

## CAUSATION IN MEDICAL NEGLIGENCE CASES

Peter M. Willcock and James M. Lepp, Q.C. <sup>1</sup>

*Much judicial and academic ink has been spilled over the proper test for causation in cases of negligence. It is neither necessary nor helpful to catalogue the various debates. It suffices at this juncture to simply assert the general principles that emerge from the cases.*<sup>2</sup>

### INTRODUCTION

In its most recent judgment on causation in a negligence case, *Resurfice Corporation v. Hanke*,<sup>3</sup> the Supreme Court of Canada has summarised the principles arising from a long line of decisions on difficult causation issues. In doing so, the Court has reaffirmed the general applicability of the “but for” test for causation in negligence cases. That test, the test with which we are most familiar and comfortable, “constitutes direct application of the *causa sine qua non* theory”.<sup>4</sup> The Court also acknowledged the necessity, in certain cases, of taking a “robust and pragmatic” approach to the evidence that is adduced in an attempt to meet that standard. The Court, however, has also recognised that there are exceptional circumstances in which the “but for” test cannot be applied without injustice and has described the circumstances in which the test ought not to be strictly applied.

While the Supreme Court has been able to reassert the essential principles of causation in short simple terms, causation continues to vex trial and appellate courts across the country. That is particularly so in medical cases. As Khoury notes:

One of the main benefits of modern life is derived from developments in medical science: but this field also still involves areas of great uncertainty. These uncertainties are reflected in instances of medical liability heard by the courts,

---

<sup>1</sup> This paper was originally presented at the Continuing Legal Education Society of British Columbia’s course “Causation in Tort After Resurfice” held in Vancouver, BC on June 26, 2008. An earlier version of this paper was presented at the Canadian Bar Association’s National Health Law Summit, Critical Issues in Health Law on May 4, 2007. The writers are grateful to their colleague Una Radoja for her valuable research and comments.

<sup>2</sup> *Resurfice Corporation v. Hanke*, 2007 SCC 7 at para. 20.

<sup>3</sup> *Ibid.*

<sup>4</sup> Lara Khoury, Uncertain Causation in Medical Liability (Yvon Blais, 2006) at p. 18.

where they present tremendous hurdles as the parties and the courts attempt to shed light on the relevant events and undertake scientific inquiries into still uncertain areas of medicine in order to do so.<sup>5</sup>

This paper is an attempt to review the cases in which there has been significant departure from the strict application of the “but for” test in medical cases in particular. These appear to fall into three categories:

1. Those cases in which it has been argued that the “robust and pragmatic” approach to causation in medical cases, which is described in the *Snell v. Farrell* case, results in a shifting of the evidentiary onus to defendants.
2. Those cases in which plaintiffs have argued for damages for the loss of a chance of a better outcome.
3. Those cases in which it has been argued that causation in medical cases is established if the plaintiff has proven that negligence has materially contributed to the risk of injury.

## **I. General Principles**

Causation is the relationship that must be found to exist between the tortious act of a defendant and the injury to the plaintiff in order to justify compensation of the latter out of the pocket of the former.<sup>6</sup> The plaintiff has the burden of proving, on a balance of probabilities, that the defendant caused or contributed to the injury.<sup>7</sup> Our Courts have consistently and recently reaffirmed that the general test for causation is that which requires the plaintiff to show that the injury would not have occurred “but for” the negligence of the defendant.<sup>8</sup> The test requires the plaintiff to establish on a balance of

---

<sup>5</sup> *Ibid*, at p. 4.

<sup>6</sup> *Snell v. Farrell*, [1990] 2 S.C.R. 311 at para. 226.

<sup>7</sup> *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para. 13; *Snell v. Farrell*, [1990] 2 S.C.R. 311 at para. 14; *McGhee v. National Coal Board*, [1972] All E.R. 1008 at 4 (H.L.).

<sup>8</sup> McLachlin, J., summarised the problem in “Negligence Law - Proving the Connection” in Mullany and Linden eds., *Torts Tomorrow, A Tribute to John Fleming* (L.B.C. Information Services, 1998) at 18, stating:

Why are the courts now asking questions that for decades, indeed centuries, they did not pose themselves, or if they did, were of no great urgency? I would suggest that it is because too often that traditional “but for”, all

probabilities that the defendant's tortious act was a necessary cause of his or her injuries. There are difficulties in the application of this test. The Courts have recognised that the criteria used by scientists to determine whether or not damages are probably related to a particular cause are, occasionally, at odds with common sense and experience. There are cases in which the negligent act of the defendant has made it impossible for the injured party to prove causation. There are cases in which the ability to prove or disprove causation rests particularly with one party. There are cases in which it is impossible to prove whether or not a negligent act, which created a risk of injury, actually caused the resultant injury. In attempting to apply the general principles to such cases, the Courts have identified circumstances in which the strict application of the "but for" test, or application of scientific standards of certainty in the application of the test, would result in an injustice. As a result our courts have been prepared to draw an inference of causation from "very little affirmative evidence"<sup>9</sup> and have identified exceptions to the "but for" test with a view toward avoiding injustice.

## **II. Attempts to Shift The Onus of Proof**

When the House of Lords decided *McGhee v. National Coal Board*,<sup>10</sup> it was widely expected that the decision would lead to a significant reappraisal of the approach taken to causation in negligence cases. Just as *Donoghue v. Stevenson*<sup>11</sup> expanded the scope of those to whom an individual owes a duty of care, so it was thought that *McGhee* would result in significant relaxation of the standard test for causation of damages. Despite the subsequent restriction or repudiation of the decision in *McGhee*, there are still those who see the case as the beginning of the end of general application of the "but for" test in negligence cases generally.<sup>12</sup>

The case of the unwashed coal miner is almost as familiar as that of the consumer of ginger beer. Mr. McGhee's employers had been negligent in failing to provide him with

---

or nothing, test denies recovery where our instinctive sense of justice - what is the right result for the situation - tells us the victim should obtain some compensation.

<sup>9</sup> *Snell v. Farrell*, [1990] 2 S.C.R. 311.

<sup>10</sup> *McGhee v. National Coal Board*, [1972] 3 All E.R. 1008 (H.L.).

<sup>11</sup> *Donoghue v Stevenson*, [1932] A.C. 562 (H.L.).

<sup>12</sup> There is a very enlightening review of the case and its impact on the law by Lord Hope of Craighead, "*James McGhee - A Second Mrs. Donahue?*" (2003) 62 Cambridge L. J. 587.

washing facilities at his workplace. It was recognised that coal dust increased the risk of an individual suffering from dermatitis and Mr. McGhee had in fact contracted that uncomfortable condition. His dermatitis might have resulted from his working conditions generally but it stood to reason that the long ride home covered in coal dust certainly increased the risk of illness. The Law Lords held that in these circumstances, it fell to the employer, the Coal Board, to establish that appropriate washing facilities would not have avoided the resultant injury. Lord Wilberforce noted:

First, it is a sound principle that where a person has, by breach of a duty of care, created a risk, and an injury occurs within the area of that risk, the loss should be borne by him unless he shows that it had some other cause. Secondly from an evidential point of view, one may ask, why should a man who is able to show that his employer should have taken certain precautions, because then there is a risk, or an added risk, of injury or disease, have to assume the burden of proving more: namely that it was the addition of the risk, caused by the breach of duty, which caused or materially contributed to the injury? In many cases, of which the present is typical, this is impossible to prove, just because honest medical opinion cannot segregate the causes of an illness between compound causes. And if one asks which of the parties, the workman or the employers, should suffer from this inherent evidential difficulty, the answer as a matter of policy or justice should be that it is the creator of the risk who, ex hypothesi must be taken to have foreseen the possibility of damage, who should bear its consequences.

The judgment in this case and Lord Wilberforce's comments, in particular, have been relied upon as authority for the proposition that where the plaintiff is able to establish that negligence has increased the risk of a particular type of injury, and that type of injury has occurred, the onus of disproving causation then falls upon the defendant.

The argument that the case stands for such a broad principle, which would wholly displace the "but for" test in an extremely wide range of cases, should have been put to rest by the subsequent decision of the House of Lords in *Wilshire v. Essex Area Health Authority*.<sup>13</sup>

In *Wilshire*, a neonate developed an eye condition that was caused either by the provision of excessive oxygen by employees of the National Health Authority, or by

---

<sup>13</sup> *Wilshire v. Essex Area Health Authority*, [1988] 2 W.L.R. 557.

other, non-tortious, factors. The claim against the National Health Authority succeeded in the Court of Appeal. The majority applied the reasoning that served as the foundation of the judgment in *McGhee v. National Coal Board*, finding that the negligent care increased the risk of the eye condition that materialised and that it fell to the National Health Authority to disprove causation, which it could not do. Sir Nicolas Browne-Wilkinson dissented, finding that *McGhee v. National Coal Board* should not be applied in circumstances where there are both tortious and non-tortious causes of the injury, either of which would have been sufficient to cause the damages. The House of Lords agreed with Sir Browne-Wilkinson and dismissed the case. Lord Bridge noted that in certain passages in *McGhee v. National Coal Board*, the Lords had been careful to restrict the application of the case. Lord Bridge noted:

The conclusion that I draw from these passages is that *McGhee v. National Coal Board*, [1973] 1 W.L.R. 1, laid down no principle of law whatsoever. On the contrary, it affirmed the principle that the onus of proving causation lies on the pursuer or plaintiff. Adopting a robust and pragmatic approach to the undisputed primary facts of the case, the majority concluded that it was a legitimate inference of fact that the defenders' negligence had materially contributed to the pursuer's injury.<sup>14</sup>

Our Supreme Court considered the principles addressed in *McGhee* and *Wilshire* and put another nail in the coffin of the argument that the burden of proof of causation in negligence cases should shift in cases where there is scientific uncertainty in its decision in *Snell v. Farrell*.<sup>15</sup> In that case, the plaintiff underwent surgery that was not performed to an appropriate standard of care, following which he suffered a stroke and became blind. Neither the plaintiff's nor the defendant's experts could say with medical certainty whether the stroke that triggered the blindness was caused by the admitted negligence. There was no doubt that the negligence in surgery - producing in fact a retrobulbar bleed - increased the risk of stroke. The trial and appellate courts considered the English decisions and differed on the extent to which there could be said to be a shifting of the burden of proof of causation. At the Supreme Court of Canada, Sopinka J. described the principles that should be applied in addressing causation in

---

<sup>14</sup> *Wilshire v. Essex Area Health Authority*, [1988] 2 W.L.R. 557 at 569.

