Causation: Navigating Through a Fool's Paradise

Prepared For: Legal Education Society of Alberta

Health Law

Co-Presenter(s):

Brian E. Devlin Q.C.

O'Brien Devlin MacLeod

Calgary, Alberta

A. L. Friend

Bennett Jones LLP

Calgary, Alberta

J. V. Miller Q.C.

Weir Bowen LLP

Edmonton, Alberta

For Presentation In:

Edmonton – March 3, 2011

Calgary – March 10, 2011

Causation: Navigating Through A Fool's Paradise

PART I – INTRODUCTION AND GENERAL LEGAL PRINCIPLES

Introduction

1. Causation is an essential element of a negligence claim. Medical malpractice cases are no different. While causation is typically seen as one of the more difficult elements to prove, this is even more amplified in medical negligence cases where the complexity of the human body and evolving medical knowledge are at play.

2. Both judges and lawyers alike have grappled with the proper way to assess causation. This is evidenced by the Courts' continuous re-evaluation of the legal tests which has occurred in recent years. On the one hand, the law must deal fairly with plaintiffs who have limited resources who are pursuing claims that raise issues of great medical complexity. Plaintiffs have often suffered a serious injury and they must not be prohibited from seeking redress by impossible standards of proof and overwhelming legal and consultant costs.

3. On the other hand, the practice of medicine is as much an art as it is a science. There are risks inherent in every medical procedure. Despite being warned of potential negative consequences, many patients never dream that they will become one of the statistics. Every patient's response to medical intervention is different and each patient will react in unique ways to even the most standard treatments. Doctors do not, and cannot, know with perfect clarity which patients will suffer complications. Accordingly, the law must allow physicians to practice without fear of being sued over outcomes that they have not caused, or that were not reasonably foreseeable.

4. The emerging trend toward lengthy litigation or separate trials focused solely on causation is not beneficial to either patients or those providing treatment. Plaintiffs risk rising legal fees while doctors live with the burden of a lawsuit hanging over their head for many years, when in many cases, the real cause of the injury will not be known with certainty.

5. This paper will discuss the shortcomings of the current state of the law and the associated complications in dealing with causation. It will cover the general principles of causation; the evolution of the law on causation; and then focus on developing trends. Particular attention will be paid to the recent Alberta cases *Nattrass, Meyers,* and *Bablitz*, decided in the wake of the Supreme Court of Canada's decision in *Resurfice*. It argues that *Snell* was the high watermark in the area of causation and that the current state of the law may be nothing but a fool's paradise.

General Principles of a Medical Malpractice Case

6. The general elements of a medical malpractice case include an assessment of whether: (1) there was informed consent to the treatment provided; (2) there was a duty of care (this is not usually contentious); (3) what the standard of care was and whether or not it was met; (4)

whether an injury occurred; and (5) whether the defendant is the cause of the injury in law and in fact.

Causation Generally

7. Causation is the casual link between the alleged negligence and the injury. A finding of a breach of the standard of care on the part of the doctor does not necessarily mean the plaintiff is entitled to damages. The issue is whether the plaintiff has proven, on a balance of probabilities, that those damages resulted from the doctor's negligent care.[1, 2]

To establish causation a plaintiff must first prove that the defendant was the cause-in-fact of the injury. Second, a plaintiff must prove that the injury was foreseeable. In *McArdle Estate v. Cox*, Justice Picard stated:

> This causation analysis has two aspects, both of which must be proved. The first is that the defendant was the cause in fact of the injury suffered by the plaintiff; that is, but for the defendant's substandard actions the injury would not have occurred. The second is that the injury was foreseeable. Both can be very difficult to prove. A simple cause-effect formula does not work because there are generally a number of forces relevant to the injury: the patient's compromised condition; treatment and care by a number of healthcare professionals; the body's reaction to drugs, surgery, or other interventions. In many cases, even the expert witnesses do not agree on what caused the injury. This makes the work of the lawyers and the judges extremely difficult.[3]

8. Any argument as to what effect the plaintiff's pre-existing conditions or other tortious acts had upon his or her losses are to be dealt with if and when damages are assessed. These issues are simply not properly part of the causation analysis.[4]

9. The old principle of *res ipsa loquitur*, that the mere fact an injury has occurred in the circumstances is sufficient to infer negligence, has been abandoned and has been replaced by the "but for" test.[5]

Cause in Fact – The "But For" Test

10. The "but for" test is a determination of the factual, technical, or scientific cause of the injury. This determination is complicated by the complexity of the human body. This test is a fundamental rule that has never been displaced and remains the primary test for causation in negligence actions. The plaintiff bears the burden of showing that "but for" the negligent

---

[1] Cranwill v. James (1994), 162 A.R. 241 (Q.B.) aff'd (1997), 193 A.R. 204 (C.A.), leave to appeal refused [1997] S.C.C.A. No. 139 at paras. 212-215 ["Cranwill"]

[2] E. Picard and G. Robertson*, Legal Liability of Doctors and Hospitals in Canada,* 4th ed. (Toronto: Carswell, 2007) at 269 ["Picard and Robertson"]

[3] *McArdle Estate v. Cox*, 2003 ABCA 106, 327 A.R. 129 at para. 24

[4] *Bedard v. Martin*, 2009 CarswellAlta 393 at paras. 154-157 (Q.B.); *Blackwater v. Plint*, [2005] 3 S.C.R. 3, 2005 SCC 58 at para. 78; *M.N.P., (Next Friend of) v. Bablitz*, 2006 ABCA 245 at para. 15

[5] *Fontaine v. British Columbia (Official Administrator)* (1997), 156 D.L.R. (4th) 577 (S.C.C.)