Court of Appeal Reinforces Evidentiary Principles of Causation

October 02, 2018

The Court of Appeal for Ontario has released another decision on causation in the context of a delayed diagnosis case —*Ghiassi v. Singh*. While the Court acknowledges at the outset that it is essentially a fact-driven appeal, it reinforced three principles important to proving or defending against a finding of causation.

Background

The case arises from the infant plaintiff's development of kernicterus, a neurological condition caused by a higher than normal level of a waste product called bilirubin in the blood. High levels of bilirubin in the blood are associated with jaundice and potential neurological damage.

In this case, the defendant nurse charted at 9 p.m. that the infant was pink and slightly yellow, indicating slight jaundice. The next morning after shift change at about 8:45 a.m., blood tests were ordered confirming the infant's high bilirubin levels. Treatment efforts were undertaken at that time, but it was too late to avoid neurological damage.

Shortly after the 12-day trial began, the plaintiffs settled the action with the seven defendant physicians, leaving the defendant nurse and hospital (the Hospital Defendants) as the only defendants at trial. After the trial, the defendant nurse was found liable for failing to report the onset of jaundice to the resident pediatrician. While the resident was not called to testify, the Court accepted that if the resident had been informed of the developing jaundice, the resident would have ordered a blood test, diagnosed the increased bilirubin and treated it in time to avoid the neurological deficits.

The appeal was argued primarily on two issues relating to causation: whether there was enough evidence for the trial judge to find that (1) the resident would have ordered a blood test if notified by the nurse; and (2) the neurological deficits would have been avoided if treatment had been commenced at 2:15 a.m.

Court of Appeal Decision

The Court of Appeal upheld the trial judge's inference of what steps the resident would have taken if notified based on expert testimony on what a competent resident would have done and the testimony of another resident with equivalent levels of knowledge and experience. In its decision, the Court of Appeal concluded that this resident was available to both the plaintiffs and Hospital Defendants to call as a witness, suggesting a responsibility on the Hospital Defendants to call the resident if they wanted to rely his evidence.

As part of this issue, the appellants argued that liability should fall on the non-party resident. However, the Court reinforced its holding in *Sacks v. Ross, 2017 ONCA 773* (an appeal successfully defended by BLG), that negligent tortfeasors in a delayed diagnosis case cannot escape liability by pointing the finger at another negligent tortfeasor, whether a defendant or non-party (**Reinforced Principle #1**). This general principle would only be applicable to tortfeasors who are found to have contributed to delay while the window of opportunity to treat the plaintiff's condition is still open.

On the second issue, the Court had evidence on whether the neurological deficits would have been avoided had treatment been started at 9 p.m. or 12 a.m. However, the trial judge found, as a fact, that treatment would have been started at 2:15 the next morning – a time at which there was no expert evidence on the efficacy of treatment.

The Court of Appeal rejected the appellants' argument that it was speculative for the trial judge to find that the neurological deficits would have been avoided. While there was no expert evidence regarding treatment at 2:15 a.m., the Court found that the expert evidence regarding treatment at 12 a.m. and the factual evidence more than supported this inference. The Court also relied on the fact that no defence expert was called on causation, and the issue of treatment at 2:15 a.m. was not put to the plaintiffs' expert on cross-examination.

The Court reinforced the often-cited holding in *Snell v. Farrell, [1990] 2 S.C.R. 311*, that "in the absence of evidence to the contrary by the defendant, an inference of causation may be drawn although positive or scientific proof of causation has not been adduced" (**Reinforced Principle #2**). Of course, such a finding is up to the discretion of the trial judge and is by no means mandatory.

Finally, the Court highlighted the fact that the lack of bilirubin reading at 2:15 a.m. — a reading that could have provided more certainty about the impact of treatment at that time — is a result of the defendant nurse's own negligence. The Court reinforced its prior holding in *Goodwin v. Olupona*, 2013 ONCA 259, that a defendant should not be permitted to rely on the lack of evidence that his or her own negligence produced (**Reinforced Principle #3**). This principle would not be enough to ground an inference on its own — but in the context of the trial judge's other findings of facts — it supported the finding of such an inference here.

The Takeaway

While the legal burden of proof falls on the plaintiffs, defendants relying on a gap in evidence to defeat an action do so at their own risk. Trial judges have wide discretion to draw inferences from the factual and expert evidence to fill apparent gaps in evidence. Consideration ought to be given by defendants as to whether to address gaps in evidence head on with their own witnesses or on cross-examination of other witnesses,

or to take their chances on the argument that the burden of proof has not been met by the plaintiffs.

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