

***Presented at the 2004 Insight Information conference on Obstetrical Malpractice***

## ***Causation in Obstetrical Malpractice Cases***

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**This article represents Mr. McGivern's opinion as of the time it was written. There may have been changes or further developments in the law since that time and this article should not be relied on as legal advice without first consulting a lawyer.**

### **Causation in Obstetrical Malpractice Litigation The Barrier that Destroys Many Claims**

On January 19, 1992 Mrs. K was admitted to hospital, fully expecting that within hours she would give birth to a healthy baby boy. This was her first pregnancy and she was both excited and nervous about her anticipated labour and delivery. What transpired in hospital, however, exceeded her worst nightmare. Towards the end of her labour problems arose. She tired and her contractions became less effective. Her attending physician elected to augment her labour by commencing an oxytocin drip. The fetal heart monitor began to show signs of trouble. By the time he was born, Mrs. K's son had suffered catastrophic brain damage due to oxygen deprivation.

Mr. and Mrs. K sued. Through expert testimony, they were able to establish that the physician and nursing staff monitoring Mrs. K's labour had acted negligently. The judge found that the augmentation was problematic. He concluded that the monitoring of the labour after initiation of the augmentation was inadequate. He found that the physician and the nursing staff were not communicating appropriately, such that critical information was either not known or acted upon. Notwithstanding these conclusions, however, he dismissed the lawsuit against both the physician and the hospital. He concluded, after reviewing all of the evidence, that the I conclude that they had failed to prove, on a balance of probabilities, that the negligence had any causal connection to the insult which resulted in the baby's brain damage. This left the family without any outside assistance towards the expenses associated with the care and upbringing of their brain damaged baby (with both sides acknowledged amounted to millions of dollars) and, to add salt to that wound, they were exposed to a claim for costs which could easily exceed \$250,000.

This case highlights one of the most difficult problems associated with obstetrical malpractice litigation – the need to prove causation. Causation is established where the plaintiff proves to the civil standard on a balance of probabilities that the defendant caused or contributed to the injury:

"Causation is an expression of the relationship that must be found to exist between the tortious act of the wrongdoer and the injury to the victim in order to justify compensation of the latter out of the pocket of the former"

*Snell v. Farrell* (1990) 72 D.L.R. (4th) 289 (S.C.C.) at pp. 298-299

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: *Horsley v. MacLaren*, [1972] S.C.R. 441.

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: *Myers v. Peel County Board of Education*, [1981] 2 S.C.R. 21; *Bonnington Castings, Ltd. v. Wardlaw*, [1956] 1 All E.R. 615 (H.L.); A contributing factor is material if it falls outside the *de minimis* range: *Bonnington Castings, Ltd. v. Wardlaw*, *supra*; see also *R. v. Pinsky* (1988), 30 B.C.L.R. (2d) 114 (B.C.C.A.), *aff'd* [1989] 2 S.C.R. 979.

The issue of causation should be considered in every medical malpractice case, and frequently requires expert evidence, often from a different area of expertise than experts advising on the standard of care. In Canada, *Snell v. Farrell* (*supra*) is the leading case. *Snell* reaffirmed the general principle that the burden of proof, on the balance of probabilities, resides with the plaintiff. There has been much debate over the years as to whether, in medical negligence cases, leaving the burden with the plaintiff is simply unfair.

Proof of causation in most personal injury litigation is rarely problematic. In motor vehicle injury litigation, for example, it is usually not difficult to link the plaintiff's injuries to a specific event – the accident. In medical malpractice litigation, however, and especially in obstetrical malpractice litigation, causation issues arise as a result of a number of special factors:

1. The relevant circumstances giving rise to the injury to the infant plaintiff are "hidden" in the sense that they occur intrapartum;
2. To the extent that the facts are known, they are usually within the exclusive knowledge of the defendant physicians\nurses;
3. Even when they are aware of the facts, most patients do not have the education or training to understand the significance of the events;
4. The present state of medical science often does not allow the proof which is called for.

Over the years, a number of attempts have been made to ease the burden on the Plaintiff.

