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Nicholas Hooper*

The Phenomenology of Medico-Legal Causation

The language of counterfactual causation employed from the bench obscures the analytical vacuity of the "but for" test. This paper takes issue with the consistent recourse to "common sense" as a methodological tool for determining the deeply complex issue of causality. Despite manifestly empty gestures to, e.g., robust pragmatism, the current approach imposes the dominant values of the judiciary in a manner that perpetuates the current distribution of power. Whatever the merits of counterfactual inquiry, its legal iteration requires judges to construct a hypothetical narrative about "how things generally happen." This, in turn, impels a uniquely comprehensive brand of judicial creativity. The results are productively examined in the context of medical malpractice, where the phenomenological lens foregrounds the connection between meaningless doctrine and the protection of the medical elite.

Les énoncés de causes contrefactuelles par les tribunaux masquent la vacuité analytique du critère « sauf si. » L'auteur s'insurge contre le recours constant au « gros bons sens » comme outil méthodologique pour examiner la question profondément complexe de causalité. Malgré des gestes manifestement vides face à, par exemple, un solide pragmatisme, l'approche actuelle impose les valeurs dominantes de la magistrature d'une manière qui perpétue la répartition du pouvoir. Quel que soit le bien-fondé de l'enquête contrefactuelle, son itération juridique exige des juges qu'ils construisent une narration hypothétique de « la façon dont les choses se passent habituellement. » Cette narration entraîne, à son tour, une créativité judiciaire aussi vaste qu'unique. Les résultats sont examinés de manière productive dans le contexte de faute professionnelle médicale où l'objectif phénoménologique met en évidence le lien entre une doctrine sans fondement et la protection de l'élite médicale.

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Introduction

The causal requirement in the law of negligence is far more complex than it appears. While the notion that liability should arise only when one causes injury is relatively uncontroversial, there is little consensus on the exact nature of this relationship. The longstanding doctrinal tradition is, of course, the "but for" test—an exercise in assuming the truth of something known to be false—toward a determination of whether, in a world without the defendant's lapse, the relevant harm still occurs. There are, to be sure, numerous cases where this approach produces intuitively valid results; when a negligent driver fatally strikes a pedestrian, the aforementioned counterfactual method commands general assent. More often, and particularly in the cases that shape the legal approach to causality, the facts are not so simple and decision-makers must presume to articulate their understanding of causal links—at least by implication. This is because, to date, no litigant (or, indeed, philosopher) has ever presented independent proof of causation in its active sense. Even in the paradigmatic car crash, we assume that the observable collision caused the ensuing injuries, but we do this via deduction rather than particle physics.

In response to this potentially metaphysical inquiry, the Supreme Court of Canada preempted the philosophical debates. In a highly influential decision, it was held that causation does not require deep theorizing from the bench; rather, it is a matter of "common sense" to be drawn from experiential inferences.[1] There is some temptation to sympathize with the Court here. Certainly, no one expects a judicial distillation of causation that puts a centuries-old debate to rest, but it is nonetheless alarming that a highly complex inquiry standing between injured parties and recovery will be decided on the basis of some form of amorphous intuition.

While the vacuity of this analytical tool provokes some concern, my central interest is the unstated bias reflected in the judicial recourse to "common sense." Obviously, there is no universal logic that somehow precedes careful reflection. Instead, these words refer to the dominant perspective of the world. Deviation from the majoritarian approach is rendered literally nonsensical. Unfortunately, this is not the only area of the law marked by this strangely explicit importation of prejudice; it is, however, a uniquely instructive field of inquiry. Since the legal approach to causation is exclusively counterfactual, it requires adjudicators to construct hypothetical narratives. It provides, in other words, a uniquely comprehensive brand of judicial authorship. When we understand doctrinal causation as the construction of an experiential narrative, we must then inquire into the perspective from which the law speaks.

Such an analysis could be undertaken in a generalized manner, but the medico-legal context provides an important and analytically useful case study. Its significance lies in the marked lack of success achieved by plaintiffs in medical malpractice claims. These numbers are alarming and show no signs of improvement. On the second point, medical negligence provides an extreme brand of inferential freedom in the causal assessment. It is an area replete with warring experts and scientific complexity, and the resultant decisions are rarely accessible enough from a medical standpoint to garner sustained criticism.

Conceptualizing this doctrine as narrative construction elucidates an important insight: outcomes can be effectively predetermined by how the counterfactual is framed. To this end, I will begin by noting the theoretical bases for the law of causality. This provides necessary background for understanding the unique malleability that characterizes the "but for" test. Secondly, a brief discussion of uniquely medical concerns is provided to locate my central interest within the broader framework of legal causation. Thereafter, I draw on the work of Duncan Kennedy, among others,

1. *Snell v Farrell*, [1990] 2 SCR 311, 1990 CanLII 70.

to employ a distinctly phenomenological lens to the problem of causal narrative construction. This facilitates a uniquely granular focus on the unstated assumptions that frame the subsequent counterfactual examples.

I. *Theoretical and jurisprudential foundations*

1. *Hume, counterfactuals, and epistemic frustration*

In the opening paragraphs of *The Philosophy of Tort Law*, Izhak Englard submits that moral responsibility and social utility form "the foundation of tortious liability, and in the conception of a number of scholars they constitute an antinomy."[2] While the relative supremacy of each abstract justification is the subject of considerable debate,[3] both narratives depend, at least in part, on the doctrine of causation. If, as Richard Markovits contends, there are "positive moral obligations of the members of and participants in a liberal, rights-based society to prevent others from suffering losses,"[4] then this ethical framework (which is broadly deontological in nature) is largely defined by consequences. Social responsibility in this context seeks to prevent wrongful loss; the morality of tort law is concerned with acts or omissions to the extent that they cause such harm.

Conversely, if the rules of liability are directed at economic efficiency or some other normative benefit,[5] causation provides significant definitional content. Although certain threshold exceptions exist, the conduct targeted by tort law is, once more, defined by its causal relationship with actionable harm. Indeed, the centrality of causation in this area has animated a sustained critique of the law of negligence: If two people suffer identical harm, their needs are theoretically equal, but their ability to recover depends on the damage being caused by tortious means. Whether the ideational underpinnings of tort law are understood as ethical or utilitarian, causation is an uncontroversial means of delineating reprehensible conduct.

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2. Izhak Englard, *The Philosophy of Tort Law* (Brookfield: Dartmouth Publishing Company, 1993) at 7.

3. For general discussion, see: David Owen, *Philosophical Foundations of Tort Law* (Oxford: Clarendon Press, 1995); Mark Reiff, "No Such Thing as Accident: Rethinking the Relation Between Causal and Moral Responsibility" (2015) 28:2 Can JL & Jur 371; and William Rowe, "Responsibility, Agent-Causation, and Freedom: An Eighteenth-Century View" (1991) 101:2 Ethics 237. The general critical ambivalence is, however, particularly well stated by Stephen Perry: "[T]here is no single criterion of distribution, such as a particular conception of fault, that can be applied in a uniform way in all cases. Rather the inquiry is an open-ended one: it is possible to take many different factors into consideration" ("Loss, Agency, and Responsibility for Outcomes: Three Conceptions of Corrective Justice" in Ken Cooper-Stephenson & Elaine Gibson, eds, *Tort Theory* (North York: Captus Press, 1993) 24 at 47).

4. Richard Markovits, "Liberalism and Tort Law: On the Content of the Corrective-Justice-Securing Tort Law of a Liberal, Rights-Based Society" (2006) 2006:2 U Ill L Rev 243 at 248-249.

5. Alan Harel & Assaf Jacob, "An Economic Rationale for the Legal Treatment of Omissions in Tort Law: The Principle of Salience" (2002) 3:2 Theor Inq L 413 at 415.

