UPDATE ON CAUSATION

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Introduction

It is undisputed that in civil cases, the plaintiff bears the burden of proof on a balance of probabilities to establish causation between the conduct of the defendant and the alleged injury.

The law appeared to have been well settled that causation was proven when a plaintiff was able to establish that "but for" the negligent act or omission of a defendant(s), the injury would not have occurred.

The test for establishing causation, however, became more difficult to apply where there were multiple causes of an injury. This paper will attempt to review the jurisprudence as it has developed vis a vis the appropriate test to be used to establish causation.

Athey v. Leonati [1996] 3 S.C.R. 458

By way of background, the plaintiff in *Athey* had suffered back injuries in two automobile accidents. In addition, the plaintiff suffered from pre-existing back problems. After undergoing back surgery, the plaintiff began a rehabilitation program at a fitness centre. While stretching in the gym, the plaintiff aggravated his back injuries and was diagnosed with a herniated disc. The plaintiff sued the drivers involved in the two motor vehicle accidents. The defendants admitted liability for the accidents, but defended the action on the issue of causation and damages, arguing that the proximate cause of the injury was the plaintiff's pre-existing condition as opposed to the motor vehicle accidents.

At trial, the judge awarded 25% of the assessed damages on the theory that the contribution of the motor vehicle accidents to the injury was only 25% with the balance being attributed to the plaintiff's pre-existing condition. The trial judge's decision was affirmed by the Court of Appeal, however, on further appeal; the Supreme Court of Canada unanimously reversed the trial judge's decision and awarded the plaintiff 100% of the assessed damages.

In reality, *Athey v. Leonati* was nothing more than what Major J. described as

> *….a straightforward application of the thin skull rule. The pre-existing disposition may have aggravated the injuries, but the defendant must take the plaintiff as he finds him. If the defendant's negligence exacerbated the existing condition and caused it to manifest in a disc herniation, then the defendant is a cause of the disc herniation and is fully liable.*

The fact that the plaintiff was made previously vulnerable to disc herniation by prior, non-tortious events did not relieve the defendants of their obligations to compensate the plaintiff for that injury if he would not have suffered that injury but for the defendant's negligence. It was on this basis that the decision in *Athey v. Leonati* was founded.

The Court did not dismiss the "crumbling skull" argument. The "crumbling skull" argument did not succeed because there was no finding at trial that the disc herniation would have occurred without the car accident. Therefore, if cogent evidence had been adduced at trial that the disc herniation would have occurred without the car accident, causation may not have been established.

In his decision, Major J. outlined the reasoning of the Court. He confirmed that the general test for causation is the "but for" test, however he also went on to state that the "but for" test was not the conclusive test for causation.

The court opined that there were some circumstances where the "but for" test was unworkable such that the courts would recognize causation where it was established that the defendant's negligence "materially contributed" to the occurrence of the injury. Delivering the judgment for the Court, Major J. (in obiter) opined as follows:

> *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…*

Despite the fact that the court noted that the "material contribution" test would only be applied when the "but for" test was unworkable, this passage has subsequently been relied upon by plaintiff counsel to suggest that causation is established if there is a "material contribution" to the occurrence of the injury. Even subsequent jurisprudence set aside the traditional "but for" test in favour of a lower-threshold "material contribution" test to establish causation.

An example of the application of the "material contribution" test is the decision of the Ontario Court of Appeal in *Alderson v. Callaghan* [1998] O.J. No. 2181. The plaintiff in that case suffered brain damage as a result of a motor vehicle accident resulting in memory loss, personality changes, mental impairment and an inability to work. The plaintiff had some pre-existing psychological and emotional issues. In addition, the plaintiff had been the victim of several post accident assaults. At trial, the defendant took the position that the plaintiff's personality changes were attributable to her pre-exiting psychological and emotional condition, as well as the effects of the brain damage caused by the post-accident assaults.

In his charge to the jury, the trial judge implied that the plaintiff would be entitled to full recovery only if the jury were of the view that her condition was directly attributable to the motor vehicle accident. The central issue in the appeal was whether the trial judge misdirected the jury on the issue of contributory causation.

The Court of Appeal concluded that the instruction of the trial judge to the jury was not in accord with the principles set forth in *Athey*. The jury should have been told that if the plaintiff's overall condition resulted from the cumulative effect of the injuries sustained in the subject accident, the multiple beatings inflicted upon her thereafter, and her pre-existing psychological condition, she would nonetheless be entitled to full compensation so long as the jury was satisfied, on a balance of probabilities, that the injuries sustained in the motor vehicle accident materially contributed to her overall condition. The jury should also have been told that if they were not so satisfied, they should assess the plaintiff's damages based upon the nature and extent of the injuries, which in their opinion, were directly attributable to the motor vehicle accident.

This is similar to the approach that has been applied by the trial judges in this jurisdiction. I recently defended a jury trial where the plaintiff had been involved in a prior motor vehicle accident as well as two subsequent motor vehicle accidents. The only action that was commenced was the one that I was defending.