<sup>15</sup> *Snell v. Farrell*, [1990] 2 S.C.R. 311 at pp. 326 and 328.

circumstances where medical opinion evidence is an imperfect tool to establish or disprove a causal link between established breach of duty and obvious damages:

1. Causation need not be determined with scientific precision;
2. Factfinders are to take a “robust and pragmatic approach” to the facts relied upon by an injured person to support the conclusion that the misconduct of a defendant is a factual cause of his or her injury;
3. Where the relevant facts are particularly within the knowledge of the defendant “very little affirmative evidence will be needed to justify an inference of causation, in the absence of evidence to the contrary”; and
4. Factual causation is a question to be answered by the application of “ordinary common sense”.<sup>16</sup>

A portion of the judgment of Sopinka J. is often cited in arguments on causation. Mr. Justice Sopinka makes it clear in his judgment that the Court is describing circumstances in which inferences may be drawn from evidence properly adduced, rather than a shifting of the burden of proof in difficult causation cases. He notes “[t]his is sometimes referred to as imposing on the defendant a provisional or tactical burden”, and continues as follows:

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 *Wilshire* when he referred to a ‘robust and pragmatic approach to the ... facts’.<sup>17</sup> (emphasis added)

*Snell v. Farrell* is a case in which the Court, as a result of evidentiary constraints, drew inferences from evidence before the Court. In drawing those inferences, the Court, in

---

<sup>16</sup> *Snell v. Farrell*, [1990] 2 S.C.R. 311 at 328-30.

<sup>17</sup> *Ibid*, at 330.

accordance with well-established principles, weighed the nature of the evidence that each party was likely to have been able to lead. The judgment has, accurately in our view, been described as an application of the evidentiary rules governing circumstantial evidence.<sup>18</sup> Mr. Justice Sopinka clearly understood that such circumstantial evidence is often all that exists in medical cases and that medical defendants, like other professionals, are often in a better position to adduce evidence than are plaintiffs. He noted:

In many malpractice cases, the facts lie particularly within the knowledge of the defendant. In these circumstances, very little affirmative evidence on the part of the plaintiff will justify the drawing of an inference of causation in the absence of evidence to the contrary.<sup>19</sup>

In a number of cases, courts have attempted to confine the application of the judgment in *Snell* to cases where there is circumstantial or *prima facie* evidence of causation and where no evidence has been led by the defendant. Mr. Justice Sopinka's judgment clearly contemplates such a restriction.

In *Moore v. Castlegar & District Hospital*,<sup>20</sup> the plaintiff established that the defendant doctor breached the duty of care owed to the plaintiff by failing to take appropriate spinal x-rays following a motor vehicle accident. At issue was whether the plaintiff's spinal cord injury occurred before or after the plaintiff's admission to hospital. Both parties led evidence on the issue of causation. The trial judge rejected the plaintiff's evidence on causation and accepted the defendant's evidence and the action was dismissed. On appeal, the plaintiff contended that the trial judge erred in failing to draw an inference, in the absence of affirmative x-ray evidence,<sup>21</sup> that the defendant's spinal cord injury occurred after he arrived in the hospital. Hollinrake J.A. determined that, since expert evidence had been led on the causation issue, this was not a case in which the court could rely upon an inference of causation, as described in *Snell*:

---

<sup>18</sup> David Cheifetz, "The *Snell* Inference and Material Contribution: Defining the Indefinable and Hunting the Causative Snark" (2005) 30:1 Advocates' Q. 45.

<sup>19</sup> *Snell v. Farrell*, [1990] 2 S.C.R. 311 at 328-329.

<sup>20</sup> *Moore v. Castlegar & District Hospital* (1998), 49 B.C.L.R. (3d) 100 (C.A.) leave to appeal to S.C.C. ref'd (1998) S.C.C.A. No. 171.

<sup>21</sup> Part of the physician's breach of duty was that appropriate x-rays had not been taken. Had the x-rays been taken there would have been affirmative evidence, one way or the other, with respect to when the spinal cord damage occurred.

With respect, I think in a case such as this where there is affirmative medical evidence leading to a medical conclusion it is not open to apply “the common sense reasoning urged in *Snell v. Farrell*”. I take it this is what the trial judge was referring to when she said:

All parties have led evidence on this issue [causation] and it would be inappropriate to resort to an inferential analysis as was argued on the plaintiff’s behalf.

I share that view.<sup>22</sup>

A similar result was obtained in *Bigcharles v. Dawson Creek and District Health Care Society*.<sup>23</sup> Mr. Bigcharles suffered a spinal injury in a motor vehicle accident, attended at hospital and was later found to have suffered a neurological injury resulting in paraplegia. He had not received an appropriate series of x-rays and the Court had to wrestle with the difficult question whether or not a failure to immobilise Mr. Bigcharles caused or contributed to his ultimate injury. In dissenting reasons, Madam Justice Southin noted at para. 5:

Because of the nature of the evidence, this case raises what to me is the most elusive concept in the common law - a concept which arises in many branches of the law - ‘causation’. In the very close case, which this is, that essential ingredient is made not less elusive by being dependent on the doctrine of burden of proof. That doctrine is easy enough to put into words, but in every close case, its proper application is an intellectual minefield made more dangerous in medical malpractice cases where, if the law is as [defence counsel] asserts, it is all or nothing, by which I mean that no matter how grossly incompetent the physician is the plaintiff gets nothing unless he can ‘prove’ ‘causation’ or ‘material contribution’, but if he can show a ‘material contribution’ from some act which is on the very borderline of negligence, he may recover an enormous sum of money no matter how tenuous his moral right.

Madam Justice Southin noted:

In my opinion, the only way that a case like this can be fairly decided is upon the judge’s ‘sense of the moral’.<sup>24</sup>

Her Ladyship further held as follows:

---

<sup>22</sup> *Moore v. Castlegar & District Hospital*, *supra* note 20, at 105.

<sup>23</sup> *Bigcharles v. Lomax*, 2001 BCCA 350.

<sup>24</sup> *Ibid.* at para. 38.



It would not be a right ‘formalistic proposition’ to deny any recovery to the appellant, but it would equally not be right to hold that he is entitled to recover judgment in the same amount as he would recover from the driver of the other vehicle if that driver had been the sole cause of the collision and the resultant paraplegia.<sup>25</sup>

Southin J.A. would have granted judgment to the plaintiff in the sum of \$150,000, an amount which appears to have been intended to reflect either the blameworthiness of the defendant physician’s conduct relative to that of the other tortfeasor or the relative contribution in causal terms of each contributor to the Plaintiff’s indivisible injury.

The majority of the Court in *Bigcharles* took a more conventional approach to causation, holding that, because substantial evidence on the issue of causation had been adduced by the defendants, a ruling on the factual evidence was required. That substantial body of evidence had been weighed by the trial judge, who had refused to draw an inference favourable to the plaintiff on causation. Hollinrake J.A. held:

I do not view the principle in *Snell* as being one to permit a trial judge to leap to a conclusion by way of an inference without a full consideration of the evidence during the weighing process. If that process leads to a conclusion that neither party has made out its case on a balance of probabilities where, as here, there is a substantial body of evidence led by the defendants on the issue of causation, it is in my opinion open to the trial judge to decline to draw an inference on this issue.<sup>26</sup>

Further confirmation that the inferential approach is not appropriate in cases where affirmative medical evidence is adduced by the defence on the issue of causation came from the *C.P.M. (Guardian ad litem of) v. Martin*<sup>27</sup> decision.

In *Martin*, a woman gave birth to twins, one of whom was diagnosed with herpes shortly after delivery. She brought an action in negligence against Dr. Martin, a specialist in obstetrics and gynecology for failing to diagnose her genital herpes. The mother also sued, as *guardian ad litem* of one of the twins, claiming that the infant contracted herpes in the birth canal during delivery, a result which could have been avoided if Dr. Martin diagnosed her herpes in a timely fashion and recommended birth by caesarean section.

---

<sup>25</sup> *Ibid.* at para. 42.

<sup>26</sup> *Ibid.* at para. 71.

Dr. Martin was found negligent at trial for failing to properly test the mother for and exclude the diagnosis of herpes. However, the infant plaintiff's claim was dismissed on the basis that causation had not been proven.

There were three possible periods during which herpes could have been acquired by the infant plaintiff in *Martin*: in *utero*; during birth; post-birth in the hospital nursery. Only if the Court could find that herpes was contracted during birth could it hold that Dr. Martin's negligence in failing to diagnose herpes and recommend birth by caesarean section, which the mother would have accepted, caused the injury.

Each party called expert evidence on the issue of the medical degree of likelihood that the infant plaintiff contracted herpes during delivery. The plaintiff's expert opined that based on the fact that 90-95% of cases of neonatal herpes infections occur at the time of delivery, it was more likely that the infant plaintiff also contracted herpes during delivery. The defence's expert did not disagree with the plaintiff's expert's statistics, but concluded that specific facts made it more likely that the infant plaintiff's case fell in the exceptional category of cases in which herpes was contracted in *utero* or after delivery. The most significant fact favouring this conclusion was that the infant plaintiff's twin, who was delivered first and was thus exposed to hours of broken membranes and maternal genital secretions, had not contracted the virus.

Having heard both experts' evidence, the trial judge concluded that there were two equally plausible theories of causation and that the infant plaintiff's case did not cross the necessary threshold of proof of causation on a balance of probabilities.

On appeal, the infant plaintiff argued that the trial judge erred in failing to apply the robust and pragmatic approach in *Snell* to the issue of causation. The basis of the infant plaintiff's argument was that in the absence of "definitive medical proof on a balance of probabilities, it was incumbent on the trial judge to instead apply the *Snell* approach".<sup>28</sup> If she had applied *Snell*, the argument went, the trial judge would have concluded that Dr. Martin's negligence "materially contributed" to the risk that the infant

---

<sup>27</sup> *C.P.M. (Guardian ad litem of) v. Martin*, 2006 BCCA 333.

plaintiff would acquire the virus during birth, amounting to proof of causation.<sup>29</sup> The Court of Appeal disagreed with this argument, noting that the defence led ample evidence that the virus had not been contracted during delivery and that, based on that evidence, the trial judge concluded that the plaintiff failed to establish causation on a balance of probabilities. *Snell*, in the opinion of the Court of Appeal, did not stand for the proposition that, as the infant plaintiff's argument implied, a "tie means that the plaintiff succeeds or, to put it another way, that 50% equals 51%".<sup>30</sup> Further, in distinguishing the *Martin* case from the *Snell* case, the Court of Appeal noted:

The defendant in *Snell* negligently failed to detect and treat a condition that might have led directly to the plaintiff's blindness in one eye. Dr. Martin did not cause the adult plaintiff to have genital herpes. He did not alter her physical condition. His negligence was his failure to pursue medical investigation that would have resulted in the correct diagnosis. Had he made the correct diagnosis, the risk of either twin contracting herpes during birth would have been lessened by resort to caesarean section, although some risk would have continued. But the question still remained as to whether the infant plaintiff contracted the virus during birth or as a result of one of the other possible causes. The expert evidence was directed to that question. ... The ability of the medical experts in this case to render a subjective opinion as to the likely cause of the infant plaintiff's exposure to the virus was not obscured by anything done or not done by Dr. Martin.<sup>31</sup>

Another example of a defendant leading "evidence to the contrary" to prevent the drawing of an inference of causation from circumstantial evidence as per *Snell* is the case of *Sam v. Wilson*<sup>32</sup>.