The general assent that attends this causal emphasis can be usefully contrasted with the analytical difficulties that follow. As with any area of the law, one hardly expects judicial citations of philosophical discourse—and, yet, asserting that "X caused Y" is clearly evocative of a centuries-old debate dating back to ancient Greece. Accordingly, whether or not this element of negligence is expressly situated within a given critical context, it must necessarily take a (contested) position. Causation, in other words, is a loaded term; a decision-maker can only hold that such a relationship exists by accepting one definition as true. The law is, however, at pains to divest itself of any deep theorizing; our longstanding approach is well stated by Allen Linden and Bruce Feldthusen:

> The defendant's conduct must cause the plaintiff's loss or else there is no liability....The most commonly employed technique for determining causation-in-fact is the "but for" test, whereby if the accident would not have occurred but for the defendant's negligence, this conduct is a cause of the injury.[6]

This approach—the counterfactual method of determining causation—is ostensibly straightforward. It is not, the courts submit, an exercise in empirical diagnostics but rather the operation of "common sense inference[s]."[7] Moreover, the legal determination is a paradigmatically binary exercise, asking the trier of fact to decide, on a balance of probabilities, whether the defendant's negligence caused the relevant harm. This is a question of fact,[8] and it requires the decision-maker to assess the proffered evidence for whether the plaintiff has discharged their burden of proof.[9] Although these choices find virtually no justification in the relevant jurisprudence, they constitute a self-enclosed system for approaching a highly theoretical inquiry. Amidst this judicial silence, it is instructive to consider the unstated foundations of legal causation, which elucidates the necessarily political perspective from which the law speaks.

Although the law of causation explicitly eschews "scientific precision," it maintains a latent debt to the work of David Hume—an attribution that has been a hallmark of relevant scholarship while remaining unstated in the case law.[10] The conclusions to be drawn from his work are the subject

6. Halsbury's Laws of Canada, *Negligence*, "Requisite Elements: Causation" (II.3.(1)) at HNE-6.
7. *Zsoldos v Canadian Pacific Railway Co*, 2009 ONCA 55 at para 52, [2009] OJ No 231.
8. See, e.g., *Wiens v Serene Lea Farms Ltd*, 2001 BCCA 739 at para 14, [2001] BCJ No 2719.
9. The general rule is concisely stated in *Zefferino v Meloche Monnex Insurance Co*, 2013 ONCA 127 at para 7, [2013] OJ No 870. The possibility of shifting burdens of proof is relevant to the broader discussion of this paper, but is an exception to the general rule. It is discussed at length below.
10. For a concise account, see: SL Porter, "The Measure of Damages in Contract and Tort" (1934) 5:3 Cambridge LJ 176.

of ongoing disagreement, but few would argue against the general premise that, for Hume, we can never observe causation. Instead, we assert a causal relationship based on experience. If X and Y are noted together often enough, we begin to say, "X causes Y."[11] While this approach is best described as a "regularity analysis,"[12] it does not preclude—and, in many ways, it supports—a counterfactual method of inquiry.[13] To return more explicitly to the legal sphere, proof of causation is largely oxymoronic; we are relegated to inference drawing because of the epistemic problem presented by causality. It is difficult to applaud the judicial insistence upon "common sense" as an analytical tool, but an understanding of this philosophical basis is important for a balanced critique of the current method. If we accept the Humean model of causation, any incredulity directed at the normative and overtly anti-intellectual character of "common sense" is mitigated by the lack of an obvious alternative.

A critical reading of the "but for" test demonstrates the practical significance of this theoretical framework. Consider, for instance, the unfortunately commonplace case of *Goodman v. Viljoen,*[14] where the obstetrician-defendant fell below the requisite standard of care in failing to advise the plaintiff to seek immediate medical attention when she reported significant fluid loss. At trial, it was accepted that the plaintiff was in premature labour. She gave birth to twins who developed cerebral palsy.[15] After hearing the expert evidence, the Court found that, in essence, delayed treatment markedly increased the likelihood of diffuse periventricular leukomalacia ("PVL"). This, in turn, caused the infants' cerebral palsy.[16] When the causal narrative is rendered as a series of analytical moves, it bears a striking resemblance to Hume's notion of unknowability: The defendant's negligence occurred, followed by the diagnoses of PVL. The expert evidence spoke to the consensus that, in experiential terms, the second event often follows the first. The same leap is made when we connect PVL with the relevant harm: the cerebral palsy. This standard application of the "but for" test does not, in other words, endeavour to locate causation in its active sense; instead, as Kenneth Abraham notes, "there is no independent evidence of cause-in-fact…there is evidence

11. See, e.g., Angela Coventry, *Hume's Theory of Causation: A Quasi-realist Interpretation* (New York: Continuum, 2006) at 1-6.
12. Anne Jaap Jacobson, "Causality and the Supposed Counterfactual Conditional in Hume's Enquiry" (1986) 46:3 Analysis 131 at 131.
13. For a concise example of this reading, see: Martin Bunzl, "Humean Counterfactuals" (1982) 20:2 J of the History of Philosophy 171.
14. 2012 ONCA 896, [2012] OJ No 6332.
15. *Ibid* at para 57.
16. *Ibid* at para 130.

resting on the fact that the defendant was (or allegedly was) negligent."[17] Since this fact finding process is directed at that which cannot be proved, it is centrally important to locate the legal mechanisms that give precise content to the judicial determination of causation.

By its very definition, a counterfactual analysis assumes the truth of something known to be false; the "but for" test can never be demonstrated empirically. The doctrinal result is a test "based on inference from experience of how things *generally* happen."[18] Accordingly, the decision-maker must construct and assess a hypothetical narrative, which centres on the space left by omitting the negligent act. This, of course, takes place within a highly artificial analysis. In one of the most famous works on the subject, the authors posit a potentially tortious fire to illustrate the demarcation required by legal causation.[19] We do not, they observe, point to oxygen as the cause of the damage—although, but for its presence, the fire would not have ignited.[20] In part, this is because "the defendant is liable, even if his or her act alone was not enough to create the injury,"[21] but a more important question hinges on the malleability of this legal construct.

As discussed, the scholarly consensus begins and ends with the central place of causation in the law of negligence; the successful plaintiff must prove the causal relation that has frustrated efforts toward empirical assessment for centuries. The legal response can be seen in the proliferation of concepts such as "common sense" and "inference drawing." Given the theoretical underpinnings of this concept, such efforts are broadly necessary; however, the epistemic problems of Humean causation cannot validly justify an approach that is, at once, amorphous and normative. Accepting the unknowability of an active cause does, indeed, relegate our efforts to the realm of inferences, but it then becomes essential to articulate the perspective from which these inferences are drawn and the assumptions embodied therein. To this end, an examination of the relevant jurisprudence is instructive.

2. *Robustly pragmatic "common sense"*

The historical development of legal causation provides perhaps the clearest example of its inherent flexibility. While the rules themselves have avoided explicit reformulation, their application has shifted significantly based on

17. Kenneth Abraham, "Self-Proving Causation" (2013) 99:8 Va L Rev 1811 at 1811.
18. John Fleming, *The Law of Torts*, 9th ed (North Ryde: LBC Information Services, 1998) at 220.
19. HLA Hart & Tony Honoré, *Causation in the Law*, 2nd ed (Oxford: Clarendon Press, 1985) at 11.
20. *Ibid.*
21. CED 4th (online), *Negligence* (II.3.(a)) at §30.

ideologies of adjudication. For instance, judicial concerns surrounding the volume of cases that failed on causation impelled a liberalized approach to inference drawing. Fleming, in his 1977 edition of *The Law of Torts*, suggested that "as a matter of forensic reality, the dice tend to be rather heavily loaded against any defendant."[22] Again, this preoccupation with "plaintiff friendly causation" did not alter the formal contours of the analysis; rather, the response was "incremental," and courts have reaffirmed "one dominant test for causation that is always available."[23] This language of singularity is, however, largely disingenuous; as discussed above, there is a great deal of manipulability at play where courts find unobservable facts via "common sense" inferences.

