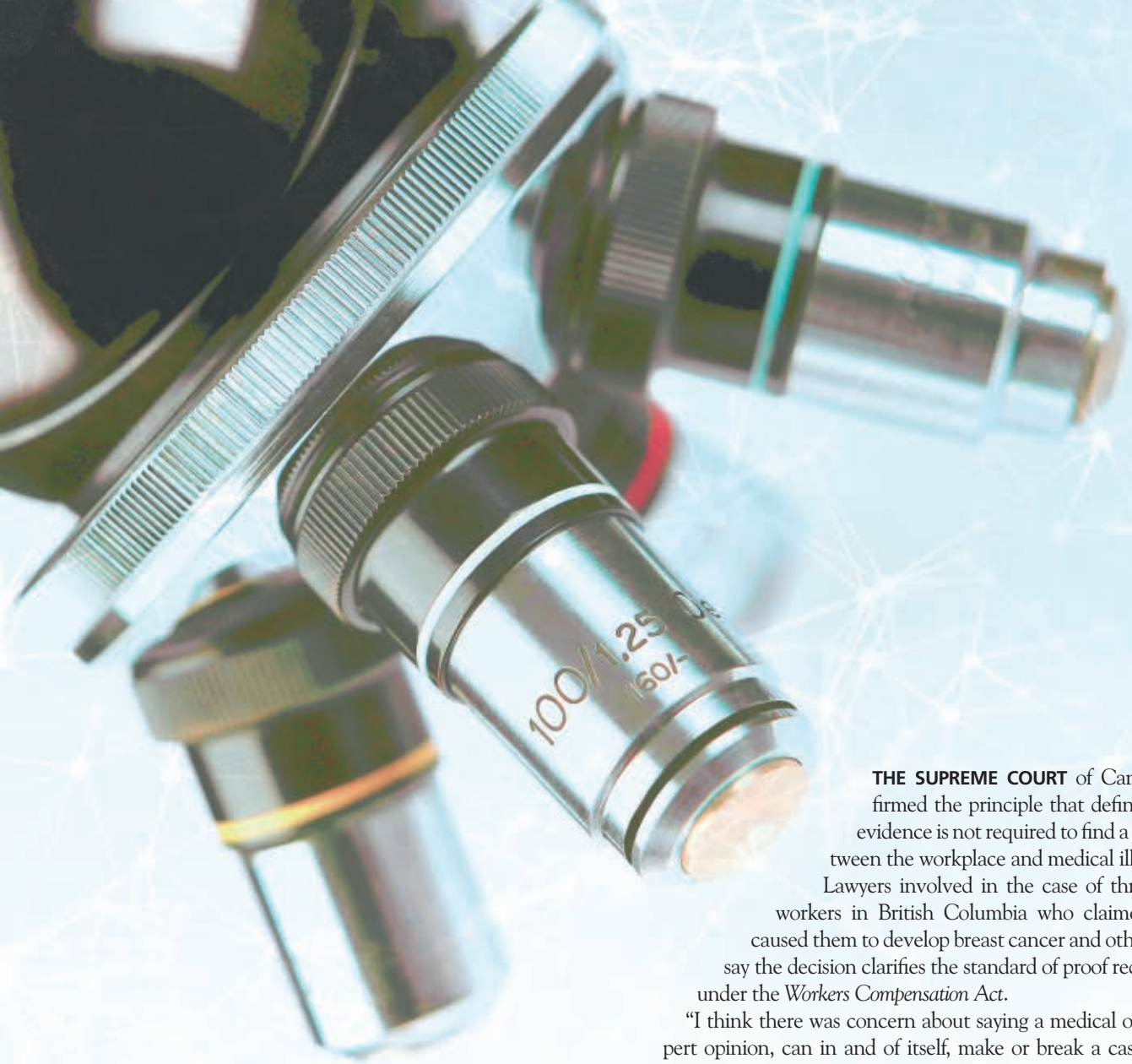

# WORKPLACE CANCER STANDARD OF PROOF CLARIFIED

## Top court says scientific evidence not required to find link

By JILLIAN KESTLER-D'AMOURS

**THE SUPREME COURT** of Canada has reaffirmed the principle that definitive scientific evidence is not required to find a causal link between the workplace and medical illness or injury. Lawyers involved in the case of three healthcare workers in British Columbia who claimed their work caused them to develop breast cancer and other experts also say the decision clarifies the standard of proof required in cases under the *Workers Compensation Act*.