***Cook v. Lewis*, [1951] S.C.R. 830**

One of the early Canadian cases to move away from the strict requirement that the plaintiff prove causation on the balance of probabilities is the judgment of the Supreme Court of Canada in *Cook v Lewis*. In *Cook* the plaintiff was struck by a bullet fired from the gun of one of his two companions. The plaintiff could not prove which defendant had shot him, and therefore under the traditional test, his case was bound to fail. The court found that since both defendants were negligent, it would be inappropriate to allow the claim to be defeated by simply allowing each to assert that his negligence did not

cause the injury. Since the plaintiff could establish that one of them caused the injury, and that both were negligent, the burden of proof (as opposed to merely the evidentiary burden) would be shifted to the defendants to establish that he was responsible for the injury. Failing such proof, each would be held liable.

This judgment has very limited applicability in most medical malpractice actions. It is a rare case where the plaintiff can establish negligence, and the evidence also supports the view that one of the defendants caused the plaintiff's injuries but it is unclear which defendant is ultimately responsible. This is not to be confused with the more common situation where the physicians and the nursing staff fight over which of them was negligent (ie – where the nurses testify that critical information was passed on but not acted upon by the physician, and the physician testifies that the information was never passed on). In that scenario, the fight is over which one was negligent. The *Cook* scenario does not arise until negligence against both is already established.

***McGhee v. National Coal Board, [1972] 3 All ER 1008.***

In the early '70's this case was said to be authority for the proposition that, where it is proved that there has been a breach of duty of care which has created a risk, and injury has occurred within that area of risk, the onus shifts to the defendant to prove absence of causation between the breach and the injury. This came from a passage in the judgment of Lord Wilberforce where he stated:

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There were a number of judgments in Canada (none in BC) which relied upon *McGhee* to reverse the burden of proof and find for the plaintiff in the absence of proof to the contrary. Those days, however, were short lived. The question was considered by the House of lords in *Wilsher v. Essex Area Health Authority* [1988] 2 W.L.R. 557 where Lord Bridge of Harwich, speaking for a unanimous House, referred to those passages in the speech of Lord Wilberforce and said at p. 567:

My lords, it seems to me that both these paragraphs, particularly in the words I have emphasised, amount to saying that, in the circumstances, the burden of proof of causation is reversed and thereby to run counter to the unanimous and emphatic opinions expressed in *Bonnington Castings Ltd. v. Wardlaw* [1956] A.C. 613 to the contrary effect. I find no support in any of the other speeches for the view that the burden of proof is reversed and, in this respect, I think Lord Wilberforce's reasoning must be regarded as expressing a minority opinion.

After extensive consideration of the speeches in *McGhee*, Lord Bridge of Harwich said at p. 569:

The conclusion I draw from these passages is that *McGhee v. National Coal Board* [1973] 1 W.L.R. 1 laid down no new principle of law whatever. On the contrary, it affirmed the principle that the onus of proving causation lies on the pursuer or plaintiff. Adopting a robust and pragmatic approach to the undisputed primary facts of the case, the majority concluded that it was a legitimate inference of fact that the defenders' negligence had materially

contributed to the pursuer's injury. The decision, in my opinion, is of no greater significance than that and to attempt to extract from it some esoteric principle which in some way modifies, as a matter of law, the nature of the burden of proof of causation which a plaintiff or pursuer must discharge once he has established a relevant breach of duty is a fruitless one.

This language was to have serious implications for the subsequent development of the law in Canada.

### *Snell v. Farrell (Supra)*

At the time when this case was decided, there was considerable uncertainty about Canadian law on causation in light of developments in British case law, specifically, *McGhee (supra)* and *Wilsher (Supra)*. As indicated, when Snell came before the Supreme Court of Canada a number of Canadian judges, including the trial judge in that case, had applied *McGhee* to reverse the ordinary burden of proof with respect to causation.

In *Snell* the plaintiff lost sight in one eye following an operation performed by the defendant surgeon. The trial judge found that the defendant had acted negligently in continuing with the operation after noticing a haemorrhage in the plaintiff's eye. The medical evidence was that the operation was a possible cause of the loss of sight, but the medical witnesses could not say positively that it was the cause.

