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COURT OF APPEAL FOR ONTARIO

ROSENBERG, MACPHERSON and ROULEAU JJ.A.

B E T W E E N :	)	
	)	
JENNIFER ARISTORENAS	)	**Paul L. Seitz**
	)	**for the respondent**
	)	
Plaintiff (Respondent)	)	**Colin S. Jackson**
	)	**for the appellant,**
	)	**Comcare Health Services**
- and -	)	
	)	**Kirk F. Stevens and**
	)	**Brian T. Butler**
COMCARE HEALTH SERVICES and	)	**for the appellant**
DR. JEFFREY GILMOUR	)	**Dr. Jeffrey Gilmour**
	)	
Defendants (Appellants)	)	
	)	
	)	**Heard: May 10, 2006**

On appeal from the judgment of Justice Sidney N. Lederman of the Superior Court of Justice dated September 7, 2004.

MACPHERSON J.A. (Dissenting):

A. INTRODUCTION

[1] Jennifer Aristorenas delivered a baby by Caesarian section on June 1, 2000. She was at a high risk for infection after the delivery because of her obesity. After her discharge from hospital, she developed an infection. Over a two-week period she was treated by Dr. Jeffrey Gilmour, an obstetrician and gynaecologist, and several home care nurses employed by Comcare Health Services ("Comcare").

[2] Ms. Aristorenas' condition worsened. Ultimately, she was diagnosed with necrotizing fasciitis (flesh-eating disease). Emergency surgery was performed. An abdomen muscle was removed. In a second operation, this muscle was replaced with muscle taken from her right leg.

[3] Fortunately, Ms. Aristorenas recovered. She brought an action in negligence against Dr. Gilmour and Comcare. Following a six-day trial, Lederman J. found that both defendants had been negligent in their post-natal treatment of Ms. Aristorenas, that their negligence caused Ms. Aristorenas' injury, and that she was entitled to general damages of $55,000.

[4] The appellants do not appeal the trial judge's findings of negligent treatment or his damages award. They appeal on a single issue – the trial judge's conclusion on causation.

B. FACTS

(1) The parties and the events

[5] In June 2000, Ms. Aristorenas was a 28-year old single parent. She had a four-year old child, Jasel, and worked as a legal secretary. She was pregnant and went to Scarborough Grace Hospital. She delivered a baby girl, Janelle, by Caesarian section on June 1, 2000.

[6] Dr. Silver, who delivered the baby, prescribed an intravenous antibiotic because Ms. Aristorenas' obesity put her at high risk for infection.

[7] Dr. Gilmour, who was involved in Ms. Aristorenas' post-natal hospital care, continued the antibiotic until her discharge on June 5. On discharge, Dr. Gilmour prescribed an oral antibiotic. He did not observe any infection at that time.

[8] Ms. Aristorenas saw Dr. Gilmour in his office on June 9. The incision had serious non-purulent discharge and redness around the area. Dr. Gilmour did not think that there was an infection but decided to leave the staples in for a few more days and he instructed his patient to finish the oral antibiotic.

[9] Ms. Aristorenas saw Dr. Gilmour again on June 14 to remove the staples. Dr. Gilmour observed dehiscence (separation of skin and tissue layers) and was very concerned that Ms. Aristorenas would develop an infection, as the edges of the skin were open. He arranged for her to have home care nursing by Comcare, whose nurses would clean and monitor the wound.

[10] Between June 16 and 22, Ms. Aristorenas was cared for by seven Comcare nurses and was assessed 14 times. Over the first five days, different nurses noted an escalating deterioration of the condition of the wound, including the presence of coloured discharge, itchiness, increased pain, and the presence of a foul smell.

[11] On June 21, Ms. Aristorenas went back to Dr. Gilmour's office. She carried with her a letter from one of the nurses recommending a change in the method of treatment.

Dr. Gilmour noted that there was purulent discharge from the wound and that some of the tissue was necrotic (dead). He also noted a foul odour.

[12] Dr. Gilmour did not change the dressing on the wound. He prescribed the same antibiotic as before. Adopting a recommendation from a Comcare nurse, he ordered an increase in dressing frequency and prescribed intrasite gel for the wound area.

[13] Later on June 21, a Comcare nurse visited Ms. Aristorenas. She was concerned about the state of the wound and sought the opinion of a senior nurse. The senior nurse, Lorna Thompson, saw Ms. Aristorenas the next day. Nurse Thompson advised Ms. Aristorenas to go to the hospital immediately. After arranging for child care, Ms. Aristorenas went back to the hospital.

[14] On June 23, a surgical debridement (removal of damaged tissue) of the wound took place.

[15] On June 24, Ms. Aristorenas' temperature increased. On June 25, a further debridement was considered.

[16] On June 26, exploratory surgery was performed. Ms. Aristorenas was diagnosed with necrotizing fasciitis, a life-threatening infection. Emergency surgery followed immediately. An abdomen muscle was removed. In a second operation, a muscle from the patient's right leg was removed and inserted in her abdomen.

