INTRODUCTION

This is part 5 of our 8-part series on the anatomy of a medical negligence claim within which we review the following topics:

• The Doctor-Patient Relationship and Duty of Care (Verdict Issue 163 – Winter 2019)
• Consent (Verdict Issue 164 – Spring 2020)
• Standard of Care (Verdict Issue 165 – Summer 2020)
• Defences to a Claim of a Breach of the Standard of Care (Verdict Issue 166 – Fall 2020)
• Causation – Basic Principles
• Causation – Application
• Expert Evidence
• Disclosure of Errors

In previous articles, we outlined two essential criteria in a medical negligence action: the need to establish that a defendant physician or nurse owes a duty of care to their patients, and that the defendant breached the standard of care. Establishing these two components will not, however, lead to a successful lawsuit. Once the plaintiff has established a duty of care and a breach of the standard of care, it is still necessary to establish that the breach caused the injuries of which the plaintiff complains.

Medical negligence is a particularly complicated area of the law, often as a result of the need to establish causation. Motor vehicle accidents may have causation issues arising out of an argument about whether one particular injury was pre-existing or the result of the accident, but primary causation is relatively easy to establish: plaintiff was healthy, plaintiff was hit by a car, plaintiff is now injured. Medical negligence is rarely so clear cut. For example, there is the issue of why the plaintiff sought medical treatment in the first place. Are the injuries complained of something that would have arisen from that original medical issue regardless of the care or something caused by the care? There can also be issues related to risks of a procedure. This is something that is often raised in the standard of care portion of a claim but can also arise in the causation analysis: are the plaintiff’s injuries those from known risks that arose despite adequate medical care, or are they caused by the negligent act(s)? Sometimes a plaintiff can have injuries from both. There can be gray areas where it is difficult to draw a line between what resulted from unfortunate but anticipated medical problems, and the specific injuries resulting from negligent care. Additionally, there is the issue of the limits of existing medical knowledge. Medicine is constantly evolving. Knowledge is growing but there are limits to what we know about the human body and how it reacts to external stimuli. Proving the impact of different medical treatment can be extremely challenging.

BACKGROUND – THE HISTORY OF THE CAUSATION ANALYSIS

The causation issue has vexed the courts of the Commonwealth for decades. Difficulties of proof have lain at the heart of the debate. Usually, the physician or nurse providing care has specialized knowledge and experience which allows him/her to both recognize and understand the evidence as it relates to causation. The courts have gone back and forth on such issues as who should bear the burden to proof and what the burden should be. For example, in McGhee v. National Coal Board, the plaintiff sued his employer after he developed dermatitis on the job. The cause of his illness was coal dust on his skin. He was exposed to this dust...
both while working in a kiln (the non-negligent exposure) and as it stayed on his skin for an extended period while he made his way home (the negligent exposure). His employer was supposed to have supplied shower facilities but did not do so. In allowing the claim, Lord Wilberforce, in an oft cited judgment, stated:

“…there could be little doubt that the Appellant’s dermatitis resulted from a combination, or accumulation, of two causes: exposure to dust while working in hot conditions in the kiln and the subsequent omission to wash thoroughly before leaving the place of work; the second of these, but not the first, was, on the findings, attributable to the fault of the Respondents. The Appellant’s expert was unable to attribute the injury to the second of these causes for he could not say that if the Appellant had been able to wash off the dust by showers he would not have contracted the disease. He could not do more than say that the failure to provide showers materially increased the chance, or risk, that dermatitis might set in.

My Lords, I agree with the judge below to the extent that merely to show that a breach of duty increases the risk of harm is not, in abstracto, enough to enable the pursuer to succeed.

But the question remains whether a pursuer must necessarily fail if, after he has shown a breach of duty, involving an increase of risk of disease, he cannot positively prove that this increase of risk caused or materially contributed to the disease while his employers cannot positively prove the contrary…it is a sound principle that where a person has, by breach of a duty of care, created a risk, and injury occurs within the area of that risk, the loss should be borne by him unless he shows that it had some other cause.

This judgment was widely (and usually unsuccessfully) cited as suggesting that so long as the plaintiff could prove a breach of the standard of care which increased the risk of injury, then the burden of proof shifted to the defendant to disprove causation.

The debate as to how to conduct the causation analysis in medical negligence cases was addressed by the Supreme Court of Canada in Snell v Farrell. In that case, the plaintiff lost vision in one eye after undergoing surgery to remove a cataract. Neither side was able to establish with certainty when or how the injury occurred. The trial judge, relying on McGhee, found for the plaintiff on the basis that the defendant had created a risk of injury, the harm suffered fell within the ambit of the risk and the defendant had not disproven causation. The plaintiff’s judgment was upheld on appeal, but for different reasons. In the Supreme Court of Canada, the court ruled that “Causation need not be determined by scientific precision.” This statement, in itself, lines up neatly with the existing legal principles: proof is required on a balance of probabilities, not with scientific certainty. The judgment went further, however, and stated:

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 Wilsher when he referred to a “robust and pragmatic approach to the … facts” (p. 569). [Emphasis added]

The question thus arose as to whether scientific evidence and proof of causation was required at all, or whether trial judges were permitted to make inferences of causation based on ordinary common sense.

