Focus PERSONAL INJURY

Do ties always go to the defence?


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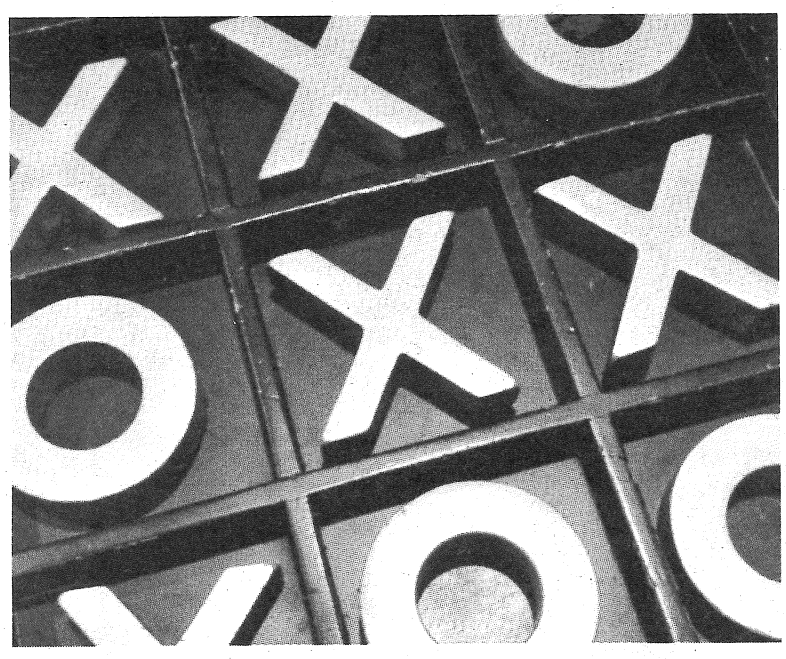

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In a series of judgments commencing with *Snell v. Farrell* [1990] S.C.J. No. 73 and concluding with *Ediger v. Johnston* [2013] S.C.J. No. 18, the Supreme Court of Canada has repeatedly reaffirmed the general proposition that the plaintiff in a personal injury action must prove all the elements of negligence on the balance of probabilities. With respect to causation, the test is expressed as the "but for" test, but it is the same test — proof on the balance of probabilities. In the years between *Snell* and *Ediger* a great deal of judicial and academic ink has been spilled debating whether this burden could be satisfied, in certain circumstances, by proof that the defendant created a risk of harm and the injury fell within the scope of that risk. The answer, at the end of the day, was (in almost all cases) "no."

It is now beyond question that proof on the balance of probabilities is the requirement, and only in extremely rare circumstances will the court deviate from that test. In this sense, it can be said unequivocally that a "tie" always goes to the defence. If the scales are evenly balanced, by definition the plaintiff has not proven his/her case on the balance of probabilities, and the case will be dismissed.

As a result, it is not at all unusual in personal injury cases, and it is almost the norm in medical malpractice cases, for defence counsel to proffer expert opinion evidence and then to submit that the plaintiff cannot, as a matter of law, satisfy the balance of probabilities requirement. This submission is premised largely upon two cases, one English and one Canadian.

In *Maynard v. West Midlands Regional Health Authority* [1984] 1 WLR 635 (HL) (frequently followed in Canada), Lord Scarman stated, "It is not enough to show that there is a body of competent professional opinion which considers that there was a wrong decision, if there also exists a body of professional opinion, equally competent, which supports the decision as reasonable in the circumstances." Appellate courts in this country, including the Supreme Court of Canada, have also repeatedly held that a doctor will not be negligent in complying with common practice employed by respected members of the profession. Defence counsel rely upon these statements to argue that, there usually being no credibility issues regarding experts, and the defence experts being recognized as "competent and respectable" practitioners, the very fact that they support the conduct of the defendant, or that they reject the causal link, means that the claim must fail.

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This submission must be rejected in most cases. As the House of Lords stated in *Bolitho v. City and Hackney Health Authority* [1998] AC 232: "The court is not bound to hold that a defendant doctor escapes liability for negligent treatment or diagnosis just because he leads evidence from a number of medical experts who are genuinely of opinion that the defendant's treatment or diagnosis accorded with sound medical practice." Canadian courts, without reference to *Bolitho*, have reiterated this point frequently.

Causation is often proven by inferences drawn from the evidence proffered. Defence counsel frequently cite cases such as *Moore v. Castlegar & District Hospital* [1998] B.C.J. No. 332 for the proposition that the trier of fact is not permitted to draw an inference of causation where the defence has raised any, or any expert, evidence to the contrary. In *Ediger*, the Supreme Court of Canada rejected this proposition and stated that the trier of fact may draw an inference of causation where the defendant does not introduce *sufficient* evidence in opposition to that which supports the plaintiff's theory of causation. The decision in *Ediger* makes it clear that, while an inference of causation can be negated by sufficient contrary evidence, the mere existence of expert evidence in support of the defendant's position does not prohibit recourse to inference reasoning.

Examination of reported and unreported judgments in personal injury cases shows that it is extremely rare for a court to find that the scales are truly evenly balanced. Where there is a difference of opinion, most judges recognize their obligation to sift through the opinions from both sides and to determine what weight ought to be given to that evidence, and then to select the expert theory most consistent with all the evidence before the court (*Rogers v. Grypma* [2001] A.J. No. 1425).

Thus, while a "tie" must always go to the defence, a true "tie" is unusual. By carefully preparing the expert opinion evidence to be presented at trial, by ensuring that all relevant facts are addressed by the experts, and that all appropriate medical and other expert theories are properly addressed, counsel can ensure that the issues and the evidence relevant to those issues are put before the court and that the case is properly adjudicated on its merits, rather than on a technical determination of the burden of proof.

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