[17] Ms. Aristorenas could not walk for a month. She suffered extreme pain and discomfort after the surgery. She could not fully look after her two children for six to seven months.

(2) The Trial

[18] Ms. Aristorenas sued both Dr. Gilmour and Comcare in negligence for their supervision of her care and recovery from June 14 to June 21, 2000. The trial judge heard testimony from ten witnesses during the six-day trial, including Ms. Aristorenas, Dr. Gilmour, several Comcare nurses, Dr. Parry Mayer, a family physician with expertise in the subject of wound care, Dr. Paul Bernstein and Dr. Mathias Gysler, obstetricians and gynaecologists, and Professor Margaret Wood, an expert with respect to nursing standards for wound care.

[19] The trial judge found that the treatment of Ms. Aristorenas by Dr. Gilmour and the Comcare nurse team fell below the accepted standard of care for their professions.

[20] Concerning Dr. Gilmour, the trial judge found that his examination and treatment of Ms. Aristorenas on June 21, 2000 was negligent:

> The evidence establishes that Dr. Gilmour failed to recognize that conventional treatment was not assisting in the healing of this post-operative surgical wound. At least by June 21st, when he saw the plaintiff in his office, if not earlier, he noted that the plaintiff was exhibiting discharge from the wound. It was observed to be large, purulent discharge and some of the tissue was necrotic. The plaintiff was having a burning pain and there was the onset of a foul odour.
>
> This obvious marked deterioration of the wound site when compared with the chronology of the failed conventional treatments called out for an immediate debridement, either in Dr. Gilmour's office or at the hospital.
>
> I find that this failure constituted a breach of the standard of care of a reasonable and prudent medical doctor responding to post-operative symptoms.

[21] The trial judge also found that the Comcare nurses, collectively, were negligent in their treatment of Ms. Aristorenas:

> In summary, the plaintiff entered home care with an obviously infected wound. Her wound deteriorated. There is little in the Comcare records to suggest that the nurses applied their knowledge of wound care and healing. The nurses did not assess accurately or completely, did not document according to the standards expected, and did not promptly inform the supervisory physician of complications.

[22] On the causation issue, the trial judge applied the "robust and pragmatic approach" to fact finding in relation to causation set out in *Snell v. Farrell*, [1990] 2 S.C.R. 311 at 330, and concluded that "the plaintiff has established, on a balance of probabilities, that the defendants' negligence materially contributed to the injury."

[23] The trial judge assessed damages in this fashion:

> The plaintiff faced death as a result of her encounter with necrotizing fasciitis. She suffered through repeated surgical debridements which resulted in the removal of significant necrotic tissue from her abdomen. She spent 10 days in the intensive care unit and suffered through considerable pain.

> She also suffered severe anxiety in terms of fear for her own life and the future of her children. She had to undergo significant skin and muscle grafts from her leg to her abdomen and she has been left with a large permanent scar on her abdomen and leg. She was deprived of effective loss of her mother's leave for post-natal bonding with her infant. She went through a long period of rehabilitation.
>
> She was able to return to work approximately 6 months after the surgery at the point when she had significantly recovered from the result of the necrotizing fasciitis and corrective surgery.
>
> In the circumstances, I assess general damages at $55,0000….

[24] Both Dr. Gilmour and Comcare appeal the trial judge's judgment. However, they do so on only a single issue ─ causation. They do not contest the trial judge's findings of negligence against them or his assessment of damages.

C. ISSUE

[25] The sole issue on the appeal is whether the trial judge erred in finding that the breach of the standard of care he found on the part of Dr. Gilmour and Comcare caused the necrotizing fasciitis infection suffered by Ms. Aristorenas.

D. ANALYSIS

[26] The appellants make two submissions on the causation issue: (1) the trial judge erred in relaxing the "but for" test for causation in medical malpractice cases; and (2) if the "but for" test had been applied to the evidence and to the specific nature of the breach of duty found against the appellants, the test was not satisfied.

(1) The test

[27] The trial judge was well aware of the leading causation cases in the medical malpractice domain. He carefully considered the governing principles from *Snell v. Farrell*, *supra*, *Athey v. Leonati*, [1996] 3 S.C.R. 458, and *Cottrelle v. Gerrard* (2003), 67 O.R. (3d) 737 (C.A.).

[28] The general principles relating to causation were succinctly summarized by Major J. in *Athey v. Leonati* at paras. 13-15:

> 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: *Snell v. Farrell*, [1990] 2 S.C.R. 311; *McGhee v. National Coal Board*, [1972] 3 All E.R. 1008 (H.L.).
>
> 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.); *McGhee v. National Coal Board, supra*….

[29] One of the circumstances in which the "but for" test is potentially unworkable is in medical malpractice cases where scientific proof of causation is simply not attainable. In such cases, although the ultimate burden of proof remains with the plaintiff, a court is entitled to take a "robust and pragmatic approach" to the fact finding component of the causation analysis: see *Snell v. Farrell* at p. 330.