"I think there was concern about saying a medical opinion, an expert opinion, can in and of itself, make or break a case," said Tonie Beharrell, a Health Sciences Association of British Columbia lawyer and lead counsel for the workers.

"You have to look at all of the evidence and I think that the Supreme Court was reaffirming that principle."

Katrina Hammer, Patricia Schmidt and Anne MacFarlane were among seven hospital laboratory technicians at Mission Memorial Hospital in British Columbia who developed breast cancer.

Hammer and Schmidt worked as technologists and Schmidt was an aide in the lab, where they used chemicals to test blood and other medical samples. The women sought compensation under the *Workers Compensation Act* and argued that their diseases resulted from their employment.

A medical report into conditions at the hospital showed that the breast cancer rate in the laboratory was eight times higher than the rate in B.C. as a whole. But medical experts could not say with 100 per cent certainty that the workplace was responsible for the women's cancers.

Despite this, the Supreme Court found it was not patently unreasonable to make that causal link: *British Columbia (Workers' Compensation Appeal Tribunal) v. Fraser Health Authority* 2016 SCC 25.

"So the presence or absence of an expert report establishing or not establishing causation isn't determinative," Beharrell said about the court's decision.

"What the finder of fact has to do is look at all of the evidence before them, including circumstantial evidence, weigh that evidence and come to a conclusion."

The Workers' Compensation Board initially denied the women's applications for compensation after medical experts said in more than one report that they could not find scientific evidence to directly link the incidents of breast cancer to the workplace.

Instead, the experts said the cluster of cancers could have been caused by a cluster of non-occupational risk factors, past exposure to chemical carcinogens, or be a chance occurrence.

"Really what the medical experts in this case were saying is, 'Look, seven people got cancer. Does that mean it was caused by the workplace?' " said Nazeer Mitha, a partner at Harris & Company LLP who represented the Fraser Health Authority, which runs the hospital.

"These are what are called clusters and clusters sometimes occur anomalously. They could occur for a whole bunch of reasons, but it's anomalous; that in and of itself doesn't prove the workplace caused it," Mitha said.

The Workers' Compensation Appeal Tribunal re-examined the initial decisions and overturned them in each case, finding that "the workers' breast cancers were indeed occupational diseases."

The Fraser Health Authority then asked for a judicial review of the decision, and the B.C. Supreme Court and B.C. Court of Appeal ruled that no evidence of workplace causation existed.

Writing for the Supreme Court majority in June, however, Justice Russell Brown stated while the tribunal did not rely on "confirmatory expert evidence," it was reasonable in finding causation between the workers' illnesses and the workplace.

"The presence or absence of opinion evidence from an expert positing or refuting a causal link is not determinative of causation. Causation can be inferred — even in the face of inconclusive or contrary expert evidence — from other evidence, including merely circumstantial evidence," Justice Brown wrote.

But the ruling was not unanimous. In a dissenting opinion, Justice Suzanne Côté found that the Workers Compensation Appeal Tribunal's decision was, in her view, patently unreasonable.

"There is no evidence — and certainly no positive evidence — capable of supporting a causal link between the workers' employment and the development of their respective diseases," Côté wrote.

Chris Rootham, a partner at Nelligan O'Brien Payne LLP, said the Supreme Court's decision is a reminder that "just because an expert says 'I can't prove this scientifically,' that doesn't mean that there's an absence of causation."

The ruling makes it more likely that workers' compensation tribunals will find claimants have met the standard of proof when "statistically significant incidents of illness" are found in the workplace, Rootham said.

He said the decision will not have an impact on the way medical experts draft their reports in these types of cases, but it may make tribunals and courts look closer at all the evidence that is presented to them.

"I think workers compensation tribunals and boards will pay closer attention to the statistical evidence that's before them about these sorts of health clusters."

