

**IN THE SUPREME COURT OF CANADA**  
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

B E T W E E N :

**SOPHIA HEMMINGS, by her Litigation Guardian, ROSALIE BROWN, ROSALIE BROWN personally, SAMANTHA CAMILE GAYLE and MOSES HEMMINGS, minor by their Litigation Guardian, ROSALIE BROWN and SAMANTHA HEMMINGS**

Appellants  
(Respondents)

- and -

**LLOYD GREGORY PADMORE and SCARBOROUGH HEALTH NETWORK (formerly known as The Scarborough Hospital)**

Respondents  
(Appellants)

- and -

*(Style of cause continued on next page...)*

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**FACTUM OF THE INTERVENER,  
ONTARIO MEDICAL ASSOCIATION**  
(Pursuant to Rules 37 and 42 of the *Rules of the Supreme Court of Canada*)

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ABORTION RIGHTS COALITION OF CANADA,  
CANADIAN CHIROPRACTIC PROTECTIVE ASSOCIATION,  
ONTARIO TRIAL LAWYERS ASSOCIATION and  
PLANNED PARENTHOOD OTTAWA**

Interveners

AND BETWEEN:

**NEIL THOMAS JAMENSKY**

Appellant  
(Respondent)

- and -

**SOPHIA HEMMINGS, by her Litigation Guardian, ROSALIE BROWN, ROSALIE  
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ONTARIO TRIAL LAWYERS ASSOCIATION and  
PLANNED PARENTHOOD OTTAWA**

Interveners

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## PART I – OVERVIEW

1. The Ontario Medical Association (the “OMA”) intervenes on one issue: what is the appropriate test for legal causation in Canada?

2. This is a medical negligence case in which legal causation (also known as remoteness) is the deciding factor. Indeed, legal causation has always been the fulcrum upon which the negligence analysis rests and its conclusion often carries the day. Its test was set and settled through decades of Privy Council and Supreme Court jurisprudence. It appropriately balances access to justice with concerns of indeterminate liability by focussing on whether the *actual injury* suffered by the plaintiff was the reasonably foreseeable result of the defendant’s negligent conduct.

3. In this appeal, the Appellants (i.e., Sophia Hemmings *et. al.*) ask for a seismic shift in this analysis—and by extension, medical negligence law generally—by asking this Court to find that reasonable foreseeability of *any physical injury* or *general harm* alone will suffice. In other words, they ask this Court to disregard a plaintiff’s actual injury, and assign negligence based on the mere presence of any harm. They go further still: they ask this Court to conflate the legal and factual causation tests and parachute the role of informed consent into the mix. The Appellants’ proposal is radical, problematic, and should be rejected. Otherwise, the policy consequences will significantly burden an already stretched health care system. The OMA intervenes in this case to ensure that the law on legal causation remains undisturbed.

4. *First*, the legal causation test must remain focussed on the *actual injury* suffered by a plaintiff. The alternative, to focus only on any physical injury or general harm alone, would upend the careful balancing of competing interests and would collapse the legal causation and duty of care analyses. As a result, physicians would adjust their clinical decision-making to guard against the spectre of indeterminate liability and corresponding professional and reputational risks. Further, as a natural by-product of that clinical practice reorientation, existing health care system strains—namely, physician burnout and shortages, and the access to care crisis—would be exacerbated.

5. *Second*, the factual and legal causation tests must remain distinct, and both must be met to establish liability. If the two inquiries are collapsed, this will further widen the spectre of liability for physicians, and so too the consequences to healthcare delivery.

6. **Finally**, informed consent must remain separate from the legal causation test; otherwise, the natural consequence will be that physicians attempt to disclose all theoretically foreseeable risks to their patients even when not proposing or offering a treatment. Not only is this contrary to the law of informed consent, but it will overwhelm treatment discussions between a physician and their patient as they try to parse what is actually relevant to the patient’s circumstances. If adopted, healthcare delivery would slow by orders of magnitude.

7. When it comes to medical negligence law, policy impact cannot be divorced from doctrine change. Physicians are the backbone of the healthcare system. If legal risk looms too large and drives how physicians deliver care, the entire system will bear the impact and the functioning of the Canadian health system—and access to it—will suffer.

## **PART II – RESPONSE TO QUESTIONS IN ISSUE**

8. The OMA’s submissions focus entirely on one issue raised—namely, what is the appropriate test for legal causation in Canada? The OMA urges this Court to uphold existing negligence law and not disturb the test for the reasons set out below.