[30] In my view, the trial judge understood and accurately stated the legal principles that govern this case. He asked himself, *per Athey v. Leonati*, whether "the plaintiff has established, on a balance of probabilities, that the defendants' negligence materially contributed to the injury." In answering this question, the trial judge adopted the "robust and pragmatic approach" to fact finding in relation to causation permitted by *Snell v. Farrell*. In the context of a disease, necrotizing fasciitis, whose causes cannot be established with scientific certainty, the trial judge did not err in framing his inquiry in these terms.

(2) Application

[31] There is a crucial starting point in this aspect of the appeal. The trial judge's conclusion on the causation issue is a conclusion on a question of fact. It is, therefore, a conclusion which must attract a significant amount of respect and deference from an appellate court. The trial judge's conclusion on causation can be set aside only if it amounts to a palpable and overriding error: see *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235.

[32] The appellants contend that this is a 'no evidence' case – that there is no evidence linking the negligent wound care given by Dr. Gilmour on June 21, and the nurses between June 16 and 22, 2000, with the development of necrotizing fasciitis in Ms. Aristorenas' abdomen.

[33] The trial judge's reasons on causation are contained in three paragraphs:

> The plaintiff bears the burden of proof of establishing causation on a balance of probabilities. It has been shown that:
>
> 1. an infected wound left untreated will develop serious complications;
>
> 2. one possible complication, albeit rare, of an infected wound is necrotizing fasciitis;
>
> 3. necrotizing fasciitis developed in the plaintiff's infected wound;
>
> 4. whether or not necrotizing fasciitis would have otherwise developed in the plaintiff is not a matter susceptible of scientific proof and none was led by any of the parties;
>
> 5. it developed in this case in the very area of the infected wound which was permitted to deteriorate due to the defendants' lack of care, and was discovered at a time proximate to the second debridement.
>
> This would seem to be an appropriate case for the "robust and pragmatic approach" to fact finding in relation to causation permitted by *Snell v. Farrell, supra*. This rare disease can be a complication of an infected wound. It is a matter of common sense that the negligence or delay on the part of the defendants allowed the wound to reach a complicated state and lead to rapid unpredictable consequences. There is absolutely no evidence to suggest that the plaintiff would have otherwise developed this serious complication but for the negligent diagnosis and treatment by the defendants. Therefore, as a matter of common sense, I conclude that the

> plaintiff has established, on a balance of probabilities, that the defendants' negligence materially contributed to the injury.
>
> In any event, and to the same effect, the law is clear that a tortfeasor takes their victims as they find them. Again, it was entirely foreseeable that an untreated infected wound would develop serious complications. This infected wound did develop serious complications. One of those serious complications has a name, necrotizing fasciitis. The plaintiff was required to establish on a balance of probabilities that the defendants' negligence would foreseeably result in a type of serious injury. However, the plaintiff was not required, particularly in a case such as this where the matter is not susceptible to scientific proof, to establish that the precise nature of the complications would be necrotizing fasciitis. To demand otherwise would prevent plaintiffs from obtaining relief where the negligence of another has created a serious injury, complications of which are rare and may be deadly.

[34] The appellants make a number of complaints about this reasoning.

[35] First, the appellants contend that the trial judge's references to the lack of evidence from all parties about how necrotizing fasciitis develops indicates that he impermissibly reversed the burden of proof.

[36] I disagree. In my view, the trial judge's language is neutral and simply describes the evidentiary record. Moreover, the trial judge's specific conclusion on causation was correctly framed: "I conclude that the plaintiff has established, on a balance of probabilities, that the defendants' negligence materially contributed to the injury."

[37] Second, the appellants contend that Ms. Aristorenas did not lead evidence to establish that their negligent wound care resulted in her contracting necrotizing fasciitis.

[38] In my view, the focus of this submission is too narrow. In *Snell v. Farrell*, Sopinka J. said at para. 18, "[p]roof 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."

[39] In the present case, Ms. Aristorenas led expert evidence from Dr. Perry Mayer and Professor Margaret Wood who testified about the standard of care with respect to the treatment of wounds by family doctors and nurses. The appellant led expert evidence

from Dr. Paul Bernstein and Dr. Mathias Gysler who also testified about the standard of care for wound infection management by an obstetrician-gynaecologist.

[40] None of these experts could testify specifically about necrotizing fasciitis. However, their testimony clearly established the first two of the trial judge's five propositions:

> 1. an infected wound left untreated will develop serious complications;
>
> 2. one possible complication, albeit rare, of an infected wound is necrotizing fasciitis;

[41] Third, the real focus of the appellants' attack on the trial judge's reasons is his fourth proposition:

> 4. whether or not necrotizing fasciitis would have otherwise developed in the plaintiff is not a matter susceptible of scientific proof and none was led by any of the parties;

The appellants contend that there is nothing to link the duration of Ms. Aristorenas' infection (approximately June 9-26) or their negligent medical treatment (June 16-21) to the onset of necrotizing fasciitis in Ms. Aristorenas' abdomen.

