your expert what response you can expect from the defendant. Conduct your own investigation of that issue. What will be the critical evidence that will resolve the issue? Who is in a position to provide that testimony? Is your client included in the list? Have you prepared his or her testimony [include FLA claimants who can, if not prepared on the import of their testimony, give casual testimony that undermines the case on causation nor other issues]? Evaluate the medical record with a view to using it to pin down the doctor on the causation issue.

- School your expert in the difference between scientific and legal cause

You will have to clarify the differences between scientific cause and legal cause with your expert and that is not an easy task. Scientific proof is the defendant's friend and often your enemy. While the Courts often make reference to the differences between legal and medical proof, it is by no means clear that the distinction is understood either by the courts or medical experts in practice.

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