Recent debate in occupational health cases in Canada has been as to whether "inferences of causation are permissible if the defendant has raised any medical evidence to the contrary," explained Paul McGivern, a senior litigator at Pacific Medical Law with expertise on medical negligence and infant injury cases.

Lower courts have been reluctant to allow causation without a firm conclusion based on medical evidence, McGivern said, but the law on causation differs in the workers compensation scheme compared to personal injury claims.

Under the *Workers Compensation Act*, the burden of proof is lower than in civil cases because it reflects "the intention of workers compensation legislation to compensate injured workers quickly without court proceedings," he said.

"The Workers Compensation Board policies indicate that the workplace need only be of 'causative significance' or 'more than a trivial or insignificant aspect' in the development of the worker's illness," McGivern said.

In civil litigation, a plaintiff in a personal injury case must demonstrate that the injury would not have taken place *but for* the defendant's negligence, McGivern explained.

In other words, the burden of proof in civil litigation is a "balance of probabilities" and a plaintiff must show that it is most likely that an act or the failure to act caused the injury.

Under the *Workers Compensation Act*, when the evidence is about evenly weighed in a case, a decision must be made in favour of the worker. This means that a worker must prove it was just as likely as not that the workplace caused the injury.

"I call that, tie goes to the worker," said Beharrell.

The Supreme Court's ruling made it clear that workers compensation issues must be squared within that scheme, Beharrell said.

"There's a different standard of proof, and so the fact that an expert report doesn't reach scientific conclusions about causation doesn't mean that the appeal tribunal cannot find causation," she said.

Beharrell also pointed to *Snell v. Farell* [1990] 2 S.C.R. 311, which the top court relied upon to justify its ruling in the women's case.

In *Snell v. Farell*, the court dismissed an appeal from an ophthalmologist (Dr. D. H. Farell) who had been found to be medically negligent in performing cataract removal surgery on an elderly patient (Margaret Snell).

The Supreme Court explained that much of the dissatisfaction with causation up until that point stemmed "to a large extent from its too rigid application in many cases.



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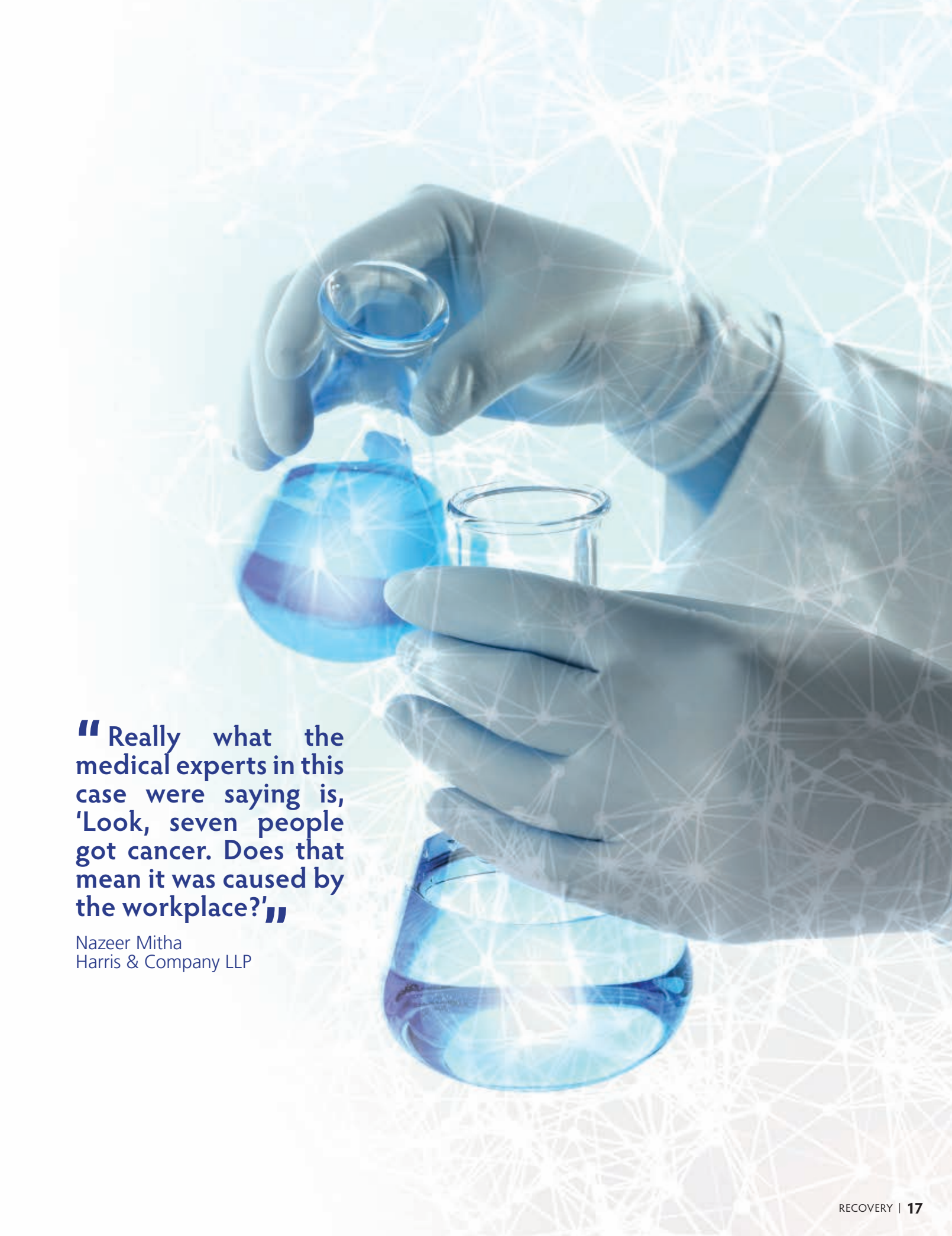