[42] I disagree. It is true that this link cannot be established to the level of scientific certainty. However, this is precisely what the case law does *not* require. As Sopinka J. explained in ***Snell v. Farrell*** at p. 330, "an inference of causation may be drawn although positive or scientific proof of causation has not been adduced." See also ***Athey v. Leonati*** at para. 16.

[43] This is essentially what the trial judge did, especially in his fifth proposition:

> 5. it developed in this case in the very area of the infected wound which was permitted to deteriorate due to the defendants' lack of care, and was discovered at a time proximate to the second debridement.

In my view, this is perfectly respectable inference drawing.

[44] I acknowledge that it is possible that the necrotizing fasciitis arose from some cause unrelated to the Caesarian section wound. It is also possible that it arose sometime between June 9 and 15, before any of the appellants' negligent treatment and care took place.

[45] However, these possibilities do not detract from the validity of the trial judge's reasoning. When the medical evidence (an untreated or mistreated infected wound can lead to serious complications; one possible complication is necrotizing fasciitis) is combined with the appellants' conduct (negligent wound care for a week) and the result (rapidly deteriorating health and, ultimately, the onset of necrotizing fasciitis in the precise area of the infected, and mistreated, wound), the trial judge's conclusion that Ms. Aristorenas had established causation on a balance of probabilities is supportable. In any event, his conclusion is far removed from being a palpable and overriding error, especially when it is recalled that in *Snell v. Farrell*, at p. 328, Sopinka J. was critical of a "too rigid application by the courts in many cases" of the traditional approach to causation, and in *Athey v. Leonati*, at para. 16, Major J. instructed that "[t]he causation test is not to be applied too rigidly." In my view, the trial judge's causation analysis in this case was faithful, in tone and substance, to these instructions.

E. DISPOSITION

[46] I would dismiss the appeal. The respondent is entitled to its costs of the appeal and the trial which I would fix at $25,000 inclusive of disbursements and GST.

"J.C. MacPherson J.A."

ROULEAU J.A:

Introduction

[47] Although I agree with my colleague Justice MacPherson that the trial judge correctly concluded that this was an appropriate case to apply the robust and pragmatic approach to causation set out in *Snell v. Farrell* (1990), 72 D.L.R. (4th) 289 (S.C.C.), I am of the view that the trial judge erred in his articulation and application of that test. Had the trial judge correctly applied the robust and pragmatic approach, he would have concluded that there was insufficient evidence on the record to support a finding that the necrotizing fasciitis was caused by the negligence of the defendants. I would, therefore, allow the appeal and reduce the amount of damages to $1,000.

Facts

[48] The facts are well summarized in Justice MacPherson's reasons. To those I simply add that Ms. Aristorenas' temperature was normal until about 11 p.m. on the evening of June 23, the date on which the first surgical debridement of the wound took place. This is an indication that until that time, the infection was not systemic. In addition, the report dated June 26 of the swab of the infection taken on June 19 did not indicate the presence of necrotizing fasciitis.

Analysis

1) The appropriate test for causation

[49] Before addressing the specific facts of this case, it is helpful to review the present state of the law of causation as outlined in various Supreme Court of Canada's decisions. I will briefly discuss the two approaches to determining causation that may be appropriate in cases such as this one. The first is the generally applicable "but for" test whereby a plaintiff must "show that the injury would not have occurred but for the negligence of the defendant."[1] The second approach, material contribution, is used where the "but for" test is unworkable, that is, "in cases where, practically speaking, it is impossible to determine the precise cause of the injury."[2] In such a case, the plaintiff need show only that the defendant's conduct materially contributed to the occurrence of the injury.[3] However, whichever test applies it is appropriate for the court to take a "robust and pragmatic approach" as described by Lord Bridge in *Wilsher v. Essex Area Health Authority*, [1988] 2 W.L.R. 557 (H.L.) at 569 and adopted by Sopinka J. in *Snell v. Farrell*.

a) The "but for" test

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[1] *Cottrelle v. Gerrard* (2003), 233 D.L.R. (4th) 45 at para. 24 (Ont. C.A.), leave to appeal to S.C.C. refused, [2003] S.C.C.A. No. 549, citing *Athey v. Leonati* (1996), 140 D.L.R. (4th) 235 (S.C.C.) at para. 14.

[2] *Cottrelle, ibid.* at para 30. In some very limited circumstances, the court may reverse the burden of proof in determining causation. However, this test is clearly not applicable to the facts of this case: see Erik S. Knutsen, "Ambiguous Cause-in-Fact and Structured Causation: A Multi-Jurisdictional Approach" (2003) 38 Tex. Int. L.J. 249 at 257 and *Snell*, at 300.

[3] *Athey v. Leonati* (1996), 140 D.L.R. (4th) 235 (S.C.C.) at para. 15.