## **PART III– STATEMENT OF ARGUMENT**

### **A. The Test for Legal Causation in Canada is Well-Established**

8. The test for legal causation has already been well-established by this Court and must remain undisturbed.

9. As conceded by the Appellants, “legal causation is established only if the injury that *actually occurred* is of a character that was reasonably foreseeable.”<sup>1</sup> Yet, they later advocate for a shift in the focus of the legal causation inquiry. The Appellants ask this Court to change the legal causation test to focus on the reasonable foreseeability of general harm – i.e., *physical injury* or a *risk of harm* – as opposed to the *actual injury* suffered by a plaintiff. This proposal not only flies in the face of this Court’s well-settled jurisprudence, but it does so with total disregard for the natural and very real consequences it will have on the practice of medicine and by extension the

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<sup>1</sup> Appellants’ Factum at para 73.

health care system writ large. Physicians’ clinical judgment is informed by risk – which tests are ordered, which procedures are recommended, which referrals should be made, what medicines to prescribe, what patients should understand about deciding whether to move forward or not with a particular health care service. Each facet is inextricably linked to other providers, institutions and services. Broaden the risk, and it will reverberate.

**(a) *A focus on reasonable foreseeability of physical or general harm is wrong in law***

10. This Court has clearly stated the test for legal causation on many occasions: “[t]he remoteness inquiry asks whether the *actual* injury was the reasonably foreseeable result of the defendant’s negligent conduct.”<sup>2</sup>

11. The Appellants argue that when applying the test, the Court of Appeal should have focused on “whether the injury [Ms. Hemmings] suffered was of a type or kind (*physical injury*) that was a foreseeable consequence of a breach of the standard of care.”<sup>3</sup> The Appellants submit that reasonable foreseeability of a “*physical injury*”, “*general harm*”, “*risk of harm*”, or “*risk to patient safety*” alone is sufficient to ground a finding of legal causation.<sup>4</sup>

12. However, focusing on “general harm” or “physical injury” alone renders the legal causation test moot for two reasons. First, in medical negligence cases, a focus on “physical injury” or “general harm” is too broad (and abstract) a concept. It will always be the case that a plaintiff in a medical negligence lawsuit has suffered some sort of harm, whether it is reasonably foreseeable from the defendant physician’s perspective or not. Relatedly, any action or omission by a physician necessarily results in risk – and in the medical context, that risk is inevitably a physical injury or general harm every time. However, not all possible risks are reasonably foreseeable risks at law.<sup>5</sup> Otherwise, legal causation would be established in every single medical negligence case—and there would be no point in even having a remoteness test.

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<sup>2</sup> *Deloitte & Touche v. Livent*, [2017 SCC 63](#) at para [77-79](#) [*emphasis added*].

<sup>3</sup> Factum of the Appellant, para 81 [*emphasis added*].

<sup>4</sup> Factum of the Appellant, paras 80-82, 89, 91-93, 114, 120, and 123.

<sup>5</sup> *Milliken v. Rowe*, [2012 BCCA 490](#) at para [25](#).

13. Take, for example, a family physician treating a patient for a viral infection. The physician prescribes an antibiotic medication, and is found to have breached the standard of care because that was not an appropriate treatment. There are risks of physical injury associated with taking the antibiotic. The patient fills the prescription and takes the medication but chokes on the tablet. Unfortunately, because the patient is not resuscitated in a timely fashion, the patient ultimately suffers an anoxic brain injury.

14. If we apply the Appellants' proposed test to this fact scenario, then legal causation would be established because a risk of physical injury was the reasonably foreseeable result of the physician's breach of the standard of care, and a physical injury indeed occurred. However – a focus on the actual injury suffered leads to a different result. The physical injuries that were reasonably foreseeable risks of the physician's breach included rash, dizziness, allergic reactions, and antibiotic-resistant infections. The physical injury that the patient actually suffered – an anoxic brain injury – was not. Finding there is legal causation in this context would be absurd, but would follow if the Appellants' proposed articulation of the legal causation test is adopted by this Court.

15. *Second*, reasonable foreseeability of harm *in general* is already considered in the preliminary stages of the negligence analysis when determining whether the defendant owed a duty of care. The focus of the foreseeability inquiry at the legal causation stage is deliberately more specific. This Court has made clear that there can be reasonable foreseeability establishing a duty of care, but no reasonable foreseeability establishing legal causation.<sup>6</sup> Both are required to find a defendant liable in negligence.