As this doctrinal expansion continued to flourish into the nineties, some notable qualifiers were imposed on the "but for" test. Most importantly for this discussion, the 1990 case of *Snell v. Farrell* announced the "flexible" nature of standards and burdens of proof in this context.[24] Snell underwent a procedure to remove a cataract in her eye. One risk, albeit a statistically small one, involved hemorrhaging caused by the insertion of the needle. Where this occurs, fairly obvious symptoms manifest and the operation must be discontinued. Farrell observed one such symptom but completed the operation, noting that he "would have to hurry." In the end, a nerve atrophied in the eye, which led to a permanent loss of vision.[25] The causation analysis was understandably complex: It was accepted that a stroke caused the atrophy, and this stroke could have been caused by either the defendant's negligence or Snell's unrelated health conditions.[26] It was, in other words, exemplary of "a case involving two potential causes of a plaintiff's injury."[27]

In response, the Supreme Court upheld "an emerging branch of the law of causation,"[28] which derives from the classical English maxim that "all evidence is to be weighed according to the proof which it was in the power of one side to have produced."[29] More specifically, it was held that a "tactical burden" arises when the defendant's negligence causes risk within the area of the impugned harm; essentially, an adverse inference can be drawn in the absence of "positive proof" unless the defendant, who

22. John Fleming, *The Law of Torts*, 5th ed (Sydney: The Law Book Co, 1977) at 182.
23. Vaughan Black, "The Rise and Fall of Plaintiff-friendly Causation" (2016) 53:4 Alta L Rev 1013 at 1016 [Black, "Rise and Fall"].
24. *Supra* note 1 at para 29.
25. *Ibid* at paras 2-6.
26. *Ibid* at para 42.
27. Erik Knutsen, "Clarifying Causation in Tort" (2010) 33 Dal LJ 153 at 168.
28. *Supra* note 1 at para 12.
29. *Batch v Archer* (1774) 1 Cowp 63 at 65, 98 ER 969.

is in the best position to adduce relevant evidence, disproves the causal link.[30]

While much has been written about this plaintiff-friendly development, two features of the decision are especially important for this discussion. First, the Court is adamant about the subsistence of "but for" causation; the tactical burden is not conceptualized as a significant doctrinal shift but rather constitutes a "robust and pragmatic" approach to the existing law. Secondly, and relatedly, Sopinka J.'s judgment exemplifies the considerable malleability of the counterfactual analysis. In his influential treatise, *Tort Law*, Lewis Klar argues that "[w]hile this approach may produce a pragmatic solution to a plaintiff's dilemma in difficult causation cases, it does depart from the traditional 'but for' test."[31] This argument, like much of the criticism directed at Snell, misses the larger point.

The amorphous nature of the counterfactual analysis does little to inspire confidence. Unfortunate, empty phrases like "robust and pragmatic" have been rightly derided and there are understandable concerns about the "policyization" of decision making based on "common sense."[32] Indeed, it is almost trite to assert the normative character of judicial constructions of "how things *generally* happen." My central claim here is that building on the *Snell* critique requires a broader focus on the nature of legal causation itself. After all, evidence theory—and our legal system itself—accept a qualified version of veritism; even if we could empirically prove causation (at the molecular level, say), it would be inconsistent for triers of fact to insist on this form of evidence. Instead, as Russell Brown put it (prior to his appointment to the bench), "though legal fact-finders may seek truth from the evidence, the most they will find is a *likelihood* of truth."[33] More specifically, legal causation is an exercise in proof by triangulation: The negligent act or omission and the impugned harm temporally surround the relevant causality and are used to draw a necessarily unobservable inference. This is not to suggest that the artifice of civil proof justifies the unilateral imposition of judicial will; rather, the unique flexibility of legal causation should be assessed in this qualified sense. Broadly speaking, inferential legal reasoning is uncontroversial, but it is difficult to imagine how one infers anything from the vacuousness of "common sense."

30. *Supra* note 1 at para 32.

31. Lewis Klar, *Tort Law*, 5th ed (Toronto: Carswell, 2012) at 402-403.

32. Vaughan Black, "The Transformation of Causation in the Supreme Court: Dilution and 'Policyization'" in Todd Archibald & Michael Cochrane, eds, *Annual Review of Civil Litigation 2002* (Toronto: Carswell, 2003) at 187.

33. Russell Brown, "The Possibility of 'Inference Causation': Inferring Cause-in-fact and the Nature of Legal Fact-finding" (2010) 55:1 McGill LJ 1 at 18.

As the (unstated) refashioning of "but for" causation in *Clements v. Clements* makes clear, this approach can justify a considerable range of outcomes. The jurisprudential trend that began this section—i.e., the liberalization of causal inferences—employed the same test that has, decades later, reversed this progressive trajectory and "turn[ed] causation into a mere fact-finding exercise."[34] While the Supreme Court sharply reversed decades of plaintiff-friendly causation, this change did not occasion any justificatory remark on the profound scope of this decision. Policy considerations aside (at least for a moment), it is alarming that a new conservative regime can be instituted under the same formal structures that consistently produced opposite results. As discussed above, the "but for" test does take a position on the nature of causal relations. Whatever the analytical merits of counterfactuals, there is a clear test in place for determining whether a potential tortfeasor caused the requisite harm. Accordingly, the considerable malleability that arises is the product of judicial application.

There is no shortage of literature detailing the discretionary nature of causal inferences, but relatively little has been written concerning the construction of the counterfactual analysis. The comparative exercise that attends a causal determination—that is, between the impugned event and a hypothetical situation where the defendant satisfied their standard of care—requires creativity on the part of the decision-maker. Assessing "how things *generally* happen" is not a neutral process; rather, the trier of fact is required to assert a necessarily speculative narrative with the force of law. While such recourse to discretion is hardly novel, the "but for" test impels a uniquely comprehensive brand of judicial supposition. It asks, in essence, for a constructed narrative that is constrained only by one's ability to draw inferences from past experience and the circumstances of the litigation.

II. *Constructing medical causality*

The notion of causation as self-conscious legal fiction can, of course, be applied in any area where the tort of negligence is invoked, but medical malpractice serves as a particularly instructive case study. Although there is no shortage of epistemic complexity inherent in any causal determination, this is stretched to extremes when health professionals allegedly cause compensable harm. Amidst the language of science and a general proliferation of expert evidence,[35] there is a unique malleability

34. Black, "Rise and Fall," *supra* note 23 at 1026.

35. See, e.g., Suzanne Blackwell & Fred Seymour, "Expert Evidence and Jurors' Views on Expert Witnesses" (2015) Psychiatry, Psychology & L 1 at 4.

at play when judges speak to medical causes. This is not to suggest any natural cohesion in potentially disparate areas; both treatment and medicine are amorphous concepts that resist inherent content.[36] This discussion, however, seeks to elucidate a common problem by focusing on a specific subset. Accordingly, my focus is the traditional sphere of causal liability under the doctrinal heading of medical malpractice; that is, I will examine cases in which a healthcare provider interacts with someone seeking treatment, where the impugned act or omission is within the scope of the defendant's occupational duties.[37]

Much has been written on the marked power imbalance that attends the doctor-patient relationship,[38] but this issue is largely unexplored in the context of legal reasoning. We know that, even when preventable medical error causes significant harm, "very few legal actions are commenced, and a majority of plaintiffs who do commence claims are unsuccessful at receiving any compensation (whether through settlement or judgment)."[39] While there are a number of contributing factors—the hegemonic power of the Canadian Medical Protective Association, for instance—the remarkably low rates at which aggrieved patient-plaintiffs recover suggests more than resource imbalance. A full-scale examination of the latent biases within adjudication is obviously beyond the scope of any paper, but the physician-favouring slant in medical negligence can be usefully unpacked through a careful reading of medico-legal causality. The "but for" test has been consistently recognized as an onerous hurdle for anyone seeking to recover in a malpractice suit[40] and the requirement that each trier must construct a counterfactual narrative provides perhaps the most comprehensive account of how judges imagine things "generally happen" when medical treatment becomes the subject of litigation.

A critique of medico-legal causality is complicated by many of the factors that render it emblematic of the broader problem. The dubious utility of partisan expert witnesses—and the blatant privileging of those with the economic means to hire them—stands in contrast to our apparent

36. See, e.g., Jonathan Herring, *Medical Law & Ethics*, 5th ed (Oxford: Oxford University Press, 2012) at 11-17; Samantha King, "OxyContin in Ontario: The Multiple Materialities of Prescription Painkillers" (2014) 25 Intl J Drug Pol'y 486.