In *Sam*, the defendant doctor and provincial nurses were found negligent in failing to monitor Mr. Sam while he was taking certain medication with potentially serious side effects. The trial judge held that it could be inferred on the basis of *Snell* that the defendants' negligence caused Mr. Sam's liver failure. On appeal, the trial judge's finding of causation was overturned.

---

<sup>28</sup> *Ibid*, para. 39.

<sup>29</sup> *Ibid*, para. 41.

<sup>30</sup> *Ibid*, para. 39.

<sup>31</sup> *Ibid*, para. 56.

<sup>32</sup> *Sam v. Wilson*, 2007 BCCA 622.

Mr. Justice Smith, speaking for the majority in *Sam*, held that because the defendant, Dr. Wilson, led expert evidence that proper monitoring (in accordance with hospital protocols) would not have likely disclosed the abnormally elevated liver enzymes at the time when such disclosure would have altered the outcome for Mr. Sam, there was no support for the finding that Dr. Wilson's failure to monitor Mr. Sam was a cause of his liver failure. This was, in the opinion of Smith J.A., "evidence to the contrary" to an inference that Dr. Wilson's negligence caused Mr. Sam's liver failure.<sup>33</sup> Therefore, causation could not be proven on a "but for" test by resorting to a common sense inference on the basis of *Snell*.

The initial consideration of *McGhee* and *Wilshire* in Canada, as reflected in the judgment in *Snell v. Farrell*, led to a refusal to shift the onus of proof of causation and a reiteration of the "but for" test. However, it also led to confirmation that the onus could be discharged, in appropriate cases, by little positive evidence. An inference of causation would be more readily drawn where the defendant did not call evidence on causation and even more readily drawn in cases where the defendants were uniquely qualified to lead such evidence but failed to do so. As can be seen from the decisions noted above, after *Snell v. Farrell* we all became more conscious of our obligation to lead evidence on causation of damages so as to avoid the invitation to draw inferences from circumstantial evidence.

### **III. Loss of Chance**

In cases where the Court receives affirmative expert evidence addressing factual causation, there are particular problems that arise when error deprives the plaintiff of a chance of avoiding injury. Where there is a probability that a specific injury (either the whole or part of the plaintiff's damages) would have been avoided, but for the error of the defendant, the plaintiff is entitled to compensatory damages. Where there is some possibility of the avoidance of damage, that is less than a probability, the Courts have wrestled with the manner in which this "loss of a chance" should be addressed.

---

<sup>33</sup> *Ibid*, para. 142.

The loss of a chance analysis evolved in the context of claims arising out of the loss of a right to participate in a contest or game of chance. In *Chaplin v. Hicks*,<sup>34</sup> the Court considered an appeal from a jury verdict in favour of a plaintiff who had lost an opportunity to enter a contest to select actresses for theatre productions. The plaintiff was selected as one of 50 finalists to be interviewed for one of the 12 prizes. The offer to participate in the contest set out terms that were found to be contractually binding once accepted by the participants. The defendant failed to properly notify Miss Chaplin of her opportunity to attend for an interview and she lost her opportunity to participate further in the contest. Although it was admitted that there was a breach of contract, the defendant argued that damages were too remote to be foreseeable or were incapable of assessment. Despite the fact that *Chaplin v. Hicks* is frequently cited as leading and ground-breaking authority for the proposition that a plaintiff may recover for the loss of a chance, the Court does not appear to have regarded the case as a novel one. The case came on appeal from a jury verdict for the Plaintiff awarding £100. The judgment on appeal notes that a chance may be a possibility or probability and that the assessment of the damages by the jury was not unreasonable in light of the value and probability of success. If success was very probable, that would only result in a higher award of damages by the jury. The award was simply regarded as a common sense assessment of a layperson's perception of the value of the loss occasioned by inability to participate further in the competition. Had the plaintiff not been selected as one of the 50 finalists, the Court indicated that damages might have appeared to be too speculative for assessment by the jury.

In anomalous cases, damages for the loss of a chance have occasionally been awarded in cases of medical negligence without careful or significant analysis of the case law. In *Seyfert v. Burnaby Hospital Society*,<sup>35</sup> for example, McEachern C.J.S.C. considered a claim brought by a plaintiff who attended at hospital following a stab wound to the abdomen. The Court found that the patient had been discharged from hospital without the careful period of observation necessary so as to ensure that the wound had not resulted in bowel perforation and the attendant risk of infection, which constituted a

---

<sup>34</sup> *Chaplin v. Hicks*, [1911] 2 K.B. 786 (C.A.).

<sup>35</sup> *Seyfert v. Burnaby Hospital Society*, (1986), 27 D.L.R. (4th) 96 (B.C.S.C.).

failure to meet the standard of care. The issue at trial was whether delay in providing the plaintiff with treatment caused or contributed to the subsequent abdominal infection, which required a second surgery and the performance of a colostomy. The Court considered the plaintiff's submission that *McGhee v. National Coal Board* was applicable in the circumstances of the case, but rejected that argument holding:

In my view, it would be contrary to principle to hold the defendant responsible for damage he may not have caused unless there is a compelling reason why the Court should reach such a conclusion.<sup>36</sup>

The Court went on, however, to hold that there was 25% chance that the second surgery could have been avoided by early and prompt treatment and awarded the plaintiff 25% of the measure of damages that would otherwise have been awarded for the second surgery and colostomy. There is no reference in the judgment to any case law on the loss of chance issue.

Careful consideration of the claims for the loss of a chance of better outcome have regularly resulted in the dismissal of claims. In *Hotson v. East Berkshire Area Health Authority*,<sup>37</sup> the House of Lords considered an appeal brought from a judgment in favour of an infant plaintiff who suffered avascular necrosis as a result of late diagnosis of a hip fracture. Significant evidence was adduced at trial with respect to the chance that the avascular necrosis could have been avoided if there had been prompt diagnosis and treatment of the fracture. The trial judge found that there was a 75% chance that the plaintiff's injury would have occurred even with prompt care and awarded the plaintiff damages that were the equivalent of 25% of those that would ordinarily have been awarded for the entire injury. The Lords were careful not to rule out entirely the possibility of medical malpractice cases resulting in a judgment for the loss of a chance, but held that the *Hotson* case was not such a case. In this respect, Lord Bridge held:

In some cases, perhaps particularly in medical negligence cases, causation may be so shrouded in mystery that the Court can only measure statistical chances. But that was not so here. On the evidence, there was a clear conflict as to what had caused the avascular necrosis. The authority's evidence was that the sole cause was the original traumatic

---

<sup>36</sup> *Ibid.* at 102.

<sup>37</sup> *Hotson v. East Berkshire Area Health Authority*, [1987] 2 All E.R. 909 (H.L.).

injury to the hip. The plaintiff's evidence, at its highest, was that the delay in treatment was a material contributory cause. This was a conflict, like any other about some relevant past event, which the judge could not avoid resolving on a balance of probabilities. Unless the plaintiff proved on a balance of probabilities that the delayed treatment was at a material contributory cause of the avascular necrosis, he failed on the issue of causation and no question of quantification could arise.<sup>38</sup>

Lord Bridge went on to hold that the case should not be decided as a loss of chance case, despite the fact that there was a "superficially attractive analogy" between the principle applied in such cases as *Chaplin v. Hicks* and "the principle of awarding damages for the lost chance of avoiding personal injury or, in medical negligence cases, for the lost chance of a better medical result which might have been achieved by prompt diagnosis and correct treatment".<sup>39</sup> Lord Bridge held that "there are formidable difficulties in the way of accepting the analogy".<sup>40</sup>

Lord Mackay shared Lord Bridge's view that there was a factual question for the trial judge to address, namely: What was the plaintiff's condition when he first presented to the hospital? Lord Mackay answered this question as follows:

It is not, in my opinion, correct to say that on arrival at the hospital, he had a 25% chance of recovery. If insufficient blood vessels were left intact by the fall, he had no prospect of avoiding complete avascular necrosis, whereas if sufficient blood vessels were left intact on the judge's findings, no further damage to the blood supply would have resulted if he had been given immediate treatment, and he would not have suffered avascular necrosis.<sup>41</sup>

The damage had either already occurred, or it had not occurred. Like Lord Bridge, Lord Mackay was careful not to rule out the possibility that the Court could eventually consider loss of chance claims. He expressly held:

I consider that it would be unwise in the present case to lay it down as a rule that a plaintiff could never succeed in proving loss of a chance in a medical negligence case.<sup>42</sup>

---

<sup>38</sup> *Ibid.* at 913.

<sup>39</sup> *Ibid.* at 913-14.

<sup>40</sup> *Ibid.* at 914.

<sup>41</sup> *Ibid.* at 915.

<sup>42</sup> *Ibid.* at 916.

The loss of chance doctrine was carefully considered by the 1991 Supreme Court of Canada decision in *Laferriere v. Lawson*.<sup>43</sup> The *Laferriere* case came on appeal from a judgment of the Quebec Court of Appeal, which had allowed an appeal from a trial decision dismissing an action for damages for medical negligence. The patient had undergone a biopsy and excision of a lump on her right breast. The pathology report indicated that the tissue sampled was affected by a carcinoma. The patient was not informed of the result of the biopsy and only learned that she suffered from cancer following the development of symptoms associated with metastases approximately four years later. She died seven years after the biopsy, after initiating an action but before trial. The trial judge concluded that the scientific evidence led at trial confirmed “the insidious and unforeseeable nature of the development of cancer, including the degree in duration of the suffering and hardship associated with such an illness”.<sup>44</sup> She found that there was no causal link between late diagnosis and the plaintiff’s death and the case was dismissed at trial. On appeal, there were three judgments and no clear resolution of the question of whether or not a claim for loss of a chance could be maintained in the civil law. There was some support for the view that French and Quebec law recognises such claims.

The Supreme Court of Canada reviewed the civil law of France in detail and concluded its review with the observation that the courts in France appear to regularly employ loss of chance in medical cases. The Court then turned to the “limited doctrinal discussion of loss of chance in Quebec”. In addressing the cases, Gonthier J., for the majority, notes that Quebec Courts have typically required that causation be established on the balance of probabilities and that:

In cases involving lost chance, it is not the chance itself - possible (as here) or probable - which is considered, but the outcome of that chance insofar as it bears on the patient’s present condition. Where the loss of chance alone is considered to be the damage, it is theoretically consistent to admit possibilities as well as probabilities.<sup>45</sup>

---

<sup>43</sup> *Laferriere v. Lawson*, [1991] 1 S.C.R. 541.

<sup>44</sup> Quoted in *Ibid.* at 549.

<sup>45</sup> *Ibid.* at 595.