The following is an excerpt from the trial judge's charge to the jury relating to the causation issue:

> *In order to recover, a party must establish that the negligence was the proximate cause, a direct and contributing cause of the plaintiff's injuries or damages…*
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> *The proximate cause of an injury is that cause which produces the injury and without which the result would not have happened. Causation is established if the defendant's negligent act materially contributed to the plaintiff's loss. The defendant is responsible for all injuries caused or contributed to by his negligence.*

If the plaintiff's overall condition resulted from the cumulative effect of the injuries sustained in this accident and his pre-existing condition, the plaintiff is nevertheless entitled to full compensation as long as you are satisfied on a balance of probabilities that the injuries sustained in this accident materially contributed to his overall condition. If you are not so satisfied, then you should assess the plaintiff's damages based upon the nature and extent of the injuries which you find were directly attributable to the subject accident.

If you find that the plaintiff's overall condition resulted from the cumulative effect of the injuries sustained in the subject accident and the two subsequent accidents, the plaintiff would nonetheless be entitled to full compensation if you are satisfied that the injuries sustained in the subject accident materially contributed to his overall condition. If you are not so satisfied, you should assess the plaintiff's damages based upon the nature and extent of the injuries which you find are directly attributable to the subject accident. The fact that the plaintiff's overall condition may have been exacerbated by the subsequent motor vehicle accidents does not relieve the defendant from full responsibility.

Resurfice Corp. v. Hanke [2007] S.C.J. No. 7

In February of 2007, the Supreme Court of Canada released its reasons for judgment in *Resurfice Corp. v. Hanke* [2007] S.C.J. No. 7. In the *Resurfice* case, the plaintiff was the operator of an ice resurfacing machine. He was badly burned when hot water overfilled the gasoline tank of the machine, releasing vapourized gasoline which was then ignited by an overhead heater. The plaintiff sued the manufacturer and distributor of the machine alleging that the gasoline and water tanks were similar in appearance and placed too close together on the machine, with the result that he confused the two. The trial judge dismissed the action on the basis that the plaintiff had not established that the accident was caused by the negligence of the defendants. The B.C. Court of Appeal ordered a new trial and a further appeal was made to the Supreme Court of Canada.

The Supreme Court of Canada restored the trial judge's decision based on the causation issue. In the course of rendering its decision, the Supreme Court of Canada reviewed the state of the law on the causation issue, and in particular, commented on the decision of the Court in *Athey v. Leonati* and outlined the appropriate test that should be used to determine causation.

The decision of the Supreme Court was rendered by McLachlin C.J. who commented as follows:

> *First, the basic test for determining causation remains the "but for" test. This applies to multi-cause injuries. The plaintiff bears the burden of showing that "but for" the negligent act or omission of each defendant, the injury would not have occurred. Having done this, contributory negligence may be apportioned as permitted by statute.*

This fundamental rule has never been displaced and remains the primary test for causation in negligence actions.

The "but for test recognizes that compensation for negligent conduct should only be made "where a substantial connection between the injury and the defendant's conduct is present". It ensures that a defendant will not be held liable for the plaintiff's injuries where they "may very well be due to factors unconnected to the defendant and not the fault of anyone".

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 involve 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 from that injury. In other words, the plaintiff's injury must fall within an ambit of 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.*

The Court then went on to give two examples of the exceptions to the "but for" test:

> *Where it is impossible to say which of two sources caused the injury. For instance in Cook v. Lewis [1951] S.C.R. 830 where two shots were carelessly fired at the victim, but it is impossible to say which shot injured him. Provided that it is established that each of the defendants carelessly or negligently created an unreasonable risk of that type of injury that the Plaintiff in fact suffered (ie. carelessly fired a shot that could have caused injury), a material contribution test may be appropriately applied,*
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> *Where it is impossible to prove what a particular person in the causal chain would have done had the defendant not committed a negligent act or omission, thus braking the "but for" chain of causation. For instance, …in <u>Walker Estate v. York Finch Hospital</u> [2001] 1 S.C.R. 647 where it was impossible to prove that the donor whose tainted blood infected the plaintiff would not have given blood if the defendant had properly warned him against donating blood (the impossibility of establishing causation and the element of injury-related risk created by the defendant are central.*

The Court specifically indicated that the "material contribution" test was not to be used solely because there was more than one potential cause of an injury. The Court emphasized that the use of the "material contribution" test was to be used only in exceptional circumstances.

Barker v. Montfort Hospital [2007] O.J. No. 1417

This decision was released by the Ontario Court of Appeal on April 18, 2007. In this case, the plaintiff had been followed for several years for abdominal pain. On April 4, 2000, the plaintiff attended at the hospital emergency department suffering from abdominal pain and vomiting. She was assessed and released with a diagnosis of urinary tract infection. Later that same evening, the plaintiff returned to the emergency department as her condition had worsened. She was diagnosed as having a bowel obstruction. The defendant was her treating physician. The treatment that he adopted was to stop the intake of food, provide intravenous fluids, insert a nasogastric suction device and observe the plaintiff in the hope that the problem would resolve itself.