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Nazeer Mitha
Harris & Company LLP

"Causation need not be determined with scientific precision," the court decision reads.

And a judge may infer causation with or without scientific proof after weighing all of the evidence.

"Medical experts ordinarily determine causation in terms of certainties whereas a lesser standard is demanded by the law. It is the function of the trier of fact, not the medical witnesses, to make a legal determination of the question of causation," the top court ruled.

The *Snell* case outlined the court's ability "to draw common sense inference of causation even when there's no scientific proof," Beharrell said.

"I think it is the first time in 25 years that the court has reiterated that principle and so I think it certainly will open up that discussion a lot more, will open up those arguments a lot more."

McGivern said that up until *Snell*, claimants had brought many occupational disease cases forward without positive medical evidence, "often because the medicine had not advanced far enough to make the proper medical connections sought."

He said lower courts have rejected claims on the basis that more evidence is needed to prove workplace causation.

In *Sam v. Wilson* 2007 BCCA 622, for example, the B.C. Court of Appeal ruled that where affirmative medical evidence exists and can lead to a medical conclusion, "the common sense reasoning urged in *Snell v. Farrell*" should not be applied.

But the Supreme Court has "rejected the requirement of scientific certainty again and again" when looking for causation since 1990, he said.

According to Beharrell, while each occupational disease case must be examined on its own merits, the attention the Fraser Health Authority case received has raised awareness about occupational disease claims more generally.

It has "caused people working, in particular in a medical environment, to look around and say, 'Oh. I have breast cancer and so does my co-worker. I wonder if that's also caused by my work?'" she said.

"Each of those cases obviously [has] to be looked at on their merits if they get to that point, but I think it has raised awareness."

But Mitha said he doesn't believe the ruling means the law of causation has been relaxed or changed, largely since "the court didn't really get into what the test for causation is."

He added: "The majority was really focusing more on saying, look, when a tribunal makes a decision … as long as it's not completely crazy, as long as it's a possible outcome, even if we disagree with it, we should just defer to it."

Still, he said his indirect reading of the decision is that evidence of a strong correlation between illness and the workplace will be enough for a tribunal to find causation.

McGivern agreed that litigation over the last 25 years makes it clear that some evidence — though not necessarily conclusive scientific proof — is still necessary to convince a tribunal or court of workplace causation.

"The recent [Supreme Court] case is a good example where the tribunal was convinced of proof of causation in the absence of medical evidence because the statistical evidence showed that it was highly improbable that the illnesses complained of were unrelated to the job environment," he said.

"That is really what is required in most cases."



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