16. Consider how this Court's jurisprudence recognizes the two separate inquiries. With respect to the reasonable foreseeability inquiry at the duty of care stage, this Court has said:

- “The proper question to be asked in this context is *whether the type of harm suffered – personal injury – was reasonably foreseeable* to someone in the position of the defendant when considering the security of the vehicles stored in the garage.”<sup>7</sup>
- Under the *Anns* test, a *prima facie* duty of care is recognized where a “sufficiently close relationship between the plaintiff and the defendant” exists such that “in the reasonable

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<sup>6</sup> *Saadati v. Moorehead*, [2017 SCC 28](#) at para [20](#) [citations omitted].

<sup>7</sup> *Rankin v. JJ*, [2018 SCC 19](#) at para [26](#)

contemplation of the [defendant], carelessness on its part *may cause damage to the [plaintiff]*". In other words, *where injury to the plaintiff is a reasonably foreseeable consequence of the defendant's negligence, a duty of care would, prima facie, arise.*"<sup>8</sup>

- "Assessing reasonable foreseeability in the *prima facie* duty of care analysis entails asking whether *an injury to the plaintiff* was a reasonably foreseeable consequence of the defendant's negligence. [...] Broadly speaking, reasonable foreseeability concerns *the likelihood of injury* arising from the defendant's negligence. This inquiry is not amenable to, and does not require, actuarial precision."<sup>9</sup>
- "Over the years, courts in Canada have developed a body of negligence law recognizing categories of cases in which a duty of care has previously been established. In such cases, "the requisite close and direct relationship is shown" and the first stage of the *Anns/Cooper* framework will be complete, *as long as the risk of injury was reasonably foreseeable.*"<sup>10</sup>

17. By contrast, this Court has described reasonable foreseeability at the legal causation stage of the negligence analysis as follows:

- "We acknowledge that remoteness, so understood, overlaps conceptually with the reasonable foreseeability analysis conducted in the *prima facie* duty of care analysis. But the two are distinct: *the duty analysis is concerned with the type of injury that is reasonably foreseeable as flowing from the defendant's conduct, whereas the remoteness analysis is concerned with the reasonable foreseeability of the actual injury suffered by the plaintiff*: "Remoteness questions deal with how far liability should extend in reference to injuries caused to the plaintiff, once a duty relationship [has] been established". [...] Remoteness, at its core, *turns on the reasonable foreseeability of the actual injury* suffered by the plaintiff."<sup>11</sup>
- "Second, the breach must be the legal cause of the loss, meaning that the harm must not be too far remote. The remoteness inquiry asks *whether the actual injury was the reasonably foreseeable result of the defendant's negligent conduct. Remoteness is distinct from the reasonable foreseeability analysis within duty of care because it focuses on the actual injury suffered by the plaintiff*, whereas the duty of care analysis focuses on the type of injury."<sup>12</sup>

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<sup>8</sup> *Deloitte & Touche v. Livent*, [2017 SCC 63](#) at para [20](#) [citations omitted].

<sup>9</sup> *Deloitte & Touche v. Livent*, [2017 SCC 63](#) at para [32-33](#) [citations omitted].

<sup>10</sup> *Nelson (City) v. Marchi*, [2021 SCC 41](#) at para [17, 19](#) [citations omitted]

<sup>11</sup> *Deloitte & Touche v. Livent*, [2017 SCC 63](#) at para [77-79](#) [citations omitted].

<sup>12</sup> *Nelson (City) v. Marchi*, [2021 SCC 41](#) at para [97](#) [citations omitted]

- “Remoteness asks *whether the specific injury was reasonably foreseeable.*”<sup>13</sup>

18. In their factum, the Appellants describe the test for legal causation in the *exact same terms* as this Court has described it in the duty of care analysis – namely, whether the type of harm suffered (personal injury) was reasonably foreseeable.<sup>14</sup> If this proposed change is accepted, this would collapse the two distinct foreseeability inquiries into one, rendering the legal causation inquiry toothless, if not altogether moot.