This distinction is critical to the judgment of Justice Gonthier who, in addressing the loss of chance argument, deals with the theory:

First in its classical applications as a type of damage or a method of evaluating damages, and secondly, in its more controversial application to medical cases where it is said to be an attenuation of the causal link.<sup>46</sup>

Classically, a loss of chance is regarded as damage that is “contingent, hypothetical or future and, accordingly, it is uncertain and difficult to evaluate”.<sup>47</sup> Gonthier J. continues:

It is only in exceptional loss of chance cases that a judge is presented with a situation where the damage can only be understood in probabilistic or statistical terms and where it is impossible to evaluate sensibly whether or how the chance would have been realised in that particular case. The purest example of such a lost chance is that of the lottery ticket which is not placed in the draw due to negligence of the seller of the ticket. The judge has no factual context in which to evaluate the likely result other than the realm of pure statistical chance. Effectively, the pool of factual evidence regarding the various eventualities in the particular case is dry in such cases, and the plaintiff had nothing other than statistics to elaborate the claim in damages.<sup>48</sup>

Mr. Justice Gonthier refused to accept that medical conditions should be treated, for purposes of causation “as the equivalent of diffuse elements of pure chance, analogous to the non-specific factors of fate or fortune which influence the outcome of a lottery”.<sup>49</sup>

Further, in medical negligence cases, the damage has usually occurred, manifesting itself in sickness or death:

The chance is not suspended or crystallised as is the case in the classical loss of chance examples; it has been realized and the morbid scenario has necessarily played itself out. It can and should be analysed by means of the generally applicable rules regarding causation.<sup>50</sup>

Gonthier J. sets out a most useful and lucid description of general principles of causation in the case:

---

<sup>46</sup> *Ibid.* at 600.

<sup>47</sup> *Ibid.*

<sup>48</sup> *Ibid.* at 603.

<sup>49</sup> *Ibid.* at 605.

<sup>50</sup> *Ibid.*

1. The rules of civil responsibility require proof of fault, causation and damage;
2. Both acts and omissions may amount to fault and both may be analysed similarly with regard to causation;
3. Causation in law is not identical to scientific causation;
4. Causation in law must be established on the balance of probabilities, taking into account all the evidence: factual, statistical and that which the judge is entitled to presume;
5. In some cases, where a fault presents a clear danger and where such a danger materialises, it may be reasonable to presume a causal link, unless there is a demonstration or indication to the contrary;
6. Statistical evidence may be helpful as indicative, but is not determinative. In particular, where statistical evidence does not indicate causation on the balance of probabilities, causation in law may nonetheless exist, where evidence in the case supports such a finding;
7. Even where statistical and factual evidence do not support a finding of causation on the balance of probabilities with respect to particular damage ... such evidence may still justify a finding of causation with respect to lesser damage;
8. The evidence must be carefully analysed to determine the exact nature of the fault or breach of duty and its consequences, as well as the particular character of the damage that has been suffered, as experienced by the victim;
9. If, after consideration of these factors, a judge is not satisfied that the fault has, on his or her assessment of the balance of probabilities, caused any real damage, then recovery should be denied.<sup>51</sup>

---

<sup>51</sup> *Ibid.* at 608-609.

Six years after the *Laferriere* decision, a loss of chance case was considered by the British Columbia Court of Appeal in *de la Giroday v. Brough*.<sup>52</sup> The plaintiff in that case had seen his physician for flu-like symptoms before developing a painful condition in his right leg. He sought care from his family doctor and later an emergency department at a hospital before a diagnosis of necrotizing fasciitis was made and treatment initiated. It was alleged that there was negligence in failing to diagnose necrotizing fasciitis earlier or in failing to earlier refer the patient to a specialist.

The trial judge held that the only claim that might succeed against the defendant was that there ought to have been earlier referral to a specialist and that it was unlikely that a specialist would have correctly diagnosed the plaintiff sooner. Positive evidence was led by the defendants and the Court held that that evidence was “compelling and persuasive”. The trial judge further held:

Clearly, a fair reading of *Snell v. Farrell* and common sense dictates that causation is determined on a balance of probabilities with, in cases such as this, the burden remaining on the plaintiff. While a robust and pragmatic approach to the facts and cases such as this is the fairest approach. Perhaps one can even say, where the probabilities are reasonably balanced, the extra weight can be provided the robust and pragmatic judicial hand adding weight to the scale in favour of the plaintiff.<sup>53</sup>

The weight of the evidence on causation, however, did not approach a probability and the claim was dismissed.

On appeal, the majority of the Court of Appeal held that the pleadings were broad enough to encompass an action in contract as well as an action in tort and further held:

The underlying difference between an action in tort for breach of the common law duty of care and an action in contract for breach of the implied term in every contract for services that the person providing the service, whether he be a plumber or a physician, will exercise reasonable care and skill which is germane is that, in legal theory, damage is the gist of the action in tort for negligence, whereas it is not the gist of an action in contract for breach of a term of the contract. Every breach of contract

---

<sup>52</sup> *de la Giroday v. Brough* [1995] B.C.J. No. 1087 (S.C.).

<sup>53</sup> *Ibid*, at para. 61.

entitles the innocent party to damages, albeit the damages may be only nominal, and the extent of his right will be limited by the rule in *Hadley v. Baxendale* ... to what can be said to arise naturally, i.e. according to the usual course of things, or to be in the contemplation of the parties.<sup>54</sup>

The Court referred to *Chaplin v. Hicks* and other cases in support of the proposition that damages are recoverable in contract for the loss of a chance. The Court referred to *Hotson* and to *Laferriere* and noted:

As to the latter, it was a civil law case which does not in any way address the implications at common law of a contract for medical services. Thus, it is not apposite.<sup>55</sup>

*Hotson* was distinguished as a case in tort. The Court then held:

For the loss of chance approach to apply in this country in actions of tort would require either a legislative amendment or a decision to that effect of the Supreme Court of Canada.<sup>56</sup>

The majority concluded that the plaintiff could succeed, in contract, if he proved the loss of a chance of a better outcome. A new trial was ordered. In dissent, Mr. Justice Finch, as he then was, pointed out that the case had neither been pled nor tried as one for breach of contract and he would have dismissed the appeal.

Madam Justice Southin, who wrote for the majority in the *de la Giroday* case, revisited the issue in dissenting reasons in *Oliver (Public Trustee of) v. Ellison*.<sup>57</sup> After hearing argument on the question of whether or not there is a contractual relationship between physicians and patients in British Columbia, she concluded that there was such a contractual relationship. The case could, for that reason, be distinguished from *Hotson* and the plaintiff could recover damages associated with the loss of a chance of a better medical outcome. In her reasons, Madam Justice Southin did, however, note that her comments in the *de la Giroday* case respecting the contractual nature of the relationship between doctors and patients were *obiter dicta* and that her conclusion in *Oliver*

---

<sup>54</sup> *de la Giroday v. Brough*, [1997] B.C.J. No. 1146 (C.A.), para. 34.

<sup>55</sup> *Ibid.* at para. 40.

<sup>56</sup> *Ibid.* at para. 42.

<sup>57</sup> *Oliver (Public Trustee of) v. Ellison*, 2001 BCCA 359.

pertains to legislation in force at the time of the incident.<sup>58</sup> That legislation was later amended.

The majority in *Oliver* held that, as the contractual issue had not been argued at trial, it was not open to the Court to address the contractual claim and that, as a claim in tort, the action was bound to fail in the absence of evidence that, on the balance of probabilities, damages were caused by the failure to meet an appropriate standard of care.

Having previously held that the *Laferriere v. Lawson* case was not apposite because it was founded upon the logic of the civil law, it is surprising that Madam Justice Southin did not refer in her decision in *Oliver* to *Arndt v. Smith*<sup>59</sup> where Madam Justice McLachlin suggested that the logic in *Laferriere* may be applicable in common law provinces.<sup>60</sup>

The loss of chance argument came before the Supreme Court of Canada and was again addressed for the Court by Gonthier J. in *St-Jean v. Mercier*.<sup>61</sup> In that case, the trial court found that the defendant orthopaedic surgeon had failed to immobilise a spinal fracture. The patient eventually developed spastic paraplegia arising from a medullary contusion. The Court held that “the likelihood of early immobilisation leading to recuperation” was “somewhere on the spectrum in between the poles of possibility and probability: greater than the realm of what is merely possible, but still not enough to meet the threshold of probability”.<sup>62</sup> In that context, Gonthier J. held:

It is worth repeating the traditional principle set out in *Laferriere v. Lawson* [1991] 1 S.C.R. 542, at pp. 608-9, where I found that causation must be established on a balance of probabilities and that a loss of a mere chance cannot be a compensable harm.<sup>63</sup>

---

<sup>58</sup> *Ibid.*, at para. 35.

<sup>59</sup> *Arndt v. Smith*, [1997] 2 S.C.R. 539.

<sup>60</sup> *Ibid.*, at para. 43.

<sup>61</sup> *St-Jean v. Mercier*, 2002 SCC 15.

<sup>62</sup> *Ibid.*, at para. 106.

<sup>63</sup> *Ibid.*

Doubt with respect to the applicability of the judgments in *St-Jean v. Mercier* and *Laferriere v. Lawson*, in the common law provinces, has been addressed by the decision of the Ontario Court of Appeal in *Cottrelle v. Gerrard*.<sup>64</sup> In that case, the plaintiff suffered a below-knee amputation as a result of gangrene due to a failure to ensure appropriate monitoring of the development of an infection. There was some expert evidence at trial that, with appropriate care, the plaintiff might not have suffered the loss of her leg, but no witness at trial was prepared to say that it was more likely than not that with proper treatment, the leg could have been saved. Despite that evidence, the trial judge found that the physician's failure to meet the standard of care "caused the infection to deepen and that such infection contributed to the development of gangrene which mandated the amputation".<sup>65</sup>

On appeal, the finding of breach of duty was undisturbed. The trial judge's assessment of the evidence on causation was found to have been erroneous, however, and the judgment was set aside. The decision of the trial judge appears to have been based upon the description of the exceptions to the "but for" test in *Athey* (which will be discussed further below). The trial judge held that the loss of chance doctrine was not applicable. Despite the fact that it appears not to have been necessary to deal with the loss of chance doctrine in *Cottrelle*, the Ontario Court of Appeal held that "under the current state of the law, loss of a chance is non-compensable in medical malpractice cases".<sup>66</sup> In support of that proposition, the Court relied upon *Laferriere v. Lawson*, *St-Jean v. Mercier* and *Hotson*. The Court held as follows, despite the fact that the exclusion of recovery for the loss of a chance in medical malpractice cases has been criticised as being "unduly rigid and harsh":

Recovery based upon the loss of a chance would require substantial reduction of the damages to reflect the value of the less than 50% chance that was lost. In any event, the authorities cited [including *Laferriere v. Lawson*, *St-Jean v. Mercier* and *Hotson*] preclude us from considering such an award.<sup>67</sup>

---

<sup>64</sup> *Cottrelle v. Gerrard*, [2003] O.J. No. 4194 (C.A.).