Sopinka, J., in the reasons for judgment for a unanimous court, noted that proof of causation in medical malpractice cases is often difficult for the patient. The physician is usually in a better position to know the cause of the injury than the patient. Dissatisfaction with the traditional approach to causation stems to a large extent from its too rigid application by the courts in many cases. Sopinka, J. stated:

Causation need not be determined by scientific precision. It is . . . 'essentially a practical question of fact which can best be answered by ordinary common sense rather than abstract metaphysical theory'. Furthermore, the allocation of the burden of proof is not immutable. Both the burden and the standard of proof are flexible concepts.

In many malpractice cases, the facts lie particularly within the knowledge of the defendant. In these circumstances, very little affirmative evidence on the part of the plaintiff will justify the drawing of an inference of causation in the absence of evidence to the contrary. . . .

It is not strictly accurate to speak of the burden shifting to the defendant when what is meant is that evidence adduced by the plaintiff may result in an inference being drawn adverse to the defendant. Whether an inference is or is not drawn is a matter of weighing evidence. The defendant runs the risk of an adverse inference in the absence of evidence to the contrary. This is sometimes referred to as imposing on the defendant a provisional or tactical burden. . . . In my opinion, this is not a true burden of proof. . . .

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 [that all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted]. This is, I believe, what Lord Bridge had in mind in *Wilsher* when he referred to a 'robust and pragmatic approach to the . . . facts.'

It is not, therefore, essential that the medical experts provide a firm opinion supporting the plaintiff's theory of causation. Medical experts ordinarily determine causation in terms of certainties whereas a lesser standard is demanded by the law (pp. 300-301).

The finding of a breach of the standard of care in continuing with the operation was not contested on appeal, and the Court found that it was fully supported by the evidence at trial. Sopinka, J. found that the trial judge may have inferred causation from the circumstances, and in the absence of evidence to the contrary in satisfaction of the evidential burden cast upon the defendant, such an inference was fully warranted on the evidence. Alternatively, the trial judge inappropriately applied the principles outlined in *McGhee*, but Sopinka, J. was satisfied that if the trial judge had correctly applied the law, he would have drawn an inference of causation between the defendant's negligence and the injury to the plaintiff. He noted that:

The [defendant] was present during the operation and was in a better position to observe what occurred. Furthermore, he was able to interpret from a medical standpoint what he saw. In addition, by continuing with the operation, which has been found to constitute negligence, he made it impossible for the plaintiff or anyone else to detect the bleeding which was alleged to have caused the injury. In these circumstances, it was open to the trial judge to draw the inference that the injury was caused by the retrobulbar bleeding. There was no evidence to rebut this inference. . . If there was any rebutting evidence, it was weak, and it was open to the trial judge to find causation, applying the principles to which I have referred . . .

[The trial judge] failed to appreciate that it is not essential to have a positive medical opinion to support a finding of causation. Furthermore, it is not speculation but the application of common sense to draw such an inference where, as here, the circumstances, other than a positive medical opinion, permit (pp. 305-306).

While the court rejected the concept of a reversal of the burden of proof in medical negligence cases, the adoption of the "robust and pragmatic" approach to causation did provide substantial relief to plaintiffs attempting to satisfy the burden of proof regarding causation. The following cases (from BC and the Supreme Court of Canada) are examples of situations where the burden of proof was satisfied even without strong (or sometimes) any expert evidence on the point.

*Cases considering Snell v. Farrell*

*Lankenau v. Dutton (1991) 55 B.C.L.R. (2d) 218 (C.A.)*

The plaintiff suffered spinal cord compression following surgery as a result of an undiagnosed medical condition. The defendant physician, who had been charged with her post operative management, was found to have been negligent in failing to consider a possible spinal cord problem in attempting to find a diagnosis for her post-op symptoms and by delaying the calling in of a neurologist. By the time treatment was undertaken the plaintiff's injuries were irreversible. She was totally paralyzed.