37. Halsbury's Laws of Canada (online), *Medical Malpractice*, "Health Professionals and Negligence: Causation" (VI.3) at HMH-260.

38. See, e.g., Fiona Subotsky, Susan Bewley & Michael Crowe, *Abuse of the Doctor-Patient Relationship* (Dordrecht: Springer, 2013).

39. Elaine Gibson, "Is It Time to Adopt a No-Fault Scheme to Compensate Injured Patients?" (2016) 47:2 Ottawa L Rev 303 at 310.

40. See, e.g., Lara Khoury, *Uncertain Causation in Medical Liability* (Oxford: Hart Publishing, 2006) at 4-6.

interest in reaching justifiable conclusions but, again, this is taken to extremes in medical malpractice. While it is by no means unique, a recent paper published by Lerners LLP, a large Canadian law firm, illustrates the true function of adducing expert evidence: "Good expert opinion evidence and good expert reports do not happen on their own. They require careful direction and preparation by trial counsel working with the expert to develop sound expert opinion that will be persuasive and accepted by the trier of fact."[41] Where a case turns on highly technical medical phenomena, the expert will, in effect, provide or rebut the causal inferences—so long as one can afford to retain them. On this point, it is worth noting that 95% of Canadian physicians are members of the CMPA, an organization with an investment portfolio worth nearly four-billion dollars according to their most recent annual report.[42]

More generally, the medical context provides an interesting juxtaposition between legal causation and the language of science.[43] Despite the clear permissibility of inference drawing in the wake of *Snell*, courts continue to struggle with tactical burdens whenever the experts stop short of empirical certainty. In cases such as those discussed below, plaintiffs suffer clear harm from diseases that are not susceptible, as yet, to positive proof. In effect, burgeoning medical complications with insufficient scientific attention can preclude recovery where the trier insists on this form of precision.

Similarly, medico-legal causation is replete with interdependent variables that are rarely grounded in the decision-maker's experience; while there may be several moving parts in a traditional counterfactual—e.g., a multi-vehicle accident—there is perhaps no other area where the causal links are so irremediably beyond the ordinary scope of judicial experience. This iteration of the "but for" test mandates a "common sense" decision on whether the impugned deviation from healthiness (a complex term that will be discussed at length below) was (1) caused by diseases and infections brought about by negligence, (2) caused by bodily processes independent of the negligent treatment, or (3) some combination thereof. Certainly, cases exist where doctors, say, negligently remove a healthy limb that the plaintiff would have preferred to keep—that is, where the

41. Peter Kryworuk & Tyler Kaczmarczyk, "Effective Use of Experts: Litigating the Medical Malpractice Claim," online: <www.lerners.ca/wp-content/uploads/2016/05/Effective-Use-of-Experts.pdf> at 7.

42. Canadian Medical Protective Association, *CMPA Annual Report, 2015*, online: <www.cmpa-acpm.ca/documents/10179/302124485/16_AnnualReport-e.pdf> at 17.

43. Peter Greenberg, "The Cause of Disease and Illness: Medical Views and Uncertainties" in Ian Freckelton & Danuta Mendelson, eds, *Causation in Law & Medicine* (Burlington: Ashgate, 2002) 38.

scientific complexity is minimal—but anything that operates at the level of privileged medical knowledge vests the decision-maker with considerable discretion. After all, if we acknowledge the absurdity of judges ruling on what "generally happens" when, e.g., delayed treatment and antibiotics are followed by necrotizing fasciitis, we must accept that plaintiffs, appellate courts, and legal critics will be similarly precluded from full engagement with the counterfactual.

Understanding the counterfactual assessment as judicial narrative provides an effective means of overcoming these analytical difficulties. In a field replete with partisan experts, legal findings on medicine, and so-called "common sense," there is a consistent slant in the reasoning that perpetuates the doctor-patient power imbalance. Beyond the importance of reckoning with an area of law that consistently precludes recovery in the wake of often catastrophic harm, we are confronted with a uniquely malleable body of causal inferences. The ideological content of how judges suspect things "generally happen" is instructively rendered when these decisions are made in the face of a traditional hierarchy and deductions beyond the ordinary scope of experience. Accordingly, the deconstructive process begins with an inquiry into the unstated assumptions that fill the gaps in "but for" causation—a project that stands in contrast with the ostensible neutrality that characterizes these counterfactual narratives.

III. *The phenomenology of "but for" narration*

1. *The mechanization of judicial discourse*

The process of legal decision-making is generally rendered at the level of found facts and governing law. Consider, for instance, the last dozen-odd judgments released by our highest court. There are some minor variations in synonymous language, but the analytical headings never change. Essentially, each decision is organized into the following steps:

1. Introduction
2. Overview of facts, legislation, and procedural history
3. Analysis (i.e., application of legal doctrine/principles to the aforementioned facts)
4. Conclusion

While this trend toward formulaic drafting may foster accessibility, it betrays a deeply ingrained methodology. The factual dispute is presented as a neutral backdrop for the legal analysis that follows; the fact/law binary is rigid in the second step while collapsing in the third. Certainly, at the appellate level, there is virtually no discussion of alternative facts and the resultant tone of dispassionate "truth-telling" is effectively naturalizing.

Put another way, the systematic application of law to the court-sanctioned version of events conceals many of the value judgments that are always uncomfortably at play.

The act of judging is presented as independent, impartial, and diligent—metanarratives that pervade the literature of organizations such as the Canadian Judicial Council—but institutional actors consistently discuss adjudication from a great, macrocosmic distance. In a keynote address given by Supreme Court Justice Rothstein, he assured the audience that, "even amidst … individual variation, there are shared institutional qualities that underlie how reasons are produced. …It is easy to overlook how much the individual act of judging is shaped by institutional factors."[44] This argument, simply stated, suggests that judicial subjectivity is irrelevant due to the platonic neutrality of legal doctrine; whether or not Justice Rothstein is sympathetic to a given cause, he will apply the relevant legal principles to the facts in issue.[45] How could personal biases ever affect such a mechanical exercise?

Conversely, there is a well-known critical tradition of rejecting—and perhaps even mocking—such aggrandizement. The legal realists, for instance, had much to say about the results oriented slant of the adjudicative process.[46] More recently, Duncan Kennedy adopted a radically granular perspective, which he describes as the "phenomenology of judging."[47] This critical project focuses on the work that is done to render the broad categories of "fact" and "law" that come together to form an ostensibly apolitical judgment. As an illustration, Kennedy writes from the perspective of a hypothetical judge faced with a dilemma: He wants to deny an employer's injunction against a workers' strike but suspects (rightly) that available precedent points the other way. This situation foregrounds the profound malleability of legal reasoning that predates its official, institutionalized articulation:

> Having to work to achieve an outcome is in my view fundamental to the situation of the judge. It is neither a matter of being bound nor a matter of being free. Or, you could say that the judge is both free *and* bound-free to deploy work in any direction but limited by the pseudo-objectivity of the rule-as-applied, which he [*sic*] may or may not be able to overcome.[48]

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44. Justice Marshall Rothstein, "The Role of Dissenting and Concurring Reasons in the Supreme Court of Canada's *Charter* Jurisprudence" (2010) 27 Nat'l J Const L 1 at 2.
45. See also: *Arsenault-Cameron v Prince Edward Island*, [1999] 3 SCR 851, [1999] SCJ No 75.
46. For a concise summary of this movement, see: Daniel Bodansky, "Legal Realism and its Discontents" (2015) 28:2 Leiden J Intl L 267.
47. Duncan Kennedy, "Freedom and Constraint in Adjudication: A Critical Phenomenology" (1986) 36 J Leg Educ 518.
48. *Ibid* at 522.

