Causation in Medical Malpractice Cases

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A. Backgrounder

Summary

In order to succeed in a medical malpractice action, the plaintiff must establish that the health care provider failed to meet the standard of care, and that this failure caused compensable harm or economic losses.

In the Supreme Court of Canada's 2007 decision in *Hanke v. Resurfice Corp.*,[1] McLachlin C.J. (as she then was) observed that "[m]uch judicial and academic ink has been spilled over the proper test for causation in cases of negligence". This remains true. Most recently, the Ontario Court of Appeal formulated its approach to jury instructions on causation in the context of the medical malpractice case, *Sacks v. Ross*,[2] for which a leave application to the Supreme Court is pending.

Leading Cases

Clements (Litigation Guardian of) v. Clements (2012)[3] remains the authoritative decision on causation in negligence cases:

> "The test for showing causation is the "but for" test. The Plaintiff must show on a balance of probabilities that "but for" the defendant's negligent act, the injury would not have occurred. Inherent in the phrase "but for" is the requirement that the defendant's negligence was *necessary* to bring about the injury – in other words that the injury would not have occurred without the defendant's negligence. This is a factual inquiry. If the plaintiff does not

[1] *Hanke v. Resurfice Corp.*, 2007 SCC 7, at para. 20.
[2] *Sacks v. Ross*, 2017 ONCA 773.
[3] *Clements (Litigation Guardian of) v. Clements*, 2012 SCC 32.

> establish this on a balance of probabilities, having regard to all the evidence, her action against the defendant fails."[4] [Emphasis by McLachlin C.J.]

The Supreme Court held that the "but for" causation test must be applied in a robust common sense fashion. There is no need for scientific evidence of the precise contribution the defendant's negligence made to the injury. The trier of fact must consider the totality of the evidence with respect to the breach that occurred and the resulting injury and decide whether to draw an inference of causation based on that evidence.[5] The defendant may then argue that the injury was inevitable and would have occurred notwithstanding the negligent act(s).[6]

In its 1993 decision in *Athey v. Leonati*,[7] the Supreme Court advanced an alternate approach to the "but for" test which could be used in select cases where the "but for" test seemed "unworkable in the circumstances".[8] This was the "material contribution" to risk test. In *Clements*, the Court further clarified the narrow scope of the "material contribution" test, concluding that it would only be applied in exceptional cases where "but for" causation cannot be proven against multiple negligent defendants where each can use a "point the finger" strategy to preclude a finding of causation on a balance of probabilities.[9] The "but for" test remains the general rule, including in cases involving multiple agents or actors.[10] Significantly, the court noted that it had never applied a material contribution to risk test.[11]

Causation in a Medical Malpractice Action

Medical malpractice actions routinely involve multiple independent health care providers, performing consecutive acts which allegedly either: (1) cause the same injury; or (2) aggravate the injuries caused by the previous individual. In all but the most straightforward of cases, causation is typically a contested issue in these proceedings. These cases can be further complicated by the trier of fact having to determine causation based on a fact scenario where

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[4] *Ibid*., at para. 8.
[5] *Supra*, note 3 at paras. 9 & 10.
[6] *Ibid.*, at para. 11.
[7] *Athey v. Leonati*, [1993] 3 S.C.R. 458 (S.C.C.).
[8] *Ibid*, at para. 15.
[9] *Supra*, note 3 at paras. 43-45.
[10] *Ibid*., at para. 43.
[11] *Supra*, note 3, at paras. 28 & 46.

what is at issue is not the health care provider's act, but rather an omission. Such was the case in *Sacks*. The Court made the following observations:

> "When what is in issue is not the defendant's act, but an omission, the trier of fact is required to attend to the fact situation as it existed in reality the moment before the defendant's breach of standard of care, and then to imagine that the defendant took the action the standard of care obliged her to take, in order to determine whether her doing so would have prevented or reduced the injury. Even though this exercise is bounded significantly by the actual facts, it counts as "factual" because the task is to consider how the events would actually have unfolded had the defendant taken the action she was obliged to take."[12]

The Court in *Sacks* remarked that in a delayed diagnosis and treatment case, the principles of causation may not unfold as simply as compared to other cases.[13] As set out above an application or leave to appeal this decision to the Supreme Court of Canada is pending.