[50] The "but for" test is used as the standard for establishing causation in most negligence cases.[4] The test is well summarized at paras. 13-14 of *Athey v. Leonati*:

> 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.[5]
>
> 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 [citations omitted].

Thus, the "but for" approach in an action for delayed medical diagnosis and treatment obliges a plaintiff to prove:

> on a balance of probabilities that the delay caused or contributed to the unfavourable outcome. In other words, if, on a balance of probabilities, the plaintiff fails to prove that the unfavourable outcome would have been avoided with prompt diagnosis and treatment, then the plaintiff's claim must fail. It is not sufficient to prove that adequate diagnosis and treatment would have afforded a chance of avoiding the unfavourable outcome unless that chance surpasses the threshold of "more likely than not" [*Cottrelle,* at para. 25].

b) The "material contribution" test

[51] There are, however, cases where the "but for" test will be unworkable. In some instances, courts have adopted the "material contribution" test for determining causation. The "material contribution" test first appeared in *McGhee v. National Coal Board* (1972), [1973] 1 W.L.R. 1 (HL).[6] A negligent act was determined to be the cause-in fact of the plaintiff's injuries "if the plaintiff could prove that the defendant materially contributed to the injury of the plaintiff."[7] In *Athey*, Major J. made reference to the "material contribution" test.[8] He said that it might be used in appropriate cases where the "but for" test is unworkable and where a contributing factor is material in that it falls outside of the *de minimis* range.

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[4] Lewis N. Klar, *Tort Law*, 3d ed. (Toronto: Thomson Carswell, 2003) at 389.

[5] The use of "contribution" by Major J. should not be confused with the "material contribution" test. Contribution, in the context of the "but for" test is explained by Linden in Allen M. Linden, *Canadian Tort Law,* 7th ed. (Markham, Ont.: Butterworths, 2001) at 110.

[6] See Knutsen, *supra* note 2 at 257.

[7] *Ibid*.

[8] See *Cottrelle, supra*, note 1 at para. 26 and *Klar, supra* note 3 at 397.

[52] *Athey*, however, provides little guidance as to when the "but for" test is unworkable and ought to be replaced by the "material contribution" test. However, Sharpe J.A. examined the type of cases that warrant the adoption of the test at para. 30 of *Cottrelle*:

> In *Athey*, for example, the Supreme Court affirmed the "material contribution" test as a qualification to the strict "but for" test only when used in cases similar to *Bonnington Castings* and *McGhee v. National Coal Board*. The more recent House of Lords decision in *Fairchild v. Glenhaven Funeral Services Ltd*, also reflects this same tendency to depart from the "but for" standard, but only where the precise cause of the injury is unknown. *Bonnington*, *McGhee*, and *Fairchild* all involved situations where the plaintiff was exposed to a harmful substance from various sources, but could not prove precisely that the substance resulting from the defendant's tortious conduct caused the loss. In *Fairchild*, the plaintiffs had been exposed to asbestos while working for various employers for various periods. The plaintiffs developed a fatal disease caused by asbestos, but could not establish which exposure or exposures to asbestos had actually caused the disease. ... The salient feature of *Fairchild* was that the plaintiffs were definitely injured by the negligence of one of the defendants, and there was no other operative cause or explanation for the injury. As pointed out in Lewis N. Klar, *Tort Law*: "courts will strive to fashion a just solution in this type of case to allow a wronged plaintiff to recover. Courts will not allow wronged plaintiffs to fall between the cracks due to the formal requirements of proving cause" [citations omitted and emphasis added].

[53] Thus, it would seem that the "material contribution" test is applied to cases that involve multiple inputs that all have harmed the plaintiff. The test is invoked because of logical or structural difficulties in establishing "but for" causation, not because of practical difficulties in establishing that the negligent act was a part of the causal chain.

c) The "robust and pragmatic" approach

[54] The "robust and pragmatic" approach is not a distinct test for causation but rather an approach to the analysis of the evidence said to demonstrate the necessary causal connection between the conduct and the injury. Importantly, a robust and pragmatic approach must be applied to evidence; it is not a substitute for evidence to show that the defendant's negligent conduct caused the injury.

[55] The "robust and pragmatic" approach was described by Sopinka J. in *Snell* at pp. 300-302:

> I am of the opinion that the dissatisfaction with the traditional approach to causation stems to a large extent from its too rigid application by the courts in many cases. Causation need not be determined by scientific precision.…
>
> 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.
>
> ...
>
> 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."
>
> 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. As pointed out in D.W. Louisell, *Medical Malpractice*, the phrase "in your opinion with a reasonable degree of medical certainty", which is the standard form of question to a medical expert, is often misunderstood [citations omitted].