As Kennedy works through this situation, he engages with the various incidents of constrained discretion; he recognizes, for instance, that finding facts to support his preferred outcome will do less to advance the law in a progressive direction than a doctrinal restatement.[49] Similarly, his reputation as an impartial adjudicator lends greater force to his ideologically motivated decisions: he must avoid being seen as radicalized.[50] Perhaps most importantly, Kennedy submits that skillfully eliding his political allegiances affords a much diminished opportunity for appellate review, but the more forceful his position, the greater its potential precedential value to those he (secretly) supports.[51]

On a more foundational level, the raw materials of judicial discourse are inherently ideological. This is not to suggest that a discussion of legal causality is an appropriate venue for a macrocosmic critique of the common law; rather, in thinking about the unstated processes by which, *inter alia*, the causal narrative is produced, it is important to remain mindful of the conditions that give rise to this construction. Putting aside its possibility for a moment, an adjudicator without a preferred outcome is still "'spoken' by his or her language"; the language of legality is perhaps uniquely replete with normative content.[52] Further, within this linguistic structure, the rules of law that ostensibly determine the results "give no reasons for themselves."[53] While this is, once more, concerning on a systemic level, it further complicates the narrative construction of legal causation: The constituent facts in each counterfactual are rarely undisputed and are shaped by both doctrine and discretion; neither of which generally receive justificatory comment. As a result, deconstructing the dominant causal narrative becomes both more obviously appropriate and far more difficult; it is the process of parsing for ideology within a system characterized by it.

In this way, the phenomenological approach provides a uniquely instructive framework. When judicial reasoning is removed from its broad official categories of facts, laws, and dispositions, a central starting point becomes clear: What is the perspective from which the unstated work of legal reasoning is undertaken? Kennedy's granular focus reminds us that innumerable psychic processes coalesce to inform a judicial determination of accepted facts or governing doctrine. The play of this structure is taken to a further extreme with legal causality, where the adjudicator must

49. *Ibid* at 526.
50. *Ibid.*
51. *Ibid.*
52. Duncan Kennedy, *A Critique of Adjudication (fin de siècle)* (Cambridge: Harvard University Press, 1997) at 134.
53. *Ibid* at 135.

render a decision on what *generally* happens—an inference that is openly based on (necessarily individualized) past experiences. Accordingly, while much is written about the flexibility of "but for" causation, a discussion of its phenomenology takes this malleability as a symptom of the larger issue: Judges construct these legal fictions from within the elite sphere of institutional power. There is, then, a common core that underlies the apparent randomness of this area, which is usefully elucidated by considering the dominant perspective from which the law speaks.

2. *Expertise, adjudication, and the outcome of governing*

While legal causality is characterized by profound malleability—the operation of unobservable counterfactual assessments and vacuous analytical tools—its effects are not evenly distributed between plaintiffs and defendants, particularly in the medical malpractice context. Instead, as numerous authors report, medical professionals enjoy a considerable statistical advantage when claims proceed to the "but for" test.[54] This is not by virtue of some neutral content embodied in "common sense," however robust or pragmatic; rather, the legal system perpetuates the current distribution of authority (i.e., the same structural imbalances that allowed elite legal actors to assume that power) and, as a result, evinces an ingrown fondness for traditional hierarchies. It is a regressive force, given that "the legal universe just reproduces the society around it: most people…rigidly observe the rituals and guard the prerogatives of their station…while vigorously denying that the concept of station has any relevance."[55] It is hardly surprising, then, that the doctor-patient relationship maintains its social ordering when it enters the courtroom.

On a foundational level, the work of Michel Foucault renders the normative, patriarchal underpinnings of state institutions, which are hidden in plain view. In a particularly memorable passage detailing the hegemonic structure of legal authority he writes:

> [R]eform was not prepared outside the legal machinery and against all its representatives; it was prepared, for the most part, from within, … on the basis of shared objectives and the power conflicts….Certainly, the reformers did not form a majority…but it was a body of lawyers who outlined its general principles: a power to judge…which, having no other functions but to judge, would exercise that power in full. In short, the power to judge should no longer depend on the innumerable, discontinuous, sometimes contradictory privileges of sovereignty, *but on the continuously distributed effects of public power.*[56]

54. Gibson, *supra* note 39.

55. Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy: A Polemic Against the System* (New York: New York University Press, 2004) at 53.

56. Michel Foucault, *Discipline & Punish*, 2nd ed, translated by Alan Sheridan (New York: Vintage Books, 1995) at 81 [emphasis added].

There is significant force in this carefully apportioned legal authority; as Robert Cover puts it, "[a] judge articulates her understanding of a text, and as a result, somebody loses [their] freedom, [their] property, [their] children, even [their] life."[57] When this institutional power is employed in a causation analysis, the ideological position is effectively obscured: The circumstances that give rise to adjudication continue to inform microcosmic acts of legal decision-making, and the privileged position that attends the judicial function necessarily shapes the experiential inferences that are available to the judiciary. In other words, we need not assume active malice toward sympathetic plaintiffs in our phenomenological framework; we need only accept the relatively uncontroversial statement that one cannot speak or detect their own ideology. It is therefore important to consider the underlying interests at stake each time a medical professional defends against an unfavourable causal link.

This admittedly localized inquiry can also be read in light of Foucault's understanding of the state—specifically, through his notion of "governmentality."[58] Essentially, he claims that any theory based on distinct institutional apparatuses misses the point; the government, he argues, is formally constrained only by the process of governing.[59] Put another way, concepts such as expertise and stigma—which are ostensibly private and uncontrollable—can be harnessed to serve the normative ends of the dominant state power. When this happens, we are confronted by governmental force regardless of its institutional iteration. Building on this idea, Terry Johnson posits a unique symbiosis between the state and the medical professions. It is axiomatic that, if governing becomes a central focus, "the institutionalization of expertise in the form of the professions" has significant potential for furthering state interests.[60] This, in turn, impels the "normalization" of the governed subject; once it crosses a certain threshold of sophistication, governmentality produces individualized self-regulation.[61]

In the medical context, we arrive at such reflexive obedience by way of "established definitions" that delineate the scope of politicized otherness.[62] It is beyond reasonable dispute that health and disease are socially

57. Robert Cover, "Violence and the Word" (1986) 95 Yale LJ 1601 at 1601.
58. Michel Foucault, *The Birth of Biopolitics: Lectures at the Collège de France, 1978–79*, translated by Graham Burchell (London: Picador, 2010) at 13-17.
59. *Ibid* at 15.
60. Terry Johnson, "Governmentality and the Institutionalization of Expertise" in Terry Johnson, Gerry Larkin & Mike Saks, eds, *Health Professions and the State in Europe* (London: Routledge, 1995) 4 at 4.
61. *Ibid* at 6-7.
62. *Ibid.*

constructed, but this axiom does not fully illuminate the relationship between medical authority and the governing state; the latter, of course, benefits greatly from the ostensible neutrality of professionalized healthcare.[63] In return, the medical expert "shares in the autonomy of the state" based on this notion of unified governance through disparate actors.[64] More broadly, the medical professional benefits from the full apparatus of the governing state: The traditional hierarchy that informs their interactions with those who seek treatment is the culmination of powerful social forces.

This is governmentality at arguably its most pervasive and effective; the power imbalance is entrenched structurally (through, e.g., the profession's monopoly on normative healthiness and pain management) and psychologically (through the archetype of the benevolent, authoritative healthcare practitioner).[65] In this way, the intersection of medicine and legal causality facilitates a sustained critique of the dominant legal perspective. With few exceptions, the jurisprudence surrounding medical malpractice presents resource and power imbalances that perpetuate the current distribution of authority. Injured plaintiffs endeavour to prove causal links—an epistemic nightmare exacerbated by the scientific expertise required in most cases—and elite decision-makers construct hypothetical narratives that are usually protected by the deferent standard of review for findings of fact. The counterfactual narrative provides a uniquely stark rendering of the dominant perspective from which the law speaks; in medico-legal causation, recovery for often catastrophic injuries is subordinated to the conservative hierarchy that constructs the narrative in a manner that precludes liability. This is most clearly observed by considering some notable examples.

IV. *Deconstructing the causal narrative: a close reading of notable appellate decisions*

Although the "but for" test formally requires judicial speculation that assumes the truth of something known to be false, the current state of counterfactual analysis rarely produces linear reasoning. Instead, as discussed above, the inquiry is generally presented in terms of the defendant's negligence. We are left with proof of the tortious act or omission and the subsequent harm. The inferences that are drawn between these findings of fact are often obscured behind the dubious workings of

63. This bears resemblance to the suggestive function of formalistic judicial reasoning—law is applied to fact; it is apolitical and impartial.