The causation issue was whether, if there had been no breach of duty by the defendant, the plaintiff would have had some recovery. In finding for the Plaintiff, the Court noted that this was a case for a "robust and pragmatic approach to the facts" and found that the plaintiff had met the burden of proving that she suffered damage from the breach of duty.

"To say that the plaintiff had the burden of showing that, if there had been no breach of duty, she could and would have received effective [pressure relieving] treatment before 1715 rather than the time the defendant says she could and would have received such treatment, namely, 1800 hours, [would be] importing into the concept of the legal burden of proof a requirement that the plaintiff demonstrate scientifically that which is incapable of scientific proof. If there had been no breach of duty, [the plaintiff's] recovery even in part was bound to be a near-run thing. But . . . there was . . . sufficient evidence for a finding that she would not have been in such a hopeless condition (p. 232)."

*Levitt v. Carr (1991) 66 B.C.L.R. (2d) 58 (C.A.)*

The plaintiff suffered avascular necrosis of the hips following steroid therapy prescribed by the defendant. The defendant continued high dosage therapy beyond the acceptable period. Avascular necrosis was a known risk of prolonged high dosage steroid therapy. It was not disputed that the high dosage steroids caused the avascular necrosis. The issue was whether there was a causal connection between the continuation of the steroid treatment and the development of the avascular necrosis. It was noted that the "etiology and pathogenesis of avascular necrosis is unknown." The Court found that on the evidence there was no precise point in the treatment duration which could be medically proven as that at which a sufficient accumulation of high dosage steroids forged a direct causal link to the injury, but there was evidence which the trial judge could rely upon to infer a relationship between duration and result. There was no evidence that there was no such relationship or that avascular necrosis would likely have developed within the acceptable initial treatment period in any event, or that some other factor constituted a more likely cause. On this basis the court held that:

"It was open to the trial judge to infer from the evidence that the duration of the high dosage steroid treatment beyond [the acceptable period] **materially increased the risk** of the development of avascular necrosis. It was further open to him to conclude that the material increase in risk was **a contributing cause** and, as such, a foundation for a finding of liability" (p. 83) [emphasis added].

The Court also quoted, with approval, a passage from *Haag v. Marshall* (1989) 39 B.C.L.R. (2d) 205 (C.A.) that:

Where a breach of duty has occurred, and damage is shown to have arisen within the area of risk which brought the duty into being, and where the breach of duty materially increased the risk that damage of that type would occur, and where it is impossible, in a practical sense, for either party to lead evidence which would establish either that the breach of duty caused the loss or that it did not, then it is permissible to infer, as a matter of legal, though not necessarily logical, inference, that the material increase in risk arising from the breach of duty constituted a material contributing cause of the loss and as such a foundation for a finding of liability.

The legal inference permitted by the principle may be prodded along by the concept that as between an innocent plaintiff and a defendant who has committed a breach of duty to the plaintiff and by so doing materially increased the risk of loss to the plaintiff, in a situation where it is impossible, as a practical matter, to prove whether the breach of duty caused the loss, it is more in keeping with a common sense approach to causation as a tool of justice, to let the liability fall on the defendant.

***Cherry v. Borsman (1991) 70 B.C.L.R. (2d) 273 (C.A.)***

The defendant was negligent in the way in which he attempted to perform an abortion. The procedure failed and the fetus was not aborted. The infant plaintiff was born with serious physical and mental impairments. At trial, there was a great deal of medical evidence led which implicated causes other than the failed abortion as the cause of the infant plaintiff's injuries. The trial judge stated that,

"Causation is difficult to establish in many instances because of the uncertainty inherent in medical science especially with regard to fetal medicine. It often cannot be said with absolute certainty that the defendant's actions caused the injury because the exact mechanisms by which the damage occurred are unknown (p. 293)."

He referred to Sopinka, J's judgment in ***Snell***

"that inferences of causation were necessary in some instances. The difficulty in proving causation should not bar an innocent plaintiff from recovering damages. Therefore, an inference of causation is necessary."