[56] It is important to note that Sopinka J. does not reduce the ultimate burden of proof from a balance of probabilities. Rather, the "robust and pragmatic" approach is adopted in evaluating the facts of the case and deciding whether they meet the civil standard. Put another way, the burden of proof is the same, but a series of facts and circumstances established by the evidence led at trial may enable the trial judge to draw an inference even though medical and scientific expertise cannot arrive at a definitive conclusion.

d) <u>The test to be used in this case</u>

[57] The nature of necrotizing fasciitis poses difficulties in proving whether the negligent delay was causally related to the plaintiff's harm. Assuming in the plaintiff's favour that it was open to the court to adopt the material contribution test for causation and to view the facts in a robust and pragmatic fashion, the fact that the cause of the disease is a mystery did not relieve the plaintiff of the burden of proof.

2) Application of the robust and pragmatic approach to the case on appeal

[58] In *Snell*, Sopinka J. indicated that causation did not have to be established with scientific precision but that there still needed to be evidence and other considerations that, when viewed pragmatically and robustly, would satisfy a trier of fact on a balance of probabilities that there was causation.

[59] The "robust and pragmatic" approach is succinctly set out at para. 16 of *Athey*:

> In *Snell v. Farrell*, this Court recently confirmed that the plaintiff must prove that the defendant's tortious conduct caused or contributed to the plaintiff's injury. The causation test is not to be applied too rigidly. Causation need not be determined by scientific precision; as Lord Salmon stated in *Alphacell Ltd. v. Woodward*, and as was quoted by Sopinka J., it is "essentially a practical question of fact which can best be answered by ordinary common sense". Although the burden of proof remains with the plaintiff, in some circumstances an inference of causation may be drawn from the evidence without positive scientific proof [citations omitted].

[60] In *Athey*, Major J. speaks of avoiding a rigid application of the test or requiring scientific precision. He also says that common sense can aid in the determination of causation. Further, an inference may be drawn without scientific proof. While this language does evoke a more "relaxed" standard to proving causation, it does not alter the requirement that the plaintiff must establish causation on a balance of probabilities. In my view the "robust and pragmatic" approach modifies the type of evidence as well as the factors that the court may consider. It does not modify the amount of proof required to establish causation.

[61] The above distinction can be illustrated by applying the "robust and pragmatic" approach to the facts in *Snell*. In *Snell*, neither expert was able to express with certainty

an opinion as to what caused the harm or when it occurred[9]. As a result, the court used a combination of evidence and other considerations to support a finding of causation on a balance of probabilities:

- First, while experts were not able to testify as to causation on a standard of scientific precision, there was some evidence that the negligent operation had led to the injury.[10]

- Second, the trial judge was satisfied that there was a greatly increased risk of injury because of the negligence.

- Third, there was a finding by the trial judge that "virtually rule[d] out natural causes".[11]

- Fourth, the defendant was in a better position to observe what occurred. He also was in a better position to interpret what he saw.

- Fifth, the negligent operation resulted in a situation where it was impossible for anyone else to detect the precise cause of the injury.

[62] Taking these factors into consideration, Sopinka J. found that it was open to infer causation. The approach is "robust and pragmatic" because this type of evidence might not otherwise satisfy the "but for" test.

[63] *Snell* and other cases have recognized that it is important to require that the plaintiff provide some sort of evidence (or other considerations) that indicates that the defendant was the cause of the harm suffered. In *Snell*, Sopinka J. at p. 299, disapproved of permitting the plaintiff to "simply prove that the defendant created a risk that the injury which occurred would occur." In *Fairchild v. Glenhaven Funeral Services*, [2002] 3 W.L.R. 89 (H.L.), Lord Rodger of Earlsferry provided this caution about applying the "robust and pragmatic" approach:

> [E]ven though it is always for the judge rather than for the expert witness to determine matters of fact, the judge must do so on the basis of the evidence, including the expert evidence. The mere application of "common sense" cannot conjure up a proper basis for inferring that an injury must have been caused in one way rather than another ... (para. 150).

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[9] *Snell, supra*, at 292.
[10] See for example *Snell, supra*, at pp. 304-305.
[11] *Snell, supra,* at 305.

[64] It is, therefore, a misapplication of the "robust and pragmatic" approach to make a finding or draw an inference of causation where no factors of the kind set out in *Snell* are present and the proper evidentiary foundation is absent.

[65] In my view, the trial judge's error is found in the chain of inferences that he identifies in the following critical passages of his reasons:

> The plaintiff bears the burden of proof of establishing causation on a balance of probabilities. It has been shown that:
>
> 1. an infected wound left untreated will develop serious complications;
> 2. one possible complication, albeit rare, of an infected wound is necrotizing fasciitis;
> 3. necrotizing fasciitis developed in the plaintiff's infected wound;
> 4. whether or not necrotizing fasciitis would have otherwise developed in the plaintiff is not a matter susceptible of scientific proof and none was led by any of the parties;
> 5. it developed in this case in the very area of the infected wound which was permitted to deteriorate due to the defendants' lack of care, and was discovered at a time proximate to the second debridement.
>
> This would seem to be an appropriate case for the "robust and pragmatic approach" to fact finding in relation to causation permitted by *Snell v. Farrell*, *supra*. This rare disease can be a complication of an infected wound. <u>It is a matter of common sense that the negligence or delay on the part of the defendants allowed the wound to reach a complicated state and lead to rapid unpredictable consequences. There is absolutely no evidence to suggest that the plaintiff would have otherwise developed this serious complication but for the negligent diagnosis and treatment by the defendants.</u> Therefore, as a matter of common sense, I conclude that the plaintiff has established, on a balance of probabilities, that the defendants' negligence materially contributed to the injury. [Emphasis added.]