64. Johnson, *supra* note 60 at 8.

65. On this latter point, see: David Naylor, "The Canadian Medical Profession: Theoretical and Historical Background" in *Private Practice, Public Payment: Canadian Medicine and the Politics of Health Insurance* (Montreal: McGill-Queen's University Press, 2004) at 8.

"common sense." This is not, however, to suggest that judges refrain from constructing a full causal narrative based on their (privileged) personal experience; rather, the critical project is complicated by the general lack of transparency surrounding the chain of inferences necessary to connect—or, more commonly, dismiss—the relation between the negligence and harm.

The fact that the underlying assumptions in medico-legal causation are left unstated is hardly surprising—indeed, my central argument here is that, while inferential reasoning is clearly necessary in this area, those inferences should be rendered more explicitly. Moreover, to expect the articulation of latent bias is clearly nonsensical. It is important, however, to note these difficulties at the outset. In this way, the phenomenological approach is particularly useful: It facilitates a deconstructive reading of relevant cases beginning with the premise that, as the statistics show, this area consistently privileges medical professionals.

The following sections discuss several appellate level decisions in detail. This focus allows for the clearest rendering of the phenomenological slant at play, but it should not be taken as an assertion that plaintiffs generally fare better at trial. Instead, our various courts of appeal are analytically helpful for what they lack: (1) complex and voluminous disputes about the factual matrix and (2) proximity to those most affected.

Regarding the former, it is hardly novel to submit that the judicial articulation of "facts" is inherently political, but trial level decisions are far more susceptible to the nuance that attends conflicting evidence. Put another way, the initial triers of fact must hear all admissible evidence and directly engage with points of inconsistency. Their decisions on, for instance, credibility are necessarily value-laden—which is, itself, an interesting inquiry—but for the purposes of discussing how fact and law impel an ostensibly neutral causal analysis, the distance of the appellate courts is instructive. These judges benefit from an official version of facts and the resultant decisions exemplify the disappearance of controversy and subjectivity. Again, the same processes are employed in trial level decisions but, given the necessarily non-exhaustive scope of this discussion, my critical framework is most productively used in concert with the most pronounced examples of physician-favouring narrative construction.

Secondly, and relatedly, appellate courts operate at a more overtly doctrinal level than is generally displayed in trial decisions. Often, sympathetic plaintiffs are relegated to the textual record presented and the advocacy of their lawyers and, from a phenomenological standpoint, it becomes easier to trace the triers' movements from stark, accepted facts to cold, unbending doctrine. This is not to suggest that plaintiffs

generally recover at trial on the basis of sympathy and at the expense of legal fidelity—quite the opposite—but a focus on appellate jurisprudence is practically useful for the directness with which the causal narrative is constructed.

The phenomenological approach to reading causal narratives has broad implications; if we understand the counterfactual process as the perpetuation of legal hierarchy through analytical predetermination, virtually every reported decision in this area is relevant. In an effort to demonstrate the utility of this theoretical framework for deconstructing medico-legal causality, I will focus exclusively on two common tropes of denying legal causation: the fluctuating demands of specificity that immunize medical authority and further the professional monopoly on expertise, and the process of presenting "common sense" and expert evidence as parallel plotlines to elide the need for justification. There are, of course, dozens more that could be claimed; however, this discussion seeks only to present emblematic—and far from exhaustive—occurrences of slanted reasoning that can be elucidated through a phenomenological inquiry.

1. *The language of specificity and professionalized power*

The narrative construction performed in *Aristorenas v. Comcare Health Services* is particularly instructive given the parallel reasoning displayed in the majority and dissenting decisions.[66] In this case, the plaintiff—who is described as "a 28-year old single parent [with] a four-year old child" at the time of the alleged negligence[67]—gave birth to her second child via Caesarean section. Thereafter, she was placed on an antibiotic and received homecare based on the "escalating deterioration of the condition of the wound."[68] After a few days, Aristorenas presented at the defendant-physician's office with recommendations from her homecare nurses, suggesting that further action was required for the wound to heal; she was prescribed the same antibiotic with an increase in wound-dressing frequency.[69] Later that day, and after returning home, she was hospitalized; she had developed a life-threatening infection, necrotizing fasciitis, which required three separate surgeries.[70] At trial, it was held that both the doctor and the nurses had breached their standards of care by failing to notice the inefficacy of their treatment and the likely result of leaving a post-

66. [2006] OJ No 4039, 151 ACWS (3d) 1161.
67. *Ibid* at para 5.
68. *Ibid* at para 10.
69. *Ibid* at para 12.
70. *Ibid* at para 16.

operative wound in that condition. This form of negligence irrefutably increases the likelihood of contracting an infection.

While Aristorenas was successful at trial, the Court of Appeal overturned that decision on the basis of causation. Despite overwhelming evidence that the impugned acts created a fertile environment for infections, the majority found no evidence by which to infer that necrotizing fasciitis *in particular* was caused by the defendants' negligence. Instead, the Court favoured evidence adduced by the defendants to the effect that no one knows the precise cause of this particular infection and there is certainly no available evidence on the interplay between this specific delay and the necrotizing fasciitis. This stands in stark contrast to the refreshingly transparent causal analysis in the trial decision:

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.[71]

On the basis of this progression, it was held that *Snell* permits a positive inference 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,"[72] and that causation is thereby satisfied. This view was endorsed by MacPherson J. in dissent.[73]

Read together, these conflicting judgments demonstrate how the language of specificity forecloses proof of causation. While this area of the law is largely characterized by scientifically complex facts, often raising the question of judicial competence, the crucial disagreement here is simple: When negligence causes the likelihood of infection, can a trial judge infer that a specific infection was thereby caused without proof of more? The answer depends on how the narrative is constructed.

At the outset, the majority concedes that the appropriate test requires robust pragmatism, but must still "be applied to evidence."[74] While this presents as axiomatic, it gives way to a subtle critique of *Snell*, suggesting

71. [2004] OJ No 3647 at para 72, 133 ACWS (3d) 718.
72. *Ibid* at para 73.
73. *Supra* note 66 at paras 44-45.
74. *Ibid* at para 54.

that the trial judge replaced evidence with inference drawing.[75] Accordingly, the causal analysis is framed as a reification of conservative, fact-based pragmatism; the blameworthiness of the defendant-professionals must be grounded in the factual structure presented in the reasoning. This gives way to a suggestive tension in the ensuing narrative: The causes of necrotizing fasciitis are not susceptible to scientific proof—they are functionally unknowable in this inquiry—but, conversely, the more generalized proof that is available in response to this mysteriousness is met with demands for scientific precision. For the majority, "but for" the negligent delay in treatment, we know nothing; the language of specificity—that we must know exactly what caused *this* disease, how it was affected by *this* negligent delay—is surrounded by the apparent ephemerality of the plaintiff's expert evidence.

When one recalls *Snell*, this presents as exactly the sort of situation in which to invoke the "tactical burden"; that discussion usefully contrasts the scientific understanding of causation with the legal burden borne by the plaintiff.[76] However, in noting the analytical moves made outside the official fact/law categories, it becomes clear that the language of specificity is assigned to the medical profession; the hierarchical logic of the counterfactual hypothetical places medicine at the service of the defendants. Shortly after conceding that necrotizing fasciitis cannot yet be causally proved, the majority writes: "The trial judge did not assess whether *this* delay caused *this* complication."[77] The notion that, in relation to a healthcare professional, "the patient, by reason of lesser experience, …is typically in a position of comparative powerlessness"[78] finds further expression in the causal narrative that will not turn medical certainty against its own; the plaintiff is constructed outside of the privileged sphere of scientific knowledge that is vital to her claim.

The phenomenological approach is similarly helpful in parsing the narrative offered in *Cottrelle v. Gerrard*, where the plaintiff lost her leg after the defendant-physician failed to examine a sore between her toes.[79] This was a clear error because, as a diabetic Indigenous woman who smoked heavily, Cottrelle was at a markedly high risk of vascular disease—a risk that can result in gangrenous tissue necessitating amputation.[80] Again, the trial judge found that the doctor's negligence had caused the relevant harm

75. *Ibid.*
76. *Supra* note 1 at para 32.
77. *Supra* note 66 at para 76.
78. *Norberg v Wynrib*, [1992] 2 SCR 224 at 279, [1991] SCJ No 107.
79. [2003] OJ No 4194, 126 ACWS (3d) 344.
80. *Ibid* at para 5.

and awarded damages, but this was overturned based on insufficiently precise causal evidence.