On the morning of April 6, 2000, the defendant determined that the plaintiff's condition had deteriorated to the point where surgery was warranted. After commencing the surgical procedure, the defendant observed that the plaintiff had a voluvus (an abdominal twisting of the small bowel) which had cut off the blood supply to a five foot section of bowel. That section of bowel had become gangrenous and had to be removed.

The plaintiff sued the defendant for negligent care. The trial judge awarded damages and found liability against the defendant. The defendant doctor appealed the decision to the Ontario Court of Appeal. The decision of the Court was rendered by P.S. Rousseau J.A.. With respect to the causation issue, the Court considered the Supreme Court of Canada's recent decision in the *Resurfice* case.

Justice Rousseau noted that the *Resurfice* case did not alter the state of the law on causation. Rather, it confirmed that the basic test for determining causation remains the "but for" test and that only in exceptional circumstances would the courts recognize exceptions to the basic "but for" test. The Court concluded that this case was not an exception to the basic rule and that the "but for" test of causation applied.

The Court reviewed the transcripts and concluded that there was no evidence before the Court to establish that the delay in proceeding with the surgery caused the plaintiff to lose five feet of her bowel. In fact, there was evidence to suggest that even if the operation had been carried out sooner, the defendant would not have saved the bowel. The Court of Appeal therefore set aside the trial judge's decision and dismissed the action against the defendant.

Rizzi v. Mavros [2007] O.J. No. 178

This decision was released by the Ontario Court of Appeal on May 8, 2007. In this case, the plaintiff's leg was injured when she attempted to move some metal sheets that were stored in the laundry room of the apartment building where she resided. As a result of the injuries sustained, the plaintiff developed fibromyalgia and brought an action against the owners of the apartment building claiming damages for her leg injury and for fibromyalgia. Causation relating to the fibromyalgia was the central issue at trial. The jury found in favour of the plaintiff, subject to a reduction of 75% for contributory negligence on the part of the plaintiff.

The decision was appealed by the plaintiff on the issue of quantum as well as contributory negligence. The defendants did not originally cross-appeal, but after the release of the *Resurfice* decision as well s the decision in Barker, the defendants brought a motion seeking an Order granting an extension of time to file a Notice of Cross-Appeal on the causation issue.

The decision of the Court of Appeal was released by E.E. Gillesse J.A. who granted an extension of time to file a Notice of Cross-Appeal to the defendants. In considering the relief sought, the Court felt that the cross-appeal had considerable merit because the trial judge had instructed the jury on the causation issue on the basis of a "material contribution" test as opposed to the "but for" test without the necessary determination having been made that special circumstances warranted the application of the "material contribution" test. Until that determination was made, it could not be known which of the two causation tests ought to have been applied.

Abel v. Hamelin 2007 CarswellOnt 3108 (Ont. S.C.J. April 30, 2007)

This is a decision of Justice Hackland dated April 30, 2007. The case involved a 48 year old plaintiff who was involved in a pedestrian motor vehicle accident. At the time of trial, she was substantially disabled from a combination of chronic pain, depression and significant cognitive impairment (the cause of which was vigorously defended at trial).

The plaintiff was employed as a personal support worker at the time of the accident. She had made inquiries with the Ontario College of Nurses prior to the accident about how she could qualify to obtain her RN designation, having previously obtained her full nursing qualifications in Ethiopia.

At trial, the court found that the plaintiff suffered from a major cognitive deficit which was not accident related. The court also found that the cognitive impairments were substantially exacerbated by the subject accident and that they played a major role in the plaintiff's ability to recover from the soft tissue injuries as well as playing a major role in the development of the chronic pain syndrome and associated depression and anxiety.

Applying the "but for" test of causation, the Court described the plaintiff as a "thin skull" plaintiff. The court did not compensate the plaintiff for any cognitive limitations which the plaintiff would have suffered irrespective of the accident and which would have eventually negatively impacted on her life.

The Court found that even without reference to the motor vehicle accident, the plaintiff would have been precluded from achieving her goal of obtaining an RN designation in Ontario due to her pre-existing cognitive impairment and the court therefore refused to award damages for future income loss based upon the income of an RN.

Summary

Following the logic and reasoning in the *Athey* case as well as the *Resurfice* case, the primary test for establishing causation is the "but for" test. This test applies to single cause injuries as well as multi-cause injuries. It is only in exceptional cases that liability will be imposed even though the "but for" test is not satisfied.

The "material contribution" test is only to be applied in situations where both of the following conditions have been met:

1) It must be impossible for the plaintiff to prove that the defendant's negligence caused the plaintiff's injury using the "but for" test due to factors that are outside of the plaintiff's control; and
2) 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 my view, the *Resurfice* decision has done much to clarify those circumstances under which a "material contribution" test should be applied and reinforce that the "but for" test remains the primary test for causation.