**(b) *A focus on physical injury or general harm leads to indeterminate liability***

19. As noted above, the Appellants’ proposed articulation of the test would lead to indeterminate liability for physicians. It would do away with the requirement to establish legal causation altogether, and increase the spectre of liability for doctors across Canada. In their factum, the Appellants go so far as to suggest that for physicians, a breach of the standard of care should *automatically result in liability*, and that the standard should somehow be higher for obstetrical doctors than physicians practicing in other specialties:

Liability should attach to healthcare providers who fail to adhere to the substantive duties of their employment. This principle is heightened in the context of obstetrical medical care where the provider is tasked to guard against risks that increase as delivery nears.<sup>15</sup>

20. If the Appellants’ arguments are accepted by this Court, this will have significant downstream implications for the way the healthcare system operates.

21. The threat of being sued or found liable in a medical negligence action weighs heavily on Canadian physicians who are often named in such lawsuits.<sup>16</sup> The weight of being sued or found liable is compounded by uncertainty in the law, and the potentially increasing spectre of liability for physicians defending medical negligence lawsuits. This is one of the major stressors faced by the OMA’s membership, and directly interferes with clinical decision-making.

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<sup>13</sup> *Nelson (City) v. Marchi*, [2021 SCC 41](#) at para 99.

<sup>14</sup> Factum of the Appellant, para 81.

<sup>15</sup> Factum of the Appellant, para 124.

<sup>16</sup> For example, based on the [CMPA’s 2024 Annual Report](#), 659 legal actions were served on Canadian physicians in 2024.

22. Physicians are mindful of the common law when treating their patients. Any rearticulation of the test for legal causation will have downstream impacts on the way physicians practice medicine and treat their patients, and on physicians' mental health and well-being.

23. If this Court pronounces that physicians can be found liable for any “physical injury” or “general harm” their patients suffer – whether the *actual* injury is foreseeable or not – physicians will naturally resort to defensive medical practices, which include over-prescribing tests, procedures, and treatments and potentially avoiding certain procedures and patients altogether—contrary to evidence-based clinical practice. Physicians may engage in “assurance behaviour” such as ordering tests, diagnostic procedures, and consultation, or using imaging technology in unnecessary circumstances. They may also eliminate procedures prone to complication and patients with complex medical problems or who are perceived as litigious altogether.<sup>17</sup> Moreover, these defensive practices would introduce added costs and be a significant burden on Canada's already struggling healthcare systems without any evidentiary benefit.

24. The threat of litigation also has a direct impact on physician mental health and well-being. Studies have found a strong relationship between malpractice lawsuits and depression, burnout, and thoughts of suicide in physicians.<sup>18</sup> In Canada, this is exacerbated by the fact that legal proceedings are public, and physicians may be required to report litigation to their hospital, clinic,

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<sup>17</sup> See, for example: David M. Studdert, et. al., JAMA (2005), Vol. 293, No. 21. “Defensive Medicine Among High-Risk Specialist Physicians in a Volatile Malpractice Environment.” Accessible online: <https://jamanetwork.com/journals/jama/fullarticle/200994>.

<sup>18</sup> See, for example: Ontario Medical Association (Aug 18, 2021). “Healing the Healers: System-Level Solutions to Physician Burnout, Recommendations of the Ontario Medical Association Burnout Task Force.” Accessible online: <https://www.oma.org/siteassets/oma/media/pagetree/advocacy/issues/burnout/burnout-paper.pdf>; Charles M. Bach et al., Journal of the American College of Surgeons (2011). “Personal Consequences of Malpractice Lawsuits on American Surgeons.” Accessible online: <https://www.ajustnhs.com/wp-content/uploads/2012/05/conseq-of-lawsuits-USA-2011.pdf>

or regulatory body which can have implications for their privileges, licensing, and professional reputation. This can impact their livelihood and ability to care for patients.

25. The well-being and ability of Canadian physicians to practice medicine in an evidence-based manner that accords with the realities of the Canadian healthcare system is integral to both the system and the health of Canadians. If the Appellants' proposed shift in the law is accepted, the manner in which physicians provide healthcare to their patients will be compromised.