After considering all the evidence, he was satisfied that, on a balance of probabilities, the defendant caused the injury suffered by the infant plaintiff. The Court of Appeal upheld this judgment.

***Dillon v. LaRoux (1993) 89 B.C.L.R. (2d) 379 (C.A.)***

The defendant was found negligent in this case in delayed diagnosing a heart attack and referring the patient to an internist. The trial judge found on a balance of probabilities that the "defendant's negligence materially contributed to the majority of the damage done to the plaintiff's heart (p. 393)" and found the defendant 80% liable for the damage. The trial judge came to this conclusion even though no expert witness was asked to express an opinion on the percentage of the damage done as a result of the negligence of the defendant. The majority of the Court of Appeal dismissed the defendant's appeal, stating:

on the question of causation . . . the plaintiff . . . has the burden of proof on a balance of probabilities. . . . Evidence must be introduced which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result. The sometimes rigid application of proof of causation principles has been somewhat relaxed (p. 391)."

In light of the fact that the trial judge had concluded that he had no difficulty in finding on a balance of probabilities that the defendant's negligence materially contributed to the majority of the damage done to the plaintiff's heart, and that there was evidence to support these findings, the Court of Appeal would not interfere.

***Wintle v. Piper (1994) 93 B.C.L.R. (2d) 387 (C.A.)***

In this case, the plaintiff underwent surgery at the hand of the defendant in order to treat an ankle fracture that was not healing. The surgery was to clamp and pin the bone in order to facilitate healing. Subsequently, the pins were removed. The plaintiff developed an infection which resulted in having to amputate his leg. He sued, alleging a number of different grounds of negligence.

During trial, the plaintiff testified that an orderly had put a cleaning solution on the pins but that there remained on the pins some old dry blood. He testified that the defendant surgeon had pulled the pins out without removing the old dried blood and that the pins were clean when they were actually removed. This evidence was ignored by the experts on both sides.

In finding for the plaintiff, the trial judge found that it was a breach of duty on the part of the defendant to introduce a pin with foreign material on it into the tibia. With respect to causation, he drew an inference that the old dried blood was removed from the pin when it was drawn through the tibia and concluded, although there was no medical evidence to support this finding, that the old dried blood had caused the infection which had necessitated the amputation.

In upholding the plaintiff's judgment the Court of Appeal referred to that portion of *Haag v. Marshall* quoted above and to *Snell*, and in particular, those portions which note that

- while the ultimate burden remains with the plaintiff, 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;
- the "robust and pragmatic approach to the facts", and

- it is not essential that the medical experts provide a firm opinion supporting the plaintiff's theory of causation. Medical experts ordinarily determine causation in terms of certainties whereas a lesser standard is demanded by the law.

Applying this reasoning, the Court of Appeal found "it was open to the trial judge to draw an inference on the basis of the evidence of the plaintiff at trial that the defendant was in breach of his duty in drawing the pin . . . through the tibia which led to the osteomyelitis." It is to be noted that this case establishes the high water mark for the application of the "robust and pragmatic" approach to medical malpractice cases in that it applied the reasoning in *Snell* to make a finding of breach of duty, not just causation, even though there was no medical evidence to support either proposition.

### ***The Empire Strikes Back***

The approach adopted by the courts as outlined above led to some alarm amongst defense counsel doing this work. They came to realize that it was not a good idea to simply sit back and say "prove it" to plaintiff's counsel. They started to lead affirmative evidence on causation, which resulted in a swing of the pendulum back the other way.

#### ***Lawson v. Laferriere, (1991) 78 D.L.R. (4th) 609 (S.C.C.),***

In this case (from Quebec) the Supreme Court again considered the question of causation. The Court of Appeal had awarded the Plaintiff damages on the basis that the Defendant doctor's breach of duty had denied her the chance or opportunity of obtaining treatment. In other words, the court had compensated the plaintiff for the lost opportunity for a cure even though the medical evidence indicated that a cure was simply not possible. The Supreme Court of Canada set aside the judgment on behalf of the plaintiff. After making reference to *Snell*, Gonthier J. stated (at p. 657):

"Both this Court and the Quebec Court of Appeal have frequently stated that proof as to the causal link must be established on the balance of probabilities taking into account all the evidence which is before it, factual, statistical, and that which the Judge is entitled to presume."