<sup>65</sup> *Cottrelle v. Gerrard*, [2001] O.J. No. 5472 (Ont. S.C.J.), para. 72.

<sup>66</sup> *Supra* note 64 at para. 36.

<sup>67</sup> *Ibid.* at para. 37.

In dismissing the plaintiff's claim, the Court also referred to the decision of the Alberta Court of Queen's Bench in *Sohal v. Brar*.<sup>68</sup>

Similarly, in the United Kingdom, the majority of the House of Lords in the recent case of *Gregg v. Scott* rejected the introduction of a loss of chance approach.<sup>69</sup> Lord Hoffman noted that a wholesale adoption of a "possible" rather than a "probable" causation analysis would be so radical a change in law as to amount to a legislative act.<sup>70</sup> *Gregg v. Scott* was recently relied upon by Garson J. of the British Columbia Supreme Court in *Seattle (Guardian Ad Litem) v. Purvis*,<sup>71</sup> to reject the loss of chance argument in a medical malpractice action. The *Gregg v. Scott* decision was also applied in the Ontario case of *McPherson v. Bernstein*,<sup>72</sup> which was a case of delayed diagnosis of breast cancer. The Court, in its conclusions on causation, held that the loss of chance analysis was inappropriate, noting that the "but for" test is applicable in medical malpractice cases.

The *Seattle* case, an obstetrical malpractice action, primarily addresses the argument that the causation analysis may be abridged or modified in cases where breach of duty materially increases the risk of an adverse outcome. That argument is dealt with at length below. At the conclusion of her reasons for judgment, however, Madam Justice Garson notes that the plaintiff's analysis is "akin to arguing that she lost her chance of a better outcome" by the general practitioner's failure to call an obstetrician to attend. Her Ladyship succinctly states:

To date, the law in Canada or in the United Kingdom does not attach liability to a defendant upon proof only of the loss of a chance of a better outcome (see *Athey* at page 37 and *Gregg v. Scott*, 2005 UKHL 2 at para. 215).<sup>73</sup>

---

<sup>68</sup> *Sohal v. Brar* (1998), 211 A.R. 81 (Q.B.).

<sup>69</sup> *Gregg v. Scott*, 2005 UKHL 2.

<sup>70</sup> *Ibid.* at para. 89.

<sup>71</sup> *Seattle (Guardian Ad Litem) v. Purvis*, 2005 BCSC 1567.

<sup>72</sup> *McPherson v. Bernstein*, [2005] O.J. No. 2162.

<sup>73</sup> *Seattle v. Purvis*, *supra* at note 71, para. 177.

The trial judge's conclusion on causation in *Seattle* was upheld on appeal.<sup>74</sup> Madam Justice Kirkpatrick, speaking for the Court, held that the plaintiffs only proved that the outcome "might have been better, not that it would have been better" absent medical negligence, which, the trial judge correctly held, was insufficient to meet the requisite standard of proof of causation.<sup>75</sup>

While the Courts have expressed considerable sympathy for plaintiffs who have suffered the loss of a chance of a better outcome as a result of medical negligence, the door appears to remain shut to such claims. In England, at least, there are clear judicial pronouncements to the effect that the adoption of a different causation analysis requires legislative, as opposed to judicial, innovation.

It is very doubtful whether, in British Columbia, there is any remaining room to argue that a contractual relationship between physicians and patients will support the claim for damages for the loss of a chance. There may be some room for that argument in a health care system that permits access to private care outside the Medical Services Plan, but in principle, *St.-Jean v. Mercier* should apply. There appears to be little appetite in other common law jurisdictions for a contractual analysis. Further, the judgments of Gonthier J. in the civil law cases suggest that what distinguishes medical cases is not that they arise out of a duty of care in negligence, as opposed to a contractual duty of care, but that in most cases, at the time of trial, scientific evidence will permit the Court to make a finding of fact with respect to whether or not the injury in question could have been avoided by appropriate care.

#### **IV. Material Contribution and the Current Legal Landscape**

The relatively short judgment of the Supreme Court of Canada in *Athey v. Leonati*<sup>76</sup> delivered by Mr. Justice Major, appears to have begun to muddy the causation waters and set the stage for the *Resurfice* decision. The case did not appear to be particularly controversial and the facts are not unusual. The plaintiff had a history of back problems

---

<sup>74</sup> *Seattle v. Purvis*, 2007 BCCA 349.

<sup>75</sup> *Ibid*, at para. 55.

<sup>76</sup> *Athey v. Leonati*, [1996] 3 S.C.R. 458.



and suffered back and neck injuries in two motor vehicle accidents. When he engaged in rehabilitative therapy, he suffered a herniated disc. The defendants admitted liability for the injury caused by the motor vehicle accidents. The trial judge held that although the accidents were “not the sole cause” of the disc herniation, they played “some causative” role and awarded a percent of the global amount of damages assessed. When the case was heard by the Supreme Court of Canada, the issue was whether causation of damages had been properly addressed at trial and whether any reduction in damages had been appropriate.

Mr. Justice Major restated the following basic principles of causation:

1. 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;
2. 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;
3. The “but for” test is unworkable in some circumstances, so the Courts have recognised that causation is established where the defendant’s negligence “materially contributed” to the occurrence of the injury (in support of this proposition, the Court cited, among other cases, *McGhee v. National Coal Board*);
4. A contributing factor is material if it falls outside the *de minimis* range.<sup>77</sup>

Mr. Justice Major held that it has never been necessary for a plaintiff to establish that the defendant’s negligence was the sole cause of an injury and the law does not excuse a defendant from liability merely because other causal factors for which he is not responsible also helped to produce the harm. The Court held that this was not a “loss of chance” case and that the trial judge had not adopted a “loss of chance” analysis. Had she done so, however, she would have been wrong. The Supreme Court of

Canada held that if the trial judge had held that there was a 25% chance that the injury was caused by the motor vehicle accidents and a 75% chance that it was caused by the pre-existing condition, “causation would simply not be proven”.<sup>78</sup> In that regard, the case is further useful, authority for those seeking to defend a “loss of chance” case.

The Court held that the findings of the trial judge indicated that it was necessary to have both the pre-existing condition and the injuries from the accidents to cause the disc herniation. The accidents, although only contributing 25%, were the *causa sine qua non* of the disc herniation. It is, therefore, difficult to see why it was necessary for Mr. Justice Major to address the circumstances in which the “but for” test is unworkable. Nevertheless, it is the description of the circumstances in which the “but for” test is unworkable that has led *Athey* to become an often-cited and difficult case.

The decision in *Athey* was revisited by Mr. Justice Major in *Walker Estate v. York Finch General Hospital*.<sup>79</sup> The plaintiffs in that case contracted AIDS from blood and blood products supplied by the Canadian Red Cross Society before the development of antibody tests to detect the presence of HIV in donated blood. The Red Cross screening procedures included a questionnaire that was given to potential donors, which did not ask symptom-specific questions about HIV. The trial Court determined that the Red Cross Society had breached its duty of care in failing to ask symptom-specific and risk-specific questions of blood donors. The causation question was whether the infected donors would have been screened out of the program if they had been asked the appropriate questions.

Mr. Justice Major held in *Walker* that in cases of negligent donor screening, it may be impossible to prove hypothetically what the donor would have done had he or she been properly screened. In such cases, the test of causation was not 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. In other words, the test is whether the conduct “materially contributed” to the occurrence of the injury outside the *de minimis*

---

<sup>77</sup> *Ibid.* at para. 13-15.

<sup>78</sup> *Ibid.* at para. 42.

<sup>79</sup> *Walker Estate v. York Finch General Hospital*, [2001] 1 S.C.R. 647.

range.<sup>80</sup> Interestingly, however, in *Walker* itself evidence was led before the trial judge as to what the donor in question would have done had CRCS followed proper procedures. The trial judge's conclusion was that the donor would not have been deterred from giving blood, despite his evidence to the contrary. On this basis, the trial judge held that causation was not established, not, as Major J.'s reasons imply, impossible to establish.

In this respect, the Court noted:

In cases of negligent donor screen, 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 Red Cross). 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, a question in cases of negligent donor screen should not be whether the CRCS' conduct was a necessary condition for the plaintiff's injuries using the "but for" test but whether the 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 tainted blood.<sup>81</sup> [Emphasis added.]

In this passage, the Court appears to require the Plaintiff to establish that the Defendant's negligence materially contributed to the occurrence of the injury. If the Plaintiff could do so, the "but for" test would be met. However, by noting that the application of the "but for" test would leave legitimate plaintiffs uncompensated, the Court suggests that that test is not being applied and that it is enough for plaintiffs to establish that negligence has materially contributed to the risk of an injury.

The Court in *Walker Estate* specifically indicates that it was describing the test for causation "in cases of negligent donor screening". This is clearly not meant to be a test of general application. Nevertheless, it raises the following questions: What are the

---

<sup>80</sup> *Ibid*, para. 88

<sup>81</sup> *Ibid*. at para. 88.

hallmarks of the cases in which a material contribution to the risk of an injury, rather than the traditional “but for” test should be considered? How are damages to be assessed in such cases? Is the defendant still liable for the whole indivisible injury?

It is difficult to extract from the reasons for judgment in the *Walker Estate* case the rationale for application of the “material contribution” test in the circumstances of that case. Courts frequently have to determine on the evidence what course of action an individual probably would have taken. In the *Arndt* case, for example, the Court wrestled with the objective/subjective test in addressing a consent case and weighed the evidence to determine what the plaintiff would have done in different circumstances.

When a causation issue again came before the Supreme Court of Canada in *St-Jean v. Mercier*<sup>82</sup>, Mr. Justice Gonthier did not refer to the judgment in *Walker Estate*. The argument that the conduct of the defendants had materially increased the risk of injury and that causation could be presumptively established was addressed in the following terms:

The Court of Appeal appropriately said that it is insufficient to show that the defendant created a risk of harm and that harm subsequently occurred within the ambit of the risk created. To the extent that such a notion is a separate means of proof with a less stringent standard to satisfy, *Snell*, supra, and definitely *Laferriere*, supra, should have put an end to such attempts at circumventing the traditional rules or proof on the balance of probabilities.<sup>83</sup>

The Ontario Court of Appeal was forced to address the confusion that appears to have arisen from the judgment of the Supreme Court of Canada in *Athey* in *Cottrelle v. Gerrard*.<sup>84</sup> In that case, the trial judge based her analysis of the causation issue on the decision in *Athey* and appears to have held that it was enough to establish a breach of a duty of care and that damages of the sort that might arise as a result of the breach, materialised. The Court of Appeal held 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

---

<sup>82</sup> *St-Jean v. Mercier*, 2002 SCC 15.

<sup>83</sup> *Ibid*, at para. 116.

<sup>84</sup> *Cottrelle v. Gerrard* (2003), 233 D.L.R. (4th) 45.

