Civil Litigation Update

Harper Grey LLP

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Benhaim v. St Germain, 2016 SCC 48

In Benhaim v. St Germain, 2016 SCC 48, the Supreme Court of Canada provided clarification regarding causation in cases where a defendant's alleged negligence undermines the plaintiff's ability to prove causation.

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In Benhaim, the issue was whether a trier of fact is required to draw an adverse inference of causation against a defendant where the defendant's alleged negligence undermines the plaintiff's ability to prove causation.

The Court confirmed there is no requirement a trier of fact draw an inference of causation. Whether an inference of causation is warranted, and how it is to be weighed against the evidence, are matters for the trier of fact applying ordinary principles of causation. The inference of causation referred to by the Court in Snell v. Farrell, [1990] 2 S.C.R. 311, is a permissive, discretionary one that a trier of fact is permitted to draw even in the absence of positive or scientific proof, not one that they are required to draw once certain criteria are established.

The Court concluded:

[66] In cases of causal uncertainty, both parties face the difficulty of attempting to establish facts in the absence of complete information. This case raises the issue of how that difficulty ought to be distributed between plaintiffs and defendants in cases involving what Prof. Lara Khoury calls "negligently created causal uncertainty": Uncertain Causation in Medical Liability (2006), at p. 223 (emphasis deleted). That distribution must balance two considerations: ensuring that defendants are held liable for injuries only where there is a substantial connection between the injuries and their fault, on the one hand, and preventing defendants from benefitting from the uncertainty created by their own negligence, on the other. In Snell, this Court struck a balance by clarifying that an adverse inference may be available in such circumstances, while leaving the decision on whether to draw that inference to the trial judge as part of the fact-finding process, which is governed by ordinary principles of causation.

The Court also commented on the use of statistical evidence in this context. The plaintiff relied on statistical evidence in support of causation. The Quebec Court of Appeal characterized this as "concrete statistical evidence."

In contrast, the Court cautioned that statistical generalizations are not determinative in particular cases. Statistics themselves are silent about whether the particular parties before the court would have conformed to the trend or been an exception from it. Without an evidentiary bridge to the specific circumstances of the plaintiff, statistical evidence is of little assistance. The Court noted:

[74] In my view, statistical evidence of this sort should be approached with some caution. Statistical generalizations are not determinative in particular cases. An example from legal theory — L. Jonathan Cohen's well-known gatecrasher paradox — illustrates the risk of reliance on pure statistical evidence. In a case where it is established that only 499 of 1,000 rodeo spectators paid for admission, and where there is no evidence available of payment or non-payment, it would be unjust to rely on the 50.1 percent probability that a randomly selected attendee is a gatecrasher in order to hold him or her liable for non-payment: The Probable and the Provable (1977), at p. 75. Even if a higher probability is available that is more closely tailored to the generic circumstances of the particular rodeo attendee — for example, by age or gender — there is still a risk of injustice where the person nevertheless falls into the minority for whom the generalization does not hold: Cohen, at p. 78. Such a statistic alone does not establish on a balance of probabilities that any specific attendee is a gatecrasher:

Regardless of what rule governs the required quantum or preponderance of proof, naked statistics, which are merely reports of accidental groupings, do not count at all as proof of what actually happened on a particular occasion. To determine what actually happened — including how it happened and who did it — we must match particularistic evidence from the particular occasion against possibly applicable causal generalizations . . .
The problem is not, as some have supposed, that it ordinarily is improper to rely solely on naked statistics. Rather, the problem is that naked statistics are not probative at all on the issues of what actually happened, how, and by whom. [Emphasis in original; footnote omitted.] (R. W. Wright, "Causation, Responsibility, Risk, Probability, Naked Statistics, and Proof: Pruning the Bramble Bush by Clarifying the Concepts" (1988), 73 Iowa L. Rev. 1001, at pp. 1056-57)

For this reason, the Supreme Court indicated that general statistics are not determinative in particular cases.

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