



Law Society  
of Ontario

Barreau  
de l'Ontario

## TAB 5

# Causation on Trial: Making Sense of Causation in the Most Difficult Cases

## Causation Fact Pattern

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## (Table Illustrating) Causation Fact Pattern

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## Glossary

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## Causation Fact Pattern

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**Leo** works at the Toronto Zoo. One night (Day 1), Leo felt a bit sick. He had difficulty sleeping and felt warm. He assumed it was either a cold or the flu.

On Day 2, the next morning, he still wasn't feeling well and had a slight headache. He took ibuprofen and headed to the zoo. Although he did not lose consciousness, he felt dizzy and stumbled while at work, bumping his head on a door frame.

On Day 4, after a couple of days of these symptoms, Leo went to see his long-time family doctor, **Dr. Lamb**. Leo told Dr. Lamb about his persistent headache and the stumbling episode. Dr. Lamb knew Leo was not well co-ordinated and concluded that Leo likely had a mild concussion from the bump on the head.

Dr. Lamb did not ask him if he had experienced other symptoms leading up to the fall. She sent him home, recommending rest and avoiding strenuous activities for a week.

Leo tried to take it easy. But a few days in (Day 6), he went for a walk to get some fresh air. He tripped and fell right outside of his house. His head hit the ground and his vision went blurry. He had a splitting headache and was nauseous. He went back to bed, but did not seek medical care.

On Day 7, in the morning Leo went back to see Dr. Lamb, and she instructed him to go to the Emergency Room.

Leo did not follow Dr. Lamb's instructions. He was exhausted and just wanted to go home to rest rather than wait in the hospital emergency department. He figured that he could take some more ibuprofen and sleep it off like before.

By Day 9, he felt far worse: he had a fever, his head and neck were aching, and he vomited several times. A friend took him to the Emergency Room.

He saw the triage nurse, **Nurse Fox**. Leo told her about the falls, the headaches, and the vomiting. He did not mention his cold/flu symptoms. Nurse Fox recorded "concussion and sore neck – falls – headache and some vomiting". She triaged him as a CTAS 4. The Emergency Room was busy that day. After a couple hours, Leo got fed up and left without telling anyone.

On Day 10, Leo's friend went to check on him. She found him unconscious and called an ambulance. The emergency room physician, **Dr. Hawk**, immediately noted the high fever, and together with the history of severe headache and neck stiffness, diagnosed Leo with bacterial meningitis and treated him with antibiotics.

Unfortunately, half a year has passed and Leo still cannot concentrate. He also has difficulties with balance and coordination, and he has not been able to return to work. Leo is now seeing a psychiatrist and is being treated with a prescription medication for major depression.

The plaintiffs' causation experts opine that had Leo been diagnosed and started on antibiotics by Day 6, he likely would have had a full recovery, and that had antibiotics been started by Day 9 he likely would have had a better outcome.

The causation opinions served on behalf of Dr. Lamb conclude that had a diagnosis been made between Days 7 and 9, Leo still would have made a full recovery.

The causation opinions served on behalf of Nurse Fox conclude that had Leo been diagnosed and started on antibiotics by Day 6, he likely would have had a better outcome, but that by Day 9, the writing was on the wall and even if antibiotics has been started that day, he would likely have had a similar outcome.

Note: At trial, both Dr. Lamb and Nurse Fox acknowledged they had breached the standard of care in their initial assessments of Leo.

CAUSATION FACT PATTERN

	Leo	Dr. Lamb	Nurse Fox (ER)	Causation Experts		
				Plaintiff	Dr. Lamb	Nurse Fox
Day 1	Feels sick, sleepy			Full recovery	Full recovery	Full recovery
Day 2	Headache, stumbled, bumped head			Full recovery	Full recovery	Full recovery
Day 4	Headache and bump on head reported	Diagnoses mild concussion. No history of what led to fall. Rx rest for a week at home.		Full recovery	Full recovery	Full recovery
Day 6	Went for walk and tripped, blurred vision, headache, nauseated, no medical attention			Full recovery	Full recovery	Better outcome
Day 7	Sees doctor. Ignores advice to go to ER. Wanted to go home to rest.	Tells Leo to go to ER		Better outcome	Full recovery	Better outcome
Day 9	Fever, head and neck ache, vomiting, taken to ER. Busy ER, he refuses to wait, goes home.		Falls, headaches, vomiting, no mention of flu-like symptoms. CTAS 4; no reassessment in 2 hours.	Better outcome	Full recovery	Damage done
Day 10	Unconscious, high fever. Ambulance to hospital. Diagnosed quickly with meningitis, based on fever, head and neck stiffness.			Damage done	Damage done	Damage done

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## Glossary

Term	Definition
<b>“caused or contributed”</b>	Language from the <i>Negligence Act</i> which addresses apportionment between multiple tortfeasors after a finding of causation has been made.
<b>“What happened” inquiry</b>	A factual finding as to what events took place at the time of the alleged negligence. In rare cases, it may be considered to determine whether there are inferences that help answer <i>whether</i> there was a breach of the standard of care. <i>Not</i> Factual Causation or Cause-in-Fact.
<b>Threshold question</b>	Some cases have suggested that a specific threshold causation question be posed to the jury before moving to the analysis for each individual defendant. Also referred to as a <b>global causation question</b> . <i>Not</i> factual causation, cause-in-fact or legal causation.
<b>Factual causation</b>	Whether breach(s) of the standard of care caused the outcome – answered by considering the counter-factual, generally referred to as the ‘but-for’ test. Also referred to as <b>cause-in-fact</b> . <i>Not</i> the “what happened” inquiry, the threshold question, legal causation or proximate cause.
<b>Legal Causation</b>	Consideration as to whether damages should be recoverable by the defendant. Described as a “policy check on tort liability”*, it is determined after factual causation. The defendant's negligence will be a legal cause if it is not too "remote" from the damage suffered by the plaintiff. The question is whether a reasonable person could have foreseen that there was a real risk that this breach of the standard of care could cause this type of harm.** <b>Also referred to as remoteness, juridical cause, cause-in-law, proximate cause and foreseeability.</b>
<b><i>Novus actus interveniens</i></b>	A new intervening act that breaks the chain of causation.

References: \*Linden et al. *Canadian Tort Law*, 11th Ed., \*\*Fridman, *The Law of Torts in Canada*, 4<sup>th</sup> Ed., Assiniboine South School Division No. 3 v. Greater Winnipeg Gas Co. 21 D.L.R., SCC (3d) 608, *Mustapha v. Culligan of Canada Ltd.*, [2008] 2 S.C.R. 114, *Saadati v. Moorhead*, 2017 SCC 28