In the ensuing two decades, trial judges and the BC Court of Appeal made it clear that the “robust and pragmatic” approach did not allow for a finding of causation in the absence of positive evidence led by the plaintiff. In addition, the BC Court of Appeal held that any evidence led by the defendant resulted in a bar against the trial judge making an inference of causation or finding causation based upon common sense reasoning.

Another complication in the causation analysis is the potential for a “material contribution” test. In Athey v Leonardi, the Supreme Court of Canada outlined the rules around causation:

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… The “but for” test is unworkable in some circumstances, so the courts have recognized that causation is established where the defendant’s negligence “materially contributed” to the occurrence of the injury… It is not now necessary, nor has it ever been, for the plaintiff to establish that the defendant’s negligence was the sole cause of the injury. There will frequently be a myriad of other background events which were necessary preconditions to the injury occurring. To borrow an example from Professor Fleming (The Law of Torts (8th ed. 1992) at p. 193), a “fire ignited in a wastepaper basket is . . . caused not only by the dropping of a lighted match, but also by the presence of combustible material and oxygen, a failure of the cleaner to empty
the basket and so forth”. As long as a defendant is part of the cause of an injury, the defendant is liable, even though his act alone was not enough to create the injury. There is no basis for a reduction of liability because of the existence of other preconditions: defendants remain liable for all injuries caused or contributed to by their negligence.

Questions subsequently arose as to whether a plaintiff, unable to prove causation on a “but for” analysis, could succeed in his or her lawsuit by establishing that the defendant “materially contributed” to the injury. Undoubtedly, the plaintiff does not need to prove that it was the defendant’s act alone (or inaction alone) that caused his or her injury. No plaintiff could ever succeed if that were the case. It is sufficient that the defendant’s care was one cause of the plaintiff’s indivisible injuries. The issue that arose was whether a plaintiff could succeed on a “material contribution” analysis of causation where it was impossible to prove causation using a “but for” test, but the defendant breached the standard of care and exposed the plaintiff to unreasonable risk of injury.9

The Supreme Court of Canada partially addressed this issue in Resurfice Corp. v. Hanke.10 McLachlin C.J., speaking for the court, clarified that the “material contribution” test is not available any time there is more than one potential cause of an injury. She also made it clear that in certain, special circumstances, an exception may be made to the basic “but for” test. A “material contribution” test may be available in situations where two criteria are met:

1. It is impossible for the plaintiff to prove causation on a “but for” analysis and this impossibility is due to factors outside the plaintiff’s control.
2. It is clear that the defendant had a duty of care, breached the standard of care and, as a result, exposed the plaintiff to an unreasonable risk of injury (as long as the plaintiff suffered that form of injury).11

THE MODERN LAW OF CAUSATION – CLEMENTS V. CLEMENTS

Clements v. Clements12 set out clearly the modern rules of causation. Clements was a motor vehicle accident case. The parties were a married couple involved in a motorcycle accident. At the time of the accident, the defendant husband was driving over the speed limit and the motorcycle was overloaded by 100lbs. A nail punctured one of the tires causing the motorcycle to wobble and fall. The plaintiff wife argued that the accident was caused by the defendant’s negligence in driving over the speed limit with an overloaded vehicle. The trial judge found it impossible to determine what speed and weight would have allowed the defendant to recover from the wobble caused by the punctured tire. The case was appealed all the way to the Supreme Court of Canada on the question of whether the “material contribution” test was available in the circumstances of the case. In holding that the trial judge should not have applied a “material contribution” analysis, the Court outlined the major principles of causation.