[66] The trial judge's causation analysis hinges on his view that it "is a matter of common sense that the negligence or delay on the part of the defendants allowed the wound to reach a complicated state and lead to rapid unpredictable consequences". Despite the use of the phrase "negligence or delay", causation in this case turned on the delay in treatment that resulted from the defendants' negligence. No other theory of causation was offered by the plaintiff. It is important, therefore, to examine the facts as found by the trial judge and disclosed by the record to determine whether there is anything to support the proposition that the defendants' delay caused or materially contributed to the plaintiff contracting necrotizing fasciitis. The defendants' negligence is now conceded. The question is whether that negligence, which led to a delay in treatment, was a cause of the necrotizing fasciitis.

[67] Necrotizing fasciitis was discovered in the plaintiff some twenty-six days after the wound was created and at least ten days after infection was identified in the wound. The trial judge found that the defendant doctor breached the standard of care when, on June 21, he neither debrided the wound nor sent the plaintiff to hospital. Instead, the plaintiff was sent to hospital the next day, on June 22. Thus, the negligence of the doctor resulted in a delay in treatment by one day.

[68] It appears from para. 62 of the trial judgment that the judge believed that, but for the nurses' negligence, the plaintiff would have been referred to a doctor or to the hospital on June 19:

> But the nurses did not put these signs and symptoms together and appreciate their significance. All of these signs and symptoms came to a clinical climax on June 19, 2002 … If they had acted on their assessment data, they would have alerted the physician immediately as to the seriousness of the situation and would not have allowed the condition to deteriorate further.

[69] Thus, assuming that the plaintiff would have seen the doctor on that same day, June 19, the negligent delay of the nurses extended the time before debridement by two additional days. The total delay caused by the combined negligence is therefore approximately three days.

[70] From my review of the trial record, the relevant evidence on the impact of delay in treatment of an infection can be summarized as follows:

- In cross-examination, Ms. Barton, the defendants' nursing expert, testified that an increase in the duration of an infection results in an increased chance of developing a variety of bacterial pathogens in the infection.

- Ms. Barton also gave evidence to the effect that the longer an infection continues without effective treatment, the greater the "risk to the patient of complications."
- Dr. Mayer, the plaintiff's expert on wound care, testified that once a debridement is performed, "[i]t provides an inhospitable medium for bacteria to grow."
- Dr. Mayer also said that, had the debridement been performed as it should, the intervention "would have changed the course for [the plaintiff]."

[71] None of these experts were qualified to give evidence about necrotizing fasciitis and, in any event and most importantly, none testified that the likelihood of contracting necrotizing fasciitis increases with a delay in treatment.

[72] The only expert that was explicitly qualified to give evidence on necrotizing fasciitis was the defendants' expert, Dr. Bernstein. He testified to the effect that there is no understanding as to the cause of necrotizing fasciitis (other than it requires the presence of an infection[12]) and that he did not think that anybody could provide its scientific cause. Another one of the defendants' experts, Dr. Gysler, testified on the standard of care applicable to obstetricians and gynaecologists. He expressed the view that necrotizing fasciitis is "rare but not necessarily preventable." When the plaintiff asked him whether he considered himself an expert in necrotizing fasciitis, he said:

> A. No.
>
> Q. But you feel free to make some opinions known to the court on something that you are not an expert on?
>
> A. I am very comfortable with dealing with wound infections, the extreme spectrum of which is necrotizing fasciitis, and dealing with it.

[73] When evaluating this evidence, the following difficulty becomes apparent. Even if you assume that there is a link between delay in the treatment of an infection and contracting necrotizing fasciitis, no witness considered or gave evidence as to what effect the three-day delay in performing the first debridement had in this case. This is the same omission that prevented a finding of causation in *Van Dyke v. Grey Bruce Regional Health Centre* (2005), 255 D.L.R. (4th) 397 at para. 48 (Ont. C.A.), leave to appeal to S.C.C. refused, [2005] S.C.C.A. No. 335. In that case the court, at para. 48, stated as follows:

> Dr. Freeman's evidence does not establish the necessary causal link between delay in stopping the administration of Gentamicin and Mr. Van Dyke's damages. Dr. Freeman was

[12] There is no suggestion in the record that the infection was caused by the negligence of the defendants.