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 the chance of avoiding the unfavourable outcome, unless that chance surpasses the threshold of 'more likely than not'.<sup>85</sup>

The Court held that it was appropriate to depart from the "but for" standard "only where the precise cause of the injury is unknown".<sup>86</sup>

In *McClelland v. Zacharias*,<sup>87</sup> the British Columbia Supreme Court dismissed a medical negligence claim, noting that, "it is not enough to show that earlier treatment 'might' have avoided the plaintiff's present condition", and cited with approval *Cottrelle v. Gerrard*.<sup>88</sup>

The British Columbia Court of Appeal has expressly limited the application of the "material contribution" test in *B.M. v. British Columbia (Attorney General)*<sup>89</sup> and in *Trinetti v. Hunter*.<sup>90</sup>

In the *B.M. v. (B.C.)(A.G.)* case, the trial judge found that officers of the Royal Canadian Mounted Police had failed in their duty of care to attend on a complaint of domestic violence. The action was dismissed against the Crown because the trial judge could not find a causal connection between the breach of duty and the trauma suffered by the plaintiff. On appeal, it was argued that:

On the modern law of causation, the default should be seen as having materially contributed to the event and consequently, liability must follow.

In his dissenting reasons, Donald J.A. held:

Where a breach of duty occurs and a loss is suffered by the person to whom the duty is owed in the circumstances where direct proof of

---

<sup>85</sup> *Ibid.* at 54-55.

<sup>86</sup> *Ibid.* at 57.

<sup>87</sup> *McClelland v. Zacharias*, 2004 BCSC 1077.

<sup>88</sup> *Ibid.* at para. 83.

<sup>89</sup> *B.M. v. British Columbia (Attorney General)*, 2004 BCCA 402.

<sup>90</sup> *Trinetti v. Hunter*, 2005 BCCA 549.

causation is impossible, considerations of fairness and justice may require relaxation of the conventional requirements for causation: *Haag v. Marshall* (1989), 39 B.C.L.R. (2d) 205 (C.A.); *Snell v. Farrell*, [1990] 2 S.C.R. 311 and *Fairchild v. Glenhaven Funeral Services and others* 2002 U.K.H.L. 22, All E.R. 305.<sup>91</sup>

Donald J.A. was clearly motivated by policy considerations in finding liability:

Is it enough for liability that the terrible violence that occurred in this case might have been avoided even though the plaintiffs cannot raise the probability to more likely than not? In my judgment the right to police protection in these circumstances is so strong and the need for teeth in a domestic violence policy so great that the causal language must be found sufficient to ground liability. Contemporary authority, examined later, requires flexibility in rules of causation so that compensation for a wrong will be provided where fairness and justice require.<sup>92</sup>

In considering the authorities, Donald J.A. distinguished *Cottrelle v. Gerrard* and *Laferriere v. Lawson* on the grounds that in those cases, the experts were able to give evidence on the likelihood of the outcome had there been no breach of the duty of care.

Hall J.A., with whom Smith J.A. concurred, held that the trial judge had properly dismissed the case. The “but for” test was held to be applicable. He considered, among other cases, the judgment of the English Court of Appeal in *Fairchild v. Glenhaven Funeral Services Ltd.*<sup>93</sup> and noted as follows<sup>94</sup>:

Lord Nicholls of Birkenhead, in his speech in *Fairchild* ... set out what I consider to be a helpful analysis of why and when the normal ‘but for’ test may not be appropriate:

On occasions, the threshold ‘but for’ test of causal connection may be over-exclusionary. Where justice so requires, the threshold itself may be lowered. In this way, the scope of a defendant’s liability may be *extended*. The circumstances where this is appropriate will be exceptional, because of the adverse consequences which the lowering of the threshold will have for a defendant. He will be held responsible for a loss the plaintiff might have suffered even if the defendant had not been involved at all. To impose

---

<sup>91</sup> *B.M. v. B.C. (A.G.)*, *supra* at note 89, para. 10.

<sup>92</sup> *Ibid*, para. 149.

<sup>93</sup> *Fairchild v. Glenhaven Funeral Services Ltd.*, [2003] 3 ALL E.R. 305 (H.L.).

<sup>94</sup> *B.M. v. B.C. (A.G.)*, *supra* at note 89, para. 131.

liability on a defendant in such circumstances normally runs counter to ordinary perceptions of responsibility. Normally this is unacceptable ... Considerable restraint is called for in any relaxation of the threshold 'but for' test of causal connection. The principle applied on these appeals is emphatically not intended to lead to such a relaxation whenever a plaintiff has difficulty, perhaps understandable difficulty, in discharging a burden of proof resting on him. Unless closely confined in its application, this principle could become a source of injustice to defendants. There must be good reason for departing from the normal threshold 'but for' test. The reason must be sufficiently weighty to justify depriving the defendant of the protection of this test normally and rightly affords him, and it must be plain and obvious that this is so.

Hall J.A. notes that cases where there have been exceptions to the rule, generally, are cases where "causality was nearly impossible to demonstrate because of the physical circumstances of the occurrence". In separate concurring reasons, Smith J.A. held that the appeal should be dismissed because proof of causation "is not precluded by the limits of scientific knowledge". In his judgment, there is a clear caution against relaxing the application of the "but for" test. The test should be relaxed only in rare cases where proof of causation to the traditional standard is impossible. To do otherwise is to offend the fundamental principle that the defendant is a wrongdoer only in respect of the damages that he actually causes to the plaintiff.

In *Trinetti v. Hunter*, the trial judge had dismissed the plaintiff's claim on the grounds that while she had proven a breach of a building bylaw, she had not establish that the breach had caused her to slip and fall and suffer injury. On appeal, the unanimous Court of Appeal adopted the reasoning of Smith J.A. in *B.M. v. B.C. (A.G.)* to the effect that the application of the "inference principle" of causation is "restricted to rare cases where it is clear that the defendants controlled all possible physical agents of harm and it is impossible to identify scientifically the pathogenesis of the harm and, therefore, to attribute precise responsibility for the harm as between the tortious acts of several defendants or as between one defendant's tortious and non-tortious acts"<sup>95</sup>.

---

<sup>95</sup> *B.M. v. British Columbia*, supra at note 89, para. 153.

In the more recent trial decision in *Seattle (Guardian ad Litem of) v. Purvis*,<sup>96</sup> Garson J. relied upon *Cottrelle v. Gerrard* in dismissing a medical negligence claim where the plaintiffs failed to establish causation on a balance of probabilities. The plaintiffs argued that the family physician, found to have been negligent in not calling in the obstetrician for a difficult delivery, caused the injury to the infant because it was more probable than not that the presence of a specialist would have resulted in a quicker delivery and avoidance of the injury. The plaintiffs argued that they had met the “material contribution” test established in *Athey v. Leonati* by demonstrating a material risk of harm and that the harm, in fact, materialised. The Court described the existing Canadian causation jurisprudence in the following fashion:

I conclude from reviewing these authorities that there are four possible theories of causation available to this plaintiff. At the risk of oversimplification, I would summarize these theories as follows:

1. The plaintiff must prove that “but for” the negligence of the defendant no injury would have occurred. This test should not be applied too rigidly, which means that an inference of causation may be made even in the absence of conclusive, precise, scientific evidence (*Snell*).
2. Where there are multiple possible causes of an injury, but the plaintiff can prove the defendant’s negligence materially contributed to the injury, liability for the whole loss, subject to claims of contribution, will attach to the defendant (*Athey*).
3. If the plaintiff can establish that the defendant materially increased the risk of a specific injury, and that specific injury occurs, the court may infer on a sufficient evidentiary basis that the material increase in risk was a contributing cause of the injury such that causation is established (*Levitt, Webster*). “The evidence is to be applied according to the proof which it was in the power of one side to have produced.” (*Snell*).

---

<sup>96</sup> *Seattle (Guardian ad Litem of) v. Purvis*, *supra* at note 71.



4. The House of Lords has held that there may be a reversal in the burden of proof for causation such that if a plaintiff establishes that the defendant created an area of risk and the injury occurred in that area, the defendant must show that the injury had some other cause in order to escape liability (*McGhee*). This theory has not been applied in Canada and seems to have been restricted in England to toxic exposure cases.<sup>97</sup>

In response to the plaintiff's argument that the "but for" test was unworkable in the circumstances and that causation could be established by showing that the defendant's negligence "materially contributed" to the risk of occurrence of the injury, Madam Justice Garson held that the "material contribution" test requires a plaintiff to prove on a balance of probabilities that the medical error did, along with other causes, materially contribute to the injury, a view which, following *Resurfice*, is no longer correct. The Court held:

This theory of causation does not relieve the plaintiff of the burden of proving an evidentiary link between the breach of duty and the damage.<sup>98</sup>

Insofar as there was no suggestion in the case that there were multiple causes of the plaintiff's injuries, the material contribution test was held to be inapplicable. The Court followed decisions in Ontario and Alberta that have rejected the finding that a "material increase in the risk of harm" satisfies the material contribution test, referring to *Robinson v. Sydenham District Hospital Corporation*, [2000] O.J. No. 703 (C.A.) and *Rhine v. Millan*, 2000 ABQB 212.

On appeal, the plaintiffs argued that the trial judge erred in failing to apply the "material contribution" test set out in *Resurfice*. Without a detailed discussion of the trial judge's description of the "material contribution" test itself, the Court of Appeal disagreed with the plaintiffs. As the trial judge held, it was not impossible for the plaintiffs, due to factors outside their control, to prove causation on a "but for" basis. It was within the

---

<sup>97</sup> *Ibid.* at para. 168.

<sup>98</sup> *Ibid.* at para. 171.

plaintiffs' power to have tendered evidence that would have tipped the balance. Causation was not incapable of proof. The plaintiffs had simply failed to provide satisfactory proof on a "but for" basis and were not entitled to rely on the material contribution test.<sup>99</sup>

Further, the Court held<sup>100</sup>:

There is no scientific gap that requires a departure from the "but for" test. Rather, this was primarily a fact-driven case decided well within established legal principles. While the factual issues were challenging, I see no reversible error in the result.

The state of the law on causation was carefully considered by the Ontario Court of Appeal in the 2006 decision in *Aristorenas v. Comcare Health Services*, [2006] O.J. No. 4039. The issue in that case was whether delay in the diagnosis of necrotizing fasciitis caused the plaintiff's injuries. The trial judge found that that was the case and the defendant physicians brought an appeal. In dissenting reasons for judgment, MacPherson J.A. held that where the "but for" test is unworkable in medical malpractice cases, where scientific proof of causation is simply not attainable, a court is entitled to take a "robust and pragmatic approach" to the fact finding component of the causation analysis (at para. 29). MacPherson J.A. found that the trial judge had done so and that there was no basis for setting aside the trial judge's finding on causation. This analysis suggests that the "robust and pragmatic approach" to the fact finding component of the causation analysis is an alternative to the application of the "but for" test. This view does not appear to be supported by the cases. A court can take a "robust and pragmatic approach" to the evidence and more readily draw inferences of causation in the course of applying the "but for" test. Where the "but for" test is unworkable, the solution to which the Courts have turned is not to lower the evidentiary bar, but rather, to pose a different question.

