Trial judge's discretion in Montreal malpractice case upheld

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For the fourth time in four years, the Supreme Court of Canada has upheld the power of trial judges to decide on causation in civil liability cases based on the entirety of the evidence, with or without scientific certainty.

In a 4-3 decision delivered Nov. 10 in *Benhaim v. St-Germain* 2016 SCC 48, the four justices in the majority rejected a 2014 ruling by the Quebec Court of Appeal that found Quebec Superior Court Justice Geneviève Marcotte committed an error in law during a 2011 medical malpractice trial by failing to find an adverse inference of causation against two Montreal doctors, Albert Benhaim and Michael O'Donovan.

Benhaim, a general practitioner, saw his 44-year-old patient Marc Émond for an annual physical in November 2005 and ordered a routine chest X-ray. Although Émond, a non-smoker and fitness buff, appeared in excellent health, O'Donovan, a radiologist, discovered an abnormality in the right lung and advised Benhaim to compare the X-ray with previous ones. He never did.

Instead, Benhaim ordered a follow-up X-ray in January 2006. O'Donovan noted no change in the right lung, but recommended a third follow-up X-ray in four months, which was not done. In an X-ray taken after his next annual physical in December 2006, O'Donovan noticed the lesion in Émond's right lung had grown. Subsequent tests confirmed he had stage IV lung cancer. He died in June 2008.

His partner Cathie St-Germain, acting in her capacity as Émond's universal legatee and tutor to their young son, sued Benhaim and O'Donovan for malpractice, alleging that the negligent delay in diagnosing Émond's cancer caused his

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death. The physicians argued the cancer would likely have taken his life even if he had been promptly diagnosed, so the delay did not cause his death.

After conflicting testimony from three expert witnesses about the staging of the lung cancer, the trial judge, who now sits on the Quebec Court of Appeal, concluded both physicians were negligent, but that their negligence did not cause Émond's death. Because their negligence made it impossible to prove causation, the trial judge recognized that she could draw an adverse inference of causation against them, but she chose not to and awarded damages to St-Germain only for anguish caused by the physicians' negligence.

The Quebec Court of Appeal reversed that decision. The majority held that the trial judge erred in law by failing to draw an adverse inference of causation, and they awarded St-Germain and her son damages of $1.7 million.

But Supreme Court Chief Justice Beverley McLachlin and Justices Andromache Karakatsanis, Richard Wagner and Clément Gascon, in speaking for the majority, rejected the Appeal Court finding. They concluded that a trial judge is not obligated to draw an adverse inference of causation as defined in article 2849 of the *Civil Code of Québec* in medical liability cases when the defendant's negligence undermines the plaintiff's ability to prove causation — and where the plaintiff provides some evidence of causation that is not successfully rebutted by the defendant. They added that the Appeal Court also failed to show deference to the trial judge's weighing of the evidence.

Arguing in dissent, Justices Rosalie Abella, Suzanne Côté and Russell Brown agreed that the Appeal Court erred by characterizing the trial judge's decision not to draw an adverse inference as an error in law. But the trial judge did err in the inference-drawing process, they argued, by misconstruing the physicians' expert's testimony and by omitting key objective evidence — namely that Émond survived more than 31 months, even though the life expectancy of patients diagnosed with stage III to stage IV lung cancer is eight to 12 months.

"Had the trial judge disregarded the highly speculative facts on which the physicians' expert's testimony was based," they noted, "and had she taken into account [Émond's] survival period, she would have drawn an inference of causation."

Both the majority and dissenting opinions made clear that the principles of causation law cited apply to both the *Civil Code* of Quebec and common law in other provinces, noted David Platts, a partner with McCarthy Tétrault in Montreal who served as co-counsel on the physicians' Supreme Court appeal.

He added the decision re-establishes the law contained in two key Supreme Court cases, *Snell v. Farrell* [1990] 2 S.C.R. 311, and *St-Jean v. Mercier* 2002 SCC 15. It's important nationally because the Quebec Appeal Court decision, if allowed to stand, could have had a significant impact on causation law across Canada. "We were worried that the Court of Appeal had created a new test," said Platts, "so it's nice to see that all the ordinary rules of causation apply."

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Erik Knutsen, an associate professor in the faculty of law at Queen's University whose academic interests include insurance law and civil litigation, said the decision again confirms the deference that appeal courts must show toward trial judges in medical malpractice suits. For lawyers, he noted "you better bring your A game at trial because the court of appeal has a restrictive role, and that's nothing new."

The fact that three of the seven judges felt compelled to contradict the trial judge underlines how difficult it can be to determine causation in medical malpractice cases, added Knutsen. He noted that one of the dissenting judges, Justice Russell Brown, is one of Canada's leading authorities on causal inferences. "That's really remarkable," he said of the 4-3 decision. "It makes the academic in me ask if there's something about the principles [of causation] that's not helping here."

Paul McGivern, a partner with Vancouver-based Pacific Medical Law, said the decision follows three recent Supreme Court cases that have attempted to maintain a level playing field between plaintiff and defendant by not overly stressing scientific evidence, while keeping the burden of proof with the plaintiff. They are *British Columbia (Workers' Compensation Appeal Tribunal) v. Fraser Health Authority* 2016 SCC 25; *Clements v. Clements* 2012 SCC 32; and *Ediger v. Johnston* 2013 SCC 18, in which McGivern served as co-counsel for the successful appellant.

He said the recent Supreme Court decisions re-establish the principle in *Snell* that causation does not have to be proven with scientific certainty. If the Quebec Court of Appeal decision had been allowed to stand, he added, it would have effectively shifted the burden of proof in medical malpractice cases to the defendant. If the plaintiff can prove negligence, however, the burden shifts to the defendant to disprove causation.