> not asked what effect, if any, a delay of two or three days would have on a person's prospects for reversing, at least in part, the adverse consequences of vestibular toxicity. Dr. Freeman testified that the literature suggested a 50-50 chance of reversal if the Gentamicin was stopped when the symptoms appeared. He did not give any evidence as to how those statistics would be affected if the discontinuation of Gentamicin was delayed by two or three days.

[74] Taken as a whole, the record in the present case does not support an inference of causation using the "robust and pragmatic" approach. When compared to *Snell*, there is far less evidence and there are no additional factors to assist the court in reaching a finding of causation. As indicated previously, the limited evidence about the impact of delay on wound care and infections was vague and general and, therefore, of little assistance. On the facts of this case, there was a wide variety of possible causes of the necrotizing fasciitis:

- The necrotizing fasciitis could have entered the wound during or after the first debridement;
- The necrotizing fasciitis could have been in the wound from the outset or might have come about during the period preceding the negligent delay;
- The necrotizing fasciitis could have developed during the period of negligent delay or after but for reasons that would have been present regardless of the three-day delay.

[75] Even assuming that the plaintiff's theory of the case is correct and that a delay in treatment can cause or materially contribute to the contracting of necrotizing fasciitis, none of the evidence led at trial addresses whether in this case it was the delay in treatment or some other factor that caused the plaintiff to contract necrotizing fasciitis. There are many theories of causation, and the evidence leaves us in a position where we do not know which one is correct or the most probable. None of the evidence provided by the parties provides a link between the negligence of the defendants and the harm suffered by the plaintiff.

[76] The trial judge did not address whether the infection would have reached a "complicated" state even without the delay caused by the defendants' negligence nor did he address whether a "complicated state" is the same as the development of a specific "complication". The trial judge did not assess whether *this* delay caused *this* complication. There are many unknown factors that could have been independent causes of the necrotizing fasciitis. Eschewing scientific certainty does not eliminate the need for any evidence to support causation. If causation can be inferred in the absence of any

proof, then it is indistinguishable from reversing the burden of proof, something Sopinka J. clearly disapproved of in *Snell*[13].

[77] Furthermore, the defendants contributed to only three of the ten days of the known period of infection prior to the second debridement. When the plaintiff went to hospital, the debridement was not carried out until the following day, suggesting that, at that point, the hospital staff did not consider it so urgent that the debridement needed to be done that day. This lends further support to my view that the three day delay, even when it is coupled with the general statements made by unqualified experts to the effect that the chance of developing a variety of bacterial pathogens increases with the duration of the infection, are insufficient to support a finding of liability on a balance of probabilities.

[78] One cannot help but have sympathy for the plight of the plaintiff. She suffered grievous injuries and proved serious acts of negligence on the part of professionals in providing what should have been basic routine wound care. But, on the current state of the law she did not make out causation. If the law were otherwise and if it were sufficient to show merely loss of a chance, or to treat an increase in risk as equivalent to a material contribution, then the plaintiff might have succeeded. However, those propositions have not been adopted in this country. See *Cottrelle* at para. 36 and *Snell* at pp. 326-27.

[79] In addition to there being an absence of evidence that could support a finding of causation on a balance of probabilities, there were no other factors that could aid in determining causation under the "robust and pragmatic" approach. The defendants did not have superior knowledge regarding the development of necrotizing fasciitis in the wound. Further, the defendants did not create a situation where the plaintiff was unable to prove causation; the difficulty in proving causation came from the nature of the illness itself.

[80] I return to what Sharpe J.A. said at para. 25 of *Cottrelle*, which in my view is fatal to the plaintiff's position: "if, on a balance of probabilities, the plaintiff fails to prove that the unfavourable outcome would have been avoided with prompt diagnosis and treatment, then the plaintiff's claim must fail. It is not sufficient to prove that adequate diagnosis and treatment would have afforded a chance of avoiding the unfavourable outcome unless that chance surpasses the threshold of 'more likely than not'".

Disposition

[81] In conclusion, I would allow the appeal and set aside the finding that the necrotizing fasciitis suffered by the plaintiff was caused by the defendants' negligence.

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[13] See e.g. *Snell*, *supra*, at 300-302.

[82] The defendants did not appeal the finding of negligence and, as a result, it is reasonable to conclude that they remain liable in damages for the pain and suffering of the plaintiff flowing from the delay in treatment caused by this negligence. Although the statement of claim clearly focussed on the damages suffered as a result of contracting necrotizing fasciitis, damages for the pain and suffering flowing from the delay in treatment were, in my view, properly part of the claim. The trial judge did not separately assess the damages flowing from the three-day delay as distinct from the damages suffered as a result of the necrotizing fasciitis. Clearly the bulk of the general damages awarded by the trial judge is attributable to the necrotizing fasciitis. As a result, I would vary the award of general damages to an award of $1,000.

[83] The appellants are entitled to their costs, if demanded. If the appellants intend to seek costs I would ask for written submissions within ten days hereof.

"Paul S. Rouleau J.A."
"I agree M. Rosenberg J.A."

RELEASED: October 11, 2006