[12] *Supra*, note 2 at para. 46.
[13] *Ibid.*, at para. 55.

B. Causation Case Scenario: Delayed Diagnosis of Subarachnoid Haemorrhage

Discussion Topic

How to approach the causation issue in a delayed diagnosis case involving multiple defendants

Facts

- The patient was a 32 year old miner working in a remote camp north of Black Lake, in Northern Ontario. On a Friday night after having consumed a few beers, he got into an altercation and was struck on the side of the head. He felt some discomfort over his temple but he did not have a headache and did not experience a loss of consciousness.
- He returned to the camp later that evening. When he went to bed around midnight, he experienced an intense headache with pain on the side of his head. The camp medical assistant, who was a former army medic, attended and advised him to sleep it off.
- The patient had a difficult night and by 06:00 am the next morning he was experiencing vomiting. A friend drove him to the Black Lake Medical Clinic. At 08:00 am he was assessed by a nurse practitioner who felt that he had a concussion. She released him and advise that if the headache worsened he should go to the nearest ER which was in Nipigon District – two hours away.
- The patient's headache persistently worsened throughout the day, he continued to vomit and became dehydrated. His friend took him to Nipigon Hospital that evening, they arrived at 18:00 pm.
- At the time of the patient's arrival there was no physician in-house. The ER nurse contacted the physician and she indicated that she would be in later that evening to assess the patient. Over the course of the next hour the patient became hypotensive and his GCR dropped to 3.
- The physician arrived at the hospital at 19:00 pm. She suspected intracranial bleeding. After the patient was intubated, CritiCall was contacted. The physician advised that the closest tertiary care centre was located in Winnipeg, one hour away. However, the transfer was arranged to Ottawa, which was a three hour flight away.

- There were delays with the air transportation by ORNGE due to the closest crew being timed out and the patient did not leave Nipigon until 01:00 am the next morning. During this interval, he developed seizures. He eventually arrived at the hospital in Ottawa at 06:00 am.
- In Ottawa, imaging was performed and he was diagnosed with a subarachnoid haemorrhage from a ruptured intracerebral aneurysm. He underwent a neurosurgical procedure later that day but has been left with severe motor and cognitive deficits and will require lifetime care.

Defendants

A. Camp Medical Assistant
B. Black Lake Medical Clinic and Registered Nurse Practitioner working at the Clinic
C. Nipigon Hospital, ER Nurse and ER physician at Nipigon Hospital
D. CritiCall and ORNGE

C. Discussion: Best Practices

1. **Early Expert Assistance**: Ideally both sides - and without exception plaintiffs - should obtain early expert advice on the issue of causation. Too often, plaintiffs have not developed an early, coherent theory on causation.

2. **Early Delivery of Expert Repots**: Causation reports should be delivered early along with standard of care opinions. Counsel should avoid delivering late-breaking causation reports which advance new causation theories on the eve of trial.

3. **Agreed Statement of Facts**: Counsel should agree on the undisputed facts which include the undisputed facts related to the causation issue.

4. **Trial Management**: In jury cases, counsel should attempt to agree in advance on the proper form of jury questions, including the causation question and on a joint brief of authorities.

5. **Identifying Objections to Expert Witnesses**: If a party wishes to challenge the admissibility of a causation expert or reduce the scope of the expert's testimony, concerns should be raised as early as possible in advance trial.

Appendix

Case Law

Athey v. Leonati, [1993] 3 S.C.R. 458 (S.C.C.).

Clements (Litigation Guardian of) v. Clements, 2012 SCC 32.

Hanke v. Resurfice Corp., 2007 SCC 7.

Sacks v. Ross, 2017 ONCA 773.