The first rule out of Clements is the explicit statement of the Court that the test for causation is the “but for” test.13 The plaintiff must prove, on the balance of probabilities, that but for the negligence of the defendant, the injury would have been avoided. The Court was clear that “but for” causation requires that the plaintiff prove that the defendant’s act was a necessary part to producing the injury.14

The Court also discussed the application of the “but for” test. Scientific evidence establishing the precise contribution the defendant’s negligence made to the injury is not required.15 Rather, judges are required to apply the “but for” test in a robust, common sense fashions.16 Where appropriate (in the face of evidence connecting a duty and breach of the standard of care to the plaintiff’s injury), a judge may infer causation on a balance of probabilities.17 It remains open to the defendant, however, to present evidence rebutting this inference and demonstrating that the injury likely would have happened in any event.18

Finally, the Court discussed the “material contribution” test.19 The Court unequivocally stated that, unlike the “but for” test, the “material contribution” test is not a test of factual causation at all. It is a method of recovery on a policy-driven basis where the plaintiff is permitted to recovery despite their inability to prove causation through no fault of his or her own. It is only to be very rarely applied (and has in fact never been applied by the Supreme Court of Canada) in instances where fairness and the basic principles of tort law require it. “Material contribution” is not about material contribution to the injury but rather material contribution to the risk of injury. In situations where the defendants owed a duty of care to the plaintiff, breached the standard of care and materially contributed to the risk of injury to the plaintiff, a plaintiff can recover only when it is impossible to prove “but for” causation. By “impossible”, the Court did not refer to scientific impossibility. If the current state of scientific knowledge does not enable the plaintiff to prove causation, the plaintiff’s claim will still fail. Impossibility leading to application of a “material contribution” test refers to the very specific scenario in which the following factors are met 20

1. The case involves multiple tortfeasors;
2. Each tortfeasor has been proven to be negligent;
3. “But for” the global negligence of the multiple tortfeasors, the plaintiff’s injury would have been avoided;
4. It is impossible for the plaintiff to prove which of the tortfeasors was individually responsible for the plaintiff’s injury because they can all point the finger at each other.

The modern law is clearly less flexible than some plaintiff’s counsel may have previously hoped. The reality of medicine is that there will be frequent circumstances in which plaintiffs do not have the scientific or medical foundation to prove the cause of their injury. This is not the kind of impossibility that would lead to application of the “material contribution” test. Also, the new “material contribution” test may sound like an easier avenue of proving causation but can in fact insert additional challenges. It allows the defendants multiple opportunities to avoid a finding of negligence. Rather than simply needing to prove that “but for” the
negligence of one defendant, the plaintiff would have avoided the injury, the plaintiff would be required to prove that each and every one of the defendants was negligent. If one defendant is found to have met the standard of care, “material contribution” may not be applicable since not all the potential causes of the injury were the result of negligence. While non-tortious factors contributing to an injury do not eliminate a finding of negligence, the principles underlying “material contribution” make it accessible only when negligent defendants would be able to escape liability by pointing the finger at each other as the cause. If one of the defendants, who may have been the sole cause of the injury, is found to have met the standard of care, this reasoning may no longer apply. In addition, other non-tortious causes (pre-existing conditions, normal complications of medical procedures and other, unrelated, medical issues) may be pointed to as likely sources of the injury, preventing the plaintiff from establishing causation on a balance of probabilities regardless of the test used.

LOSS OF CHANCE

One complication in these cases is particular to medicine: the uncertainty of treatment outcomes. Often in medicine, physicians provide the best available treatment, which leads to recovery in some patients but cannot prevent death or ongoing disability for others.

In medical negligence cases, the plaintiff must be able to prove, on a balance of probabilities, that appropriate care would have avoided their injuries. It is not enough to establish that appropriate care would have given the plaintiff a real and serious chance of benefit.\(^\text{21}\)

A frequent complaint in medical situations is that the medical team should have intervened earlier. It may be easy to show that earlier treatment would have improved the outcome or led to better odds of recovery. This is not enough. The plaintiff must establish that appropriate treatment would not only have increased the odds of success but would, on the balance or probabilities, have avoided or mitigated the injury. This issue often arises in delayed diagnosis of cancer cases. The earlier cancer is caught and treated, the better the chances of recovery. Yet, even if the plaintiff’s treatment was delayed by a year, it can be extremely difficult to prove that earlier treatment would have led to a different outcome. That loss of chance of recovery is not compensable.

CONCLUSION

Although scientific proof or scientific certainty is not required to prove causation, the underlying condition of plaintiffs and the limits of current medical knowledge make causation a significant hurdle in most medical negligence cases. In the majority of cases, adequate defence lawyers will be able to find some non-tortious sources of injury that they can point to as a likely cause of the plaintiff’s injuries. In many situations, the state of current medical understanding is about “increased risk” or “benefit of treatment” rather than certain cause and effect principles. Even with a “robust and common sense” approach to the evidence, proving that appropriate care would have avoided the plaintiff’s injury can be an overwhelming task.

This article has reviewed the basic principles of causation. In the next article in this series, we will discuss the application of these principles in medical negligence cases.\(^V\)

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2. [1972] 3 All E.R. 1008 (H.L.)
3. [1990] 2 SCR 311
4. Supra.
5. Supra.
11. Supra at para 25.
15. Supra at para 9.
17. Supra at para 10.
18. Supra at para 11.
20. Supra at para 46.