The distinctive nature of the "material contribution" test is described by Rouleau J.A. in the reasons of the majority, concurred in by Rosenberg J.A. Rouleau J.A. found that

---

<sup>99</sup> *Seattle v. Purvis*, supra at note 74, para. 68.

the case was one that called for the application of a robust and pragmatic approach to causation, but held that even taking that approach, the plaintiff had not met the “but for” test and that no other test was appropriate. Where the “but for” test is unworkable and where justice requires the application of a different standard: “The plaintiff need show only that the defendant’s conduct materially contributed to the occurrence of the injury” (para. 49).

The Court noted that the decision in *Athey*: “Provides little guidance as to where the ‘but for’ test is unworkable and ought to be replaced by the ‘material contribution’ test” (para. 52). After referring to the decision in *Cottrelle*, the Court held:

Thus, it would seem that the material contribution test is applied to cases that involve multiple inputs that all have harmed the plaintiff. The test is invoked because of logical or structural difficulties in establishing ‘but for’ causation, not because of practical difficulties in establishing that the negligent act was part of the causal chain.

The Court went on to point out that the robust and pragmatic approach to the evidence is not a distinct test for causation. The majority allowed the appeal and set aside the finding that the plaintiff’s injury was caused by the defendant’s negligence.

In 2007, the Supreme Court of Canada again addressed causation in *Resurfice Corp. v. Hanke*.<sup>101</sup>

The plaintiff in *Resurfice* operated an ice-resurfacing machine and was badly burned when hot water overfilled the gasoline tank releasing gasoline and causing an explosion. He sued the manufacturer and the distributor of the machine. He lost at trial, on the basis that neither negligence nor causation had been proven. The trial judge applied the “but for” test to the causation analysis. The Alberta Court of Appeal held that it had been an error to do so and that the “material contribution” test ought to have been applied. The Supreme Court was called upon to clarify the circumstances in which the “material contribution” test should be applied. The Court held:

---

<sup>100</sup> *Ibid*, para. 71

<sup>101</sup> *Resurfice v. Hanke*, *supra* at note 2.

The Court of Appeal erred in suggesting that where there is more than one potential cause of an injury, the 'material contribution' test must be used. To accept this conclusion is to do away with the 'but for' test altogether, given that there is more than one potential cause in virtually all litigated cases of negligence. If the Court of Appeal's reasons in this regard are endorsed, the only conclusion that could be drawn is that the default test for cause-in-fact is now the material contribution test. This is inconsistent with the Court's judgment in *Snell v. Farrell ... Athey v. Leonati ... Walker Estate v. York Finch General Hospital ... and Blackwater v. Plint ...*<sup>102</sup>

Delivering the judgment for the Court, the Chief Justice reiterated, the opinion that the "basic test for determining causation remains the 'but for' test" and that it "applies to multi-cause injuries."<sup>103</sup>

In describing the limited applicability of the material contribution test, the Court held:

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

First, it must be impossible for the plaintiff to prove that the defendant's negligence caused the plaintiff's injury using the 'but for' test. The impossibility must be due to factors that are outside of the plaintiff's control; for example, current limits of scientific knowledge. Second, it must be clear that the defendant breached a duty of care owed to the plaintiff, thereby exposing the plaintiff to an unreasonable risk of injury, and the plaintiff must have suffered that form of injury. In other words, the plaintiff's injury must fall within the ambit of the risk created by the defendant's breach. In those exceptional cases where these two requirements are satisfied, liability may be imposed, even though the 'but for' test is not satisfied, because it would offend basic notions of fairness and justice to deny liability by applying a 'but for' approach.<sup>104</sup>

The decision in *Resurfice* makes it clear that the "material contribution" test is not simply the application of the "but for" test to cases where there are multiple causes of a loss, each of which, on the evidence, could be said to have materially contributed to the injury. The Court appears now to be clearly describing a test which is a departure from the "but for" test and which requires only proof that negligence materially contributed to

---

<sup>102</sup> *Ibid.* at para. 19.

<sup>103</sup> *Ibid.* at para. 21.

<sup>104</sup> *Ibid.* at paras. 24-25.

the risk of an injury. On the other hand, the application of the “material contribution” test appears to be restricted to a very narrow range of cases and, on the basis of the judgments in *St-Jean v. Mercier* and *Laferriere v. Lawson*, there is room to argue that the “material contribution” test should rarely, if ever, be applied in medical malpractice cases.

The British Columbia Court of Appeal considered the *Resurface* decision in *Jackson v. Kelowna General Hospital*.<sup>105</sup> The patient, Jackson, suffered a broken jaw in a bar fight and underwent surgery to repair the fracture on the following day. An anaesthesiologist ordered that a patient-controlled analgesia system be provided to the patient in order to allow him to self-administer Morphine. He was to have been regularly monitored thereafter. He later brought an action alleging that he suffered a brain injury as a result of a breach of the standard of care for post-operative monitoring. The trial judge found that the nurses had breached the appropriate standard, but that the patient had failed to prove that the breach caused his injuries. In fact, the plaintiff led no evidence as to what the nurses would have discovered had they not failed to monitor him during the critical period<sup>106</sup>.

On appeal, it was argued that the standard of proof of causation should be relaxed on policy grounds because the facts lay particularly within the knowledge of the defendants and because factors outside the plaintiff’s control made it difficult to prove causation. The British Columbia Court of Appeal held that *Resurface* had articulated the “special circumstances” where the “material contribution” test may be applied and that there was no reason for relaxing the standard of proof of causation in the case on appeal. The Court clarified that the “material contribution” test should only be applied:

...to cases where it is truly impossible to say what caused the injury, such as where two tortious sources caused the injury, as in *Cook v. Lewis*, [1951] S.C.R. 830, or it is impossible to prove what a particular person in the chain of causation would have done in the absence of the negligence, such as the blood donor cases (*Walker Estate v. York Finch General Hospital*, [2001] 1 S.C.R. 647).<sup>107</sup>

---

<sup>105</sup> *Jackson v. Kelowna General Hospital*, 2007 BCCA 129.

<sup>106</sup> *Ibid.*, para. 11-12.

<sup>107</sup> *Ibid.* at para. 22.

Recently, in the case of *Bohun v. Sennewald*,<sup>108</sup> a British Columbia trial court has applied the “material contribution” test in another medical malpractice case. The plaintiff, Bohun, attended at the office of her physician as a result of concerns with respect to a breast lump that she had detected. The patient was examined and followed for a period of time before she was referred to a surgeon. There was an issue at trial with respect to whether or not the surgeon recommended a biopsy and, if he had recommended a biopsy, whether the plaintiff’s cancer would have been promptly diagnosed and treatment would have been started immediately thereafter. The causation issue was whether failure to detect the cancer at that time caused damages. The trial judge found that if there had been prompt diagnosis and removal of the tumour by a surgeon, the plaintiff’s chance of survival would have increased by 20%. The trial judge considered whether this was a “loss of chance” case after concluding that the plaintiff could not meet the “but for” test. Goepel J held:

[94]...This is not a ‘lost chance’ case, but a causation case. The case meets the special circumstances that require an application of the material contribution test. In the language of *Resurfice*, it is impossible for Mrs. Johnson to prove that Dr. Segal’s negligence caused her injury using the ‘but for’ test. The impossibility is due to factors that are outside of her control. While it is known that the cancer metastasised to other parts of Mrs. Johnson’s body prior to the first surgery in January 2002, it is impossible, due to the current limits of scientific knowledge, to know whether that migration took place before or after the June 2001.

[95] Dr. Segal’s negligence caused the delay in diagnosis and treatment. Any delay in the treatment of breast cancer increases the risk. The delay in treatment materially contributed to the fatal outcome Mrs. Johnson now faces. Mrs. Johnson’s injury falls within the ambit of the risk created by Dr. Segal’s negligence when he failed to do a biopsy in June 2001.<sup>109</sup>

The trial judge’s decision in *Bohun* represented a departure from what should be well established principles of causation. There were, at the time of the judgment, a number of previous decisions arising out of late diagnosis of cancer in which the diagnosis and prognosis were well established at the time of trial and the Court had to wrestle with the question of whether the outcome would have been different had the diagnosis been made earlier. In all such cases, the Courts determined that the Court has a duty to

---

<sup>108</sup> *Bohun v. Sennewald*, 2007 BCSC 269.

<sup>109</sup> *Ibid.* at para. 94-95.

assess the evidence and make a finding, on the scientific evidence available at trial, if such evidence is called (and it was in the *Bohun* case) with respect to what probably would have happened had there been earlier diagnosis. In fact, the probabilities were applied by the trial judge in *Bohun* in assessing damages because he subsequently reduced the plaintiff's claim to account for the very large contingency that her outcome would have been no different had there been earlier diagnosis. It is submitted that it was contradictory to say that it is impossible to reach any conclusion with respect to what probably would have occurred had there been earlier diagnosis, while at the same time discounting damages by a specific percentage to account for the probability that the outcome would have been no different.

The trial judge's conclusion on causation in the *Bohun* case was recently reversed by the B.C. Court of Appeal.<sup>110</sup> The appellant's fundamental argument, which ultimately succeeded, was that the trial judge erred in principle when he found surgeon's delay in treatment caused the harm even though the relative increase in the risk of harm from the delay was only 20%. In other words, the trial judge had found for the defendant on the "but for" test and that should have put an end to his analysis.

The Court of Appeal held, that the plaintiff had to prove that it was more probable than not that timely diagnosis and treatment would have prevented her loss – that she would likely have lived longer had the surgeon not been negligent. In other words, she had to establish that the surgeon's conduct made it more probable than not that the delayed diagnosis of cancer would cause her death to occur earlier than it would have but for his negligence. Referring to the English case of *Barker v. Corus*<sup>111</sup>, where Lord Hoffman stated that it is not enough to show that the defendant's conduct increased the likelihood of damage and may have caused it, it was necessary to show that the defendant's conduct did cause the damage in the sense that it would not have otherwise happened. The Court of Appeal concluded that the plaintiff failed to prove causation on a "but for basis".<sup>112</sup>

---

<sup>110</sup> *Bohun v. Segal*, 2008 BCCA 23.

<sup>111</sup> *Barker v. Corus*, [2006] UKHL 20.

<sup>112</sup> *Bohun v. Segal*, *supra*, at note 104, paras. 41 and 52.