### **B. The Tests for Legal Causation and Factual Causation Should Not be Conflated**

26. This Court can and should reaffirm that the tests for factual and legal causation are distinct. There is an issue in this appeal as to whether the Trial Judge below conflated these two tests. For example, in their Factum the Appellants state:

The Trial Judge's statement that "*[i]t could not be anticipated by Dr. O'Brien that Dr. Jamensky's efforts would result in an anesthetic complication and cardiac arrest*" *was made to reject a finding of factual causation* as against Dr. O'Brien. *The Appeal Court improperly used the Trial Judge's factual causation analysis for O'Brien as the basis to analyze legal causation pertaining to Dr. Padmore and Nurse San Juan.*<sup>19</sup>

27. A consideration of what could have been *anticipated* has nothing to do with factual causation, which requires a consideration of whether the injury would have occurred "but for" the defendant's negligent act and does not deal with foreseeability.<sup>20</sup> It is imperative that the tests for factual and legal causation not be conflated. As this Court has reiterated, a plaintiff must satisfy *both* tests to establish liability.<sup>21</sup>

### **C. Informed Consent Has No Place in the Legal Causation Test**

28. There is a suggestion in this appeal that principles of informed consent – which are completely distinct from legal causation – should be imported into the legal causation test.

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<sup>19</sup> Factum of the Appellant, para 108.

<sup>20</sup> *Nelson (City) v. Marchi*, [2021 SCC 41](#) at para [96-97](#).

<sup>21</sup> *Saadati v. Moorehead*, [2017 SCC 28](#) at para [20](#).

Concepts of informed consent *do not* apply in every medical case and they have no place in the legal causation test, which *does*.

29. In particular, the Appellants argue that the Court of Appeal’s decision with respect to legal causation is at odds with the definition of “material risk” in informed consent cases, and suggest that the Court of Appeal’s decision with respect to legal causation in this case somehow sets a precedent for the types of risks that physicians must disclose to their patients.<sup>22</sup> The Appellants state:

Any decision that an absolute risk of 3% is too rare to be considered foreseeable is at odds with extensive legal precedents, and would set a dangerous precedent for the types of risks that require disclosure in a medical context.<sup>23</sup>

30. But the requirement to disclose “material risks”, a cornerstone of the law of informed consent, cannot and should not be considered by the courts when deciding whether there was legal causation in any given case. Informed consent, and disclosure of “material risks”, only come into play when a physician is *offering a treatment* to their patient and needs to obtain their consent to the proposed treatment.<sup>24</sup> In many medical negligence cases, there is no issue as to whether the defendant physician obtained the patient’s informed consent. In such cases, the physician’s duty to disclose all material or foreseeable risks to patients is not engaged, and does not form part of the analysis when deciding whether the physician is liable.

31. Importing concepts of informed consent and disclosure into the test for legal causation would cause significant confusion for physicians. It would make the law unclear as to when physicians are required to disclose risks to their patients, and what risks need to be disclosed. Based on the Appellants’ proposed articulation of the test, physicians would be required to disclose any and all foreseeable risks of physical injury or general harm to their patients whether they are proposing a treatment or not. There are always myriad risks at play in healthcare. That cannot mean a physician is legally obligated to articulate every theoretical risk to their patient when they are not

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<sup>22</sup> Factum of the Appellant, paras 95 and 98.

<sup>23</sup> Factum of the Appellant, para 98.

<sup>24</sup> *Health Care Consent Act, 1996*, [S.O. 1996, c. 2, Sched. A](#) at s. [10\(1\)](#); *Wawrzyniak v. Livingstone*, [2019 ONSC 4900](#) at para [184](#); *Denman v. Radovanovic*, [2024 ONCA 276](#) at para [45](#).

offering treatment. Imagine the practical result if this was the standard—physicians could only see a fraction of the patients they currently see on a given day, as discussion of risks would swamp their capacity.

32. Any suggestion that physicians ought to be required to disclose material risks or foreseeable outcomes to their patients even when not offering treatment is not consistent with the law of informed consent or how doctors provide care in Canada. Such a requirement would likely also create confusion and unnecessary fear for patients. In the end, changing the law in this way will not make people safer or improve care. What may appear as a paper victory would ultimately be a pyrrhic one.

#### **PART IV– COSTS**

33. The Intervener, Ontario Medical Association, does not seek costs and submits that the ordinary rule that costs are not awarded against an Intervener should apply.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 1<sup>st</sup> day of December, 2025.



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Alexandra Daly (student-at-law)  
Counsel for the Intervener,  
Ontario Medical Association

**PART VII – TABLE OF AUTHORITIES & LEGISLATION**

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<i>Denman v. Radovanovic</i> , <a href="#">2024 ONCA 276</a>	30
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