As in *Aristorenas*, the possibility of proving causality here depends on the specificity with which the narrative is rendered. The trial judge opted for a generalized assessment: The defendant's failure to examine allowed the wound to go untreated; but for this omission, gangrene would have been identified and treatment would have followed. This justified an inference of causation on the balance of probabilities; there is not, of course, any available evidence about whether *this* infection coupled with *this* delay caused the amputation to a scientific certainty—though, in the trial judge's assessment, it probably did.[81]

In contrast, the Court of Appeal employed professionalized language to move the narrative into the realm of loss of chance doctrine: an area already recognized for its physician-friendly slant.[82] The counterfactual analysis begins by stating that Cottrelle "lost her leg because of an infection" without specifying the interplay between the delayed treatment and the threshold at which amputation becomes necessary.[83] This creates an unclear hypothetical which generalizes the scientific detail before demanding that precision from the plaintiff—she would have been suffered from gangrene either way; she needs to prove that this specific delay necessitated amputation.[84] It should be noted that, on a doctrinal level, there is nothing to suggest that the plaintiff should benefit from a *prima facie* reversed onus; it likely appears eminently reasonable that the Court of Appeal demands proof of a causal link between the negligent delay and the amputation. The difficulty, however, lies in the shifting degrees of precision embodied in the narrative. For the trial judge, there was enough evidence to justify a positive causal inference: The advanced state of the infection caused the harm; this advanced state was likely caused by the defendant's failure to treat.[85] This robust pragmatism hardly requires any doctrinal overhaul; rather, this is a paradigmatic case of scientific proof destroyed by the defendant's negligence, which is conceptually distinct from loss of chance. Once again, specificity is leveraged by those within the sphere of privileged medical knowledge, and the analysis that began with a degree of abstraction—"the infection" is used repeatedly without denoting its severity or temporal progression—converges upon the specific delay at issue: a matter not amenable to positive proof.

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81. *Ibid* at para 11.
82. See, e.g., S Waddams, "The Valuation of Chances" (1998) 29 Can Bus LJ 86.
83. *Cottrelle v Gerrard*, *supra* note 79 at para 31.
84. *Ibid* at para 35.
85. *Cottrelle v Gerrard* [2001] OJ No 5472 at paras 69-70, [2001] OTC 966 (SCJ).

Ultimately, the foregoing cases constitute a tiny, but emblematic, fraction of the case law that conforms to the suggestive power of professionalized knowledge. The shifting degrees of precision and the eschewal of inferences when scientific proof is unavailable typify a phenomenological process that begins with the end in mind. It could be argued that inconsistent analytical demands in cases like *Aristorenas* and *Cottrelle* are instead symptomatic of the vacuous analytical tools with which adjudicators approach causation, but a careful reading of these counterfactual narratives suggests otherwise. When the decision-maker must accept that the defendant-physician caused an opportunity for a certain harm to manifest—where they, e.g., cause vulnerability to infection—and an injury of that type subsequently occurs, the doctrinal workings of causation, sparse as they are, facilitate a plaintiff favouring disposition. The decision, then, to preclude recovery by conflating legal causality with a form of scientific certainty relies on the monopolization of medical authority within the professions. Put another way, these causal narratives are constructed to privilege those with specialized knowledge: If judges refuse to draw an inference in light of unknowable, individualized specificity, the causal link can never be established. On the surface, these decisions rehearse the permissive language of *Snell*—that an adjudicator *may* draw an adverse inference or assign a tactical burden—but the unstated effect of conservative causation is physician immunity. If the counterfactual is constructed to require extreme specificity regarding medical processes, the outcome is effectively predetermined.

2. *The double plotline: expert evidence and "common sense" inference drawing*

Understanding the counterfactual analysis as narrative construction raises the general issue of how we read and anticipate this type of information. Clearly, judges are not the only purveyors of slanted plotlines. While this is hardly the forum for a discussion of mythos and the human condition, it is important to remember that, for most hermeneutical scholars, there are only a few distinct narratives available to us—they are simply retold with minor variations.[86] Whether or not one finds the structuralists compelling on this point, it is difficult to refute the idea that popular narratives have become familiar to the point of internalization; we do not, in other words, require a full-scale rendition of, for instance, the revenge plot—we simply fill in the expected tropes with minimal prompting.

86. See, e.g., Joseph Campbell, *The Hero with a Thousand Faces*, 2nd ed (Princeton: Princeton University Press, 1968).

From a more critical perspective, this has troubling implications. In their influential *Dialectic of Enlightenment*, Max Horkheimer and Theodor Adorno suggest that the "culture industry" advances the aims of the repressive state through these familiar narrative structures:

> What happens at work…can only be escaped from by approximation to it in one's leisure time. All amusement suffers from this incurable malady. Pleasure hardens into boredom because, if it is to remain pleasure, it must not demand any effort and therefore moves rigorously in the worn grooves of association. No independent thinking must be expected from the audience: the product prescribes every reaction: not by its natural structure (which collapses under reflection), but by signals.[87]

This idea that the dominant narratives do not withstand careful scrutiny is particularly important; it is hardly novel to assert the latent (at best) normative character of mainstream narration, but Horkheimer and Adorno point to a key element in the institutional function of stories: they are not meant to be deconstructed. To this end, the work of David Bordwell, a prolific film critic, is instructive. Specifically, his writing on the "double plotline"—the notion that interweaving thematic elements distracts the viewer/reader from unresolved tension or illogic—is particularly apposite in the context of counterfactual hypotheticals.

Consider, for instance, *Anderson v. McAndrew*, where a perfunctory analysis is sufficient to hold that "the inference sought by Anderson does not necessarily equate with common sense."[88] While it is sadly unremarkable for a causal link to fail on such amorphous grounds, this decision arrives here in a significant way—by valorizing an apparent interplay between expert evidence and "common sense."[89] This case is notable for its treatment of medical complications well outside of professional intervention. *Anderson* is not a medical malpractice case; however, in determining whether a car accident caused a stroke over two years later, the Court provides an explicit starting point for understanding the double plotline of expertise and "common sense."

In the words of Ritter J.A., issuing an oral decision for the Court, there was an unimpeachable finding at trial to the effect that "the respondents' expert's knowledge and experience…*meshed* with the 'common sense' conclusion that it was improbable that a stroke that had occurred two and

87. Max Horkheimer and Theodor Adorno, *Dialectic of Enlightenment* (Palo Alto: Stanford University Press, 2007) at 109.
88. 2005 ABCA 270 at para 7, 2005 CarswellAlta 1093.
89. *Ibid* at para 3.

one-half years after an accident was caused by the accident."[90] Returning briefly to the remarks of the trial judge, two things become immediately apparent. First, the causal analysis quickly becomes preoccupied with temporal distance; "common sense" can relate physical trauma to an immediate stroke, but to do so after two years is improperly "speculative."[91] Secondly, the trial judge bolsters his use of "common sense" with a cascade of block quotations from classical decisions—nearly a dozen in total—thereby explicitly adopting an anti-intellectual mode of analysis. Taken together, we are left with a seemingly crude instrument for determining causation: The "common sense" of causal relations must be obvious and careful reflection is barred. This has interesting implications on appeal, where this stance is read in light of the recorded expert testimony.

As is perhaps obvious, the foregoing means of determining causation is nonsensical. Its refusal to critically engage with the process of deduction functionally immunizes defendants when their negligence causes harm in ways that are not profoundly apparent. This is where the Court of Appeal's finding that expert evidence "meshed" with vacuous "common sense" is instructive: The emptiness of the current use of the "but for" test is filled in by the proffered expert evidence. From a phenomenological standpoint, the dualistic presence of experts and "common sense" are used to distract and justify when decisions are made on the basis of entrenched hierarchies. If there is no fixed content or constraint surrounding the judicial creation of counterfactual narratives, this facilitates a tremendous scope for deference to partisan experts, which has particularly insidious effects in the medical malpractice context.