Further, because the defence counsel adduced scientific evidence which indicated that the delayed diagnosis increased the risk of harm by 20% only, while clearly not obligated to do so, the defence had, in fact, disproved causation.<sup>113</sup> In these circumstances, it was clearly inappropriate for the trial judge to even consider the material contribution test. Even if the defence had not been able to “disprove causation”, the reasoning of the Court of Appeal makes it clear that the *Resurface* decision would not provide assistance to the plaintiff because expert evidence on the issue of causation was available and was led at trial. *Resurface*, in the opinion of the Court, did not stand for the proposition that mere inability to prove causation on a “but for” basis meant that resort may be had to the less stringent “material contribution” test.<sup>114</sup>

In coming to its conclusion in *Bohun*, the Court of Appeal relied on its previous decision in *B.S.A. Investors Ltd. v. DSB*<sup>115</sup>. In *B.S.A.*, the issue was whether the defendant’s negligence caused a fraud to be perpetrated on the plaintiff. Because the question of what the outcome would have been, had the defendant not been negligent, could be answered with certainty only by the fraudster himself, who did not take the stand in his own defence, the Court considered whether it was impossible to prove causation on a “but for basis”, thus permitting resort to the “material contribution” test. Contrary to the opinion of the trial judge, the Court of Appeal concluded that it was not<sup>116</sup>:

With respect, I do not consider this to be one of those “rare cases” where such an inference should have been drawn. The case did not involve principles of causation unknown to modern science; there may have been no direct evidence on point, but the trial judge was still able – and indeed required – to use the available circumstantial evidence in order to decide the point.

The *B.S.A.* decision makes it quite clear that only in cases where it is truly impossible to prove causation, such as where the limits of scientific knowledge prevent the possibility of proof, can a plaintiff rely on the “material contribution” test. A lack of evidence

---

<sup>113</sup> *Ibid*, para. 52.

<sup>114</sup> *Ibid*, paras. 49-53

<sup>115</sup> *B.S.A. Investors Ltd. v. DSB*, 2007 BCCA 94.

<sup>116</sup> *Ibid*, para. 41.



(*B.S.A.*) or a lack of favourable evidence (*Bohun*) does not displace the normal “but for” test of causation.

The Alberta Court of Queen’s Bench has also considered the judgment in *Resurfice* in *Tonizzo v. Moysa* 2007 ABQB 245. The plaintiff alleged that the defendant physicians had been negligent in failing to diagnose reflex sympathetic dystrophy. The Court held that the plaintiff could not establish causation of damages. An invitation was made to apply the “material contribution” test in response to which the Court held as follows:

In certain exceptional cases, the ‘but for’ test of causation does not apply. Such cases require that:

- (i) it be impossible for the plaintiff to prove that the defendant’s negligence caused the plaintiff’s injury using the ‘but for’ test; and
- (ii) it be clear that the defendant breached a duty of care owed to the plaintiff, exposed the plaintiff to an unreasonable risk of injury, and the plaintiff suffered that form of injury: *Resurfice Corp.* at para. 25.

These requirements are not met in this case, as it was not impossible in principle, in the sense in which the Supreme Court of Canada uses the term ‘impossible’ for Mr. Tonizzo to prove that Dr. Moysa’s care caused his injury. Rather, Mr. Tonizzo claim fails simply for lack of evidence of a causal connection. The absence of evidence (as opposed to the impossibility of obtaining evidence) is not a basis to apply this exceptional test of causation).

The Court of Appeal for Ontario also discussed the “material contribution” issue in *Barker v. Montfort Hospital*.<sup>117</sup> This was an appeal from a decision that the defendant surgeon ought to have attended to assess a patient during a period when her condition was deteriorating and that doing so would have led to earlier diagnosis and surgical treatment. The trial judge found that the patient had suffered loss of a portion of her small intestine as a result of the late diagnosis. There was an appeal from both the finding of a breach of the standard of care and the finding on causation. The causal issue was whether the volvulus which led to strangulation of a portion of the bowel had already developed before the assessment ought to have been done. The majority of the Court found that there was “no expert or other evidence on which the trial judge

---

<sup>117</sup> *Barker v. Montfort Hospital*, 2007 ONCA 282.

could base his finding that if the appellant had attended at the hospital late in the evening...and had decided to operate, the section of bowel would likely not have had to be removed".<sup>118</sup>

Significantly, the majority of the Court found that evidence as to causation could have been led. The Plaintiff could have addressed causation by proving "when the full volvulus likely formed and assuming that the bowel would have died approximately eight hours later".<sup>119</sup>

As a result, when asked to consider the *Resurface* case, the Court held that the case had no application because: "the respondents have not shown that it was impossible to prove that the delay in carrying out the operation caused Mrs. Barker's injury on a balance of probabilities".<sup>120</sup> The evidence that had been led was unfavourable to the Plaintiff. The Court of Appeal applied the "but for" test, found the Plaintiff's case wanting and dismissed the claim.

In dissent, Weiler J.A. held that the trial judge was entitled to draw an inference of causation (as suggested in *Snell*), and that the Court of Appeal should treat that inference with deference. Further, however, Weiler J.A. observed that the Appellant himself submitted that it was impossible for the Respondent to prove that but for the delay in operating she would not be suffering from "short-bowel syndrome".<sup>121</sup> Weiler J.A. rejected that submission, finding that causation could be proven with the aid of a "robust and pragmatic" approach. Had she accepted the submission that causation could not possibly be proven, she would have applied *Resurface*, found that the injury that materialized was "within the ambit of the risk created by the Appellant's negligence"<sup>122</sup> and found that the Plaintiff had proven causation of damages.

In the *Sam* decision, the majority, having found that the "but for" test of causation could not be satisfied by the common sense inference from *Snell* in light of expert evidence to

---

<sup>118</sup> *Ibid.* at para. 35.

<sup>119</sup> *Ibid.* at para. 48.

<sup>120</sup> *Ibid.* at para. 53.

<sup>121</sup> *Ibid.* at para. 101.

<sup>122</sup> *Ibid.* at paras. 103-104.

the contrary led by the defence, considered the applicability of the “material contribution” test. Smith J.A., speaking for the majority and relying on the English decision in *Fairchild v. Glenhaven Funeral Services Ltd.*<sup>123</sup>, restated his conclusion in *B.M. v. B.C. (A.G.)* that this was not a test of causation at all, but rather a rule based on policy:

[165] The majority in *Fairchild* imposed liability on the basis of policy. Lord Bingham’s speech is representative of this view. After acknowledging that it may properly be said to be unjust to impose liability on a party who has not been shown to have caused the damage, he said:

[33] [...] On the other hand, there is a strong policy argument in favour of compensating those who have suffered grave harm, at the expense of their employers who owed them a duty to protect them against that very harm and failed to do so, when the harm can only have been caused by breach of that duty and when science does not permit the victim accurately to attribute, as between several employers, the precise responsibility for the harm suffered.

[Emphasis added.]

[166] In imposing liability as a matter of law, the majority expressly rejected the notion that the basis of the finding was a factual or legal inference of causation. Again, I refer to Lord Bingham, who said:

[35] For reasons given above, I cannot accept the view [...] that the decision in *McGhee*’s case was based on the drawing of a factual inference. Nor, in my opinion, was the decision based on the drawing of a legal inference. Whether, in certain limited and specific circumstances, a legal inference is drawn or a different legal approach is taken to the proof of causation, may not make very much practical difference. But Lord Wilberforce, in one of the passages of his opinion in *McGhee*’s case ... wisely deprecated resort to fictions and it seems to me preferable, in the interests of transparency, that the courts’ response to the special problem presented by cases such as

---

<sup>123</sup> *Fairchild v. Glenhaven Funeral Services Ltd.*, [2002] UKHL 22.

these should be stated explicitly. I prefer to recognize that the ordinary approach to proof of causation is varied than to resort to drawing of legal inference inconsistent with proven facts.<sup>124</sup>

Following these comments, Smith J.A. concluded the “material contribution” test did not apply. The trial judge having erred in inferring causation on a “but for” basis, the defendant’s appeal was allowed.

Very recently, the Court of Appeal of the Northwest Territories provided additional comments on the applicability and nature of the “material contribution” test in *Fullock v. Royal Oak Ventures Inc.*<sup>125</sup>

In *Fullock*, the Court considered whether the defendants could be held liable for another person’s intentional tort. Both duty of care and causation were contentious issues. In its discussion of causation, the Court clarified that the “but for” test required the plaintiff to show that the defendant’s conduct was a necessary factor in bringing about the outcome complained of, while the less stringent, “material contribution” test only required the plaintiff to show that the defendant materially increased the risk of that outcome.<sup>126</sup> On the issue of applicability of the less stringent test, the Court in *Fullock* appeared to have been satisfied that it was not appropriate to apply it. In the Court’s opinion, it was not impossible to establish on a balance of probabilities how the intentional tortfeasor would have reacted had one or more of the defendants acted reasonably in the circumstances because it was possible to lead direct and circumstantial evidence on this point.<sup>127</sup> An inference may be made from this holding that in the absence of such evidence, the Court would have found the “material contribution” test applicable, a holding which would have been contrary to the approach set out in *B.S.A. Investors*, and the cases which have followed it, as well, it is submitted, the limited applicability of the “material contribution” exception contemplated by *Resurface*.

---

<sup>124</sup> *Sam v. Wilson*, *supra* at note 32, para. 109, citing from *B.M. v. B.C. (A.G.)*, *ibid*, at para. 165.

<sup>125</sup> *Fullock v. Royal Oak Ventures Inc.*, 2008 NWTCA 04.

<sup>126</sup> *Ibid*, paras. 195-197.

<sup>127</sup> *Ibid*, para. 201.

The series of Supreme Court of Canada decisions from *Athey* through *Walker Estate* to *Resurfice* appear, now, to have established that there are cases in which causation may be proven by establishing that the defendant's negligence has materially increased the risk of the injury that has occurred. That appears to be the case, even where the plaintiff is not able to prove on a balance of probabilities that there has been, in fact, a material contribution to the injury. The doctrine does not appear to be restricted to cases where it can be shown that negligence, together with other non-tortious causes, has in fact materially contributed to a loss.

On the other hand, it also appears to be clearly established that the "material contribution" test will be narrowly limited and will generally be inapplicable in medical negligence cases where it is possible to lead some evidence on likely outcomes in the absence of negligence. It has been pointed out that the cases from the Supreme Court of Canada provide little assistance in determining when the "material contribution" test may be applied, but recent Trial and Appellate decisions permit us to say:

1. That the Court should not turn to the material contribution test until the plaintiff has established that it is impossible to meet the "but for" test;<sup>128</sup>
2. That the plaintiff must prove not only that it is difficult or impossible on the evidence to address causation, but that it is impossible in principle to do so;<sup>129</sup>
3. That impossibility must be a result of logical or structural difficulties, not because of practical difficulties;<sup>130</sup>
4. That resort should not be had to the "material contribution" test unless the application of the "but for" test to the facts of the case would offend basic notions of fairness and justice;<sup>131</sup> and

---

<sup>128</sup> *Barker v. Montfort*

<sup>129</sup> *Tonizzo v. Moysa*

<sup>130</sup> *Aristorenas v. Comcare Health Services*

<sup>131</sup> *Resurfice Corporation v. Hanke*

5. The “material contribution” test should only be employed in the “hard cases” and then as an admittedly policy decision.<sup>132</sup>

---

<sup>132</sup> *Sam v. Wilson, supra* at note 32 and 123.