With respect to causation, the Court made the following observations (at p. 58):

The rules of civil responsibility require proof of fault, causation and damage.

Both acts and omissions may amount to fault and both may be analysed similarly with regard to causation.

Causation in law is not identical to scientific causation.

Causation in law must be established on the balance of probabilities, taking into account all the evidence: factual, statistical and that which the Judge is entitled to presume.

In some cases, where a fault presents a clear danger and where such a danger materializes, it may be reasonable to presume a causal link, unless there is a demonstration or indication to the contrary.

Statistical evidence may be helpful as indicative, but is not determinative. In particular, where statistical evidence does not indicate causation on the balance of probabilities, causation in law may none the less exist where evidence in the case supports such a finding.

Even where statistical and factual evidences does not support a finding of causation on the balance of probabilities with respect to particular damage (eg: a death or sickness), such evidence may still justify a finding of causation with respect to lesser damage (eg: slightly shorter life, greater pain).

The evidence must be carefully analysed to determine the exact nature of the fault or breach of duty and its consequences, as well as the particular character of the damage which has been suffered, as experience by the victim.

If, after consideration of these factors, a Judge is not satisfied that the fault has, on his or her assessment of the balance of probabilities, caused any real damage, then recovery should be denied.

While *Lawson* is, strictly speaking a civil law case and deals only with the issue of “loss of a chance”, it clearly reaffirms the obligation on the part of the plaintiff to prove causation on the balance of probabilities.

***Moore v Johnson (1996) 25 BCLR (3d) 188, aff'd (1998) 49 BCLR (3d) 100 (CA)***

In *Moore*, the plaintiff suffered a cervical spinal cord injury in a motor vehicle accident. He was brought into hospital and treated by the attending emergency staff. He was moving about unrestrained even though proper x-rays had not been taken of his cervical spinal column. He was later found to be an incomplete quadriplegic. He sued the medical staff, alleging that he had come into hospital with a spinal column injury (ie – an injury to the bones of the spinal column) but that he was neurologically intact until he was allowed to move around unrestrained, which, he alleged, caused him injury.

The trial judge found that the medical staff had been negligent in failing to take proper x-rays and in failing to keep the plaintiff unrestrained until a spinal column injury was ruled out. With respect to causation, the plaintiff relied upon medical evidence which indicated that allowing the plaintiff to move around increased his risk of a neurologic injury. From there, the plaintiff relied upon the “common sense” approach outlined in *Snell* and suggested that the clear negligence of the defendants in allowing him to move around caused or contributed to his neurologic injury. In rejecting that submission, the court stated:

All parties have led evidence on this issue [causation] and it would be inappropriate to resort to an inferential analysis as was argued on the plaintiff's behalf.

The court found that the plaintiff's claim failed on the causation issue. The court of appeal agreed. In dismissing the appeal Hollinrake, JA, speaking for the court stated:

I think in a case such as this where there is affirmative medical evidence leading to a medical conclusion it is not open to the court to apply "the common sense reasoning urged in *Snell v. Farrell*." I take it this is what the trial judge was referring to when she said:

All parties have led evidence on this issue [causation] and it would be inappropriate to resort to an inferential analysis as was argued on the plaintiff's behalf.

I share that view.

This judgment has been applied in a number of subsequent cases (see, for example, *Bigcharles v Dawson Creek and District Health Care Society* (2001) 91 BCLR (3d) 82 (CA), *Dobie v Dlin* 2002 BCSC 356 and *Smith v. Grace* 2004 BCSC 395). So long as the defendant leads affirmative evidence suggesting that the defendant's conduct did not cause the plaintiff's injury, at least until the Supreme Court of Canada indicates otherwise, the BC courts will not have recourse to the "inference principle", the "common sense" approach or the "robust and pragmatic" approach (whatever you may wish to call it) called for in *Snell*.