In this way, the case of *Fisher v. Atack*, where plaintiff favouring inferences were overturned on appeal, is particularly instructive.[92] At trial, it was determined that the hospital's negligent procedure for intermittent monitoring of fetal heartbeats led to the infant's partial asphyxia which, in turn, caused her cerebral palsy. This necessitated a series of undeniably "robust" inferences, performed in light of expert evidence that was, of course, contested. The trial judge made findings of fact that (1) if the standard of care had been met, the bradycardia would have been detected in a timely fashion, (2) that the nurses would have then summoned assistance, and (3) that this would have led to an expedited delivery process that would have mitigated the harm.[93] In the Court of Appeal's

90. *Ibid* [emphasis added].
91. 2003 ABQB 13 at para 65, [2003] AJ No 24.
92. 2008 ONCA 759, [2008] OJ No 4481.
93. *Ibid* at para 61.

opinion, the deference owed to the initial trier on questions of fact is (at least implicitly) subordinate to the opinions of medical experts. The plaintiff friendly finding of causation had clearly arisen from "common sense" and deductive reasoning, but such an approach can only be used to "draw *reasonable* inferences concerning the issue of ultimate causation, particularly in a case involving complex medical evidence."[94] Ultimately, divergence from medical authority is presented here as a reviewable error.

A similar approach is adopted in *Nelson v. Provincial Health Services Authority* where, once more, a positive finding of causation against healthcare professionals was sent back for a new trial.[95] Here, the causal link between the negligent placement of the plaintiff's foot on a "birthing bar" and a tear in her hip cartilage became the subject of expert contention. After consideration, the trial judge endorsed the causal theory put forth by the plaintiff favouring medical expert—his assertion that the negligent leg placement likely caused the subsequent damage was found as fact.[96] The Court of Appeal, however, read the competing experts differently and opted to rebut the causal relationship. In a unanimous decision, Willcock J.A. found a "manifest error" in the preference of one expert over the other and declined to render an alternative causal narrative.[97] Once more, the overruled reasoning depended on robust pragmatism and, on the facts, the links between an epidural, a fixed metal bar, and a broken hip seem to conform to "common sense" as much as anything could. Moreover, the eschewal of deference in the appellate decision is overt and unapologetic;[98] these features coalesce to create the impression of a relatively aberrant—but familiarly defendant friendly—causal analysis.

If, however, we consider the underpinnings of the appellate counterfactual, a coherent rationale begins to take shape. The double plotline of "common sense" and expertise serves a fundamentally hierarchical function. In this case, the two foundational elements work in concert to justify the preferred outcome: Where the discretion afforded by "common sense" must be impeached, the authority of the expert provides a convenient locus of apparent objectivity and learned authority. Perhaps unsurprisingly, the counterfactual narrative offered in opposition to that of the trial judge is incoherent. But for the proved negligence, the harm cannot be known without recourse to expert testimony; although one such expert was preferred at trial, neither is accepted as dispositive on appeal.

94. *Ibid* at para 64.
95. 2017 BCCA 46, [2017] BCJ No 173.
96. *Ibid* at para 13.
97. *Ibid* at para 62.
98. *Ibid* at para 64.

This logical structure is exclusively destructive, serving to erode causal links without any potential for a positive finding.

3. *On the continued utility of phenomenological medico-legal causation*

Ultimately, the phenomenological framework impels a granular focus on the discrete analytical moves that deny causal relationships in medical malpractice. The foregoing examples serve as notable examples of two broad phenomena; they are not, however, anything like an exhaustive survey of slanted causal narratives. Instead, the above deconstructive reading of some relevant appellate judgments is offered as an illustration of my theoretical lens at work; that is, these cases, like innumerable others, demonstrate the latent ideological content that erodes medico-legal causal links by constructing narratives with predetermined outcomes. Both the language of specificity and the use of double plotlines are distinct judicial tropes that typify the larger process of "common sense" as an inherently regressive force.

Conclusion

The current approach to legal causality is inescapably replete with judicial discretion and imprecise deductive reasoning. While its epistemic complexities have occupied countless scholars across a wide spectrum of disciplines, there is no critical consensus on the nature of active causation. In response, Canadian courts eschew careful reflection and impose the dominant version of "common sense"—generally with as many references to robust pragmatism as their decisions can accommodate. Behind this suggestive image of adjudicative incompetence, the tension between the theoretical richness of causation and the judicial refusal to expend intellectual effort betrays an underlying ideological project. When decisions can be justified on the basis of "common sense", results are constrained only by one's creative faculties—an assertion pushed to extremes when the subject of determination is fundamentally unknowable.

As a requisite element to maintain an action in negligence, this amorphous, normative hurdle stands between every aggrieved plaintiff and recovery. In the context of medical malpractice, injured patients bear the burden of proof for unknowable causality, but face the additional disadvantage surrounding the exclusive nature of medical knowledge and the power and resource imbalances that inhere within the doctor-patient relationship. Accordingly, a critical reading of "but for" causation directed at repudiation of the traditional model is productive, but ultimately culminates in frustration. Courts should be criticized for the blatant imposition of normative values in causal determinations, but the epistemic problems of causality are not amenable to easy solutions. While few would

argue against the proposition that "the critical project is about disclosure of ideology, not about the claim to know the truth outside ideology,"[99] a full-scale critique of robust pragmatism should, at least ideally, begin to elucidate some alternative.

There are, of course, compelling arguments for wholesale reform to tort law, particularly in the area of medical malpractice. Given the aforementioned complexities, imbalances, and statistical results in this area—coupled with the general tort critique that the doctrinal categories of, say, negligence tell us nothing about someone's needs after they suffer an injury—the argument for a no-fault system is appealing. However, to the extent that the status quo persists, the more urgent question is the one that began this discussion; that is, if no one can validly claim to understand causation in its active sense, it is difficult to advocate for analytical reform in the absence of an uncontroversial alternative.

It seems unlikely that the epistemic problems that plagued Hume and his successors will find resolution in legal doctrine, but our reliance on inference drawing and counterfactuals may ultimately suggest an interim solution. Barring reform to the longstanding "but for" test, a more equitable—or at least less malleable—approach lies in the process of rendering judgment. The judicial performance of counterfactual determination is currently presented in a manner that obscures the discrete analytical moves. This, to be sure, is the utility of the phenomenological approach: It assists in unmasking the assumptions relied upon in the assessment of how things *generally* happen. It is possible, however, to imagine frank engagement with epistemology within the current analytical structure. In a recent case from the Constitutional Court of South Africa, *Lee v. Minister of Correctional Services*, the judges did exactly that: Their causal analysis began by acknowledging that "[t]his element of liability is complex and is surrounded by much controversy."[100] Accordingly, the Court is careful to engage with the value judgments implicit in every choice of deduction and explicitly "attempt[s] to justify these propositions."[101]

This is not the place for a sustained discussion of each causal link constructed in *Lee*; rather, that decision is adduced as a means of concluding by looking forward. The foregoing discussion of the phenomenological approach to reading causality is, in essence, an effort to foreground that which is left unstated in counterfactual narratives. The reason for optimism embodied in *Lee*—and any decision like it—is simply the

99. David Caudill, "Lacanian Ethics and the Desire for Law" (1995) 16:3 Cardozo L Rev 793 at 793.
100. [2012] ZACC 30 at para 39, [2013] 2 S Afr LR 144.
101. *Ibid* at para 45.

reduced utility of this very theoretical framework. While courts continue to perpetuate the current distribution of authority through the unexamined bias of "common sense," the critical process of deconstruction remains important. A preliminary step forward, then, is to insist on the expression of each inference toward the assertion or rejection of causality. Certainly, "but for" causation readily facilitates an approach that manifests its discrete directives; courts simply choose to remain silent on the points by which they effect proof of causation by triangulation. In this way, the phenomenological project is actively self-effacing; its adoption will render it functionally useless, but only once we demand that courts define the precise contours of their robustly pragmatic "common sense."