



# **The Supreme Court of Canada and the Law of Causation Revisited Again**

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# The Supreme Court of Canada and the Law of Causation Revisited

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**COMPARATIVE ANALYSIS: ENGLISH AND CANADIAN CAUSATION LAW & INCREASE**

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## OVERVIEW<sup>1</sup>

In tort the plaintiff must prove on a balance of probabilities that:

- (a) The defendant owed the plaintiff a duty of care in law;
- (b) The defendant breached the prescribed standard of care;
- (c) Such breach caused the plaintiff's damages.

Parties usually focus on the second issue, but the other issues are critical in many cases. The third issue is typically referred to as causation.

A starting point for a causation analysis can be found in the Supreme Court of Canada decision in *Snell*<sup>2</sup>:

Causation is an expression of the relationship that must be found to exist between the tortious act of the wrongdoer and the injury to the victim in order to justify compensation of the latter out of the pocket of the former. Is the requirement that the plaintiff prove that the defendant's tortious conduct caused or contributed to the plaintiff's injury too onerous? Is some lesser relationship sufficient to justify compensation? .... If I were convinced that defendants who have a substantial connection to the injury were escaping liability because plaintiffs cannot prove causation under currently applied principles, I would not hesitate to adopt one of these alternatives. In my opinion, however, properly applied, the principles relating to causation are adequate to the task. Adoption of either of the proposed alternatives would have the effect of compensating plaintiffs where a substantial connection between the injury and the defendant's conduct is absent. Reversing the burden of proof may be justified where two defendants negligently fire in the direction of the plaintiff and then by their tortious conduct destroy the means of proof at his disposal. In such a case it is clear that the injury was not caused by neutral conduct. It is quite a different matter to compensate a plaintiff by reversing the burden of proof for an injury that may very well be due to factors unconnected to the defendant and not the fault of anyone.

Typically causation is determined on the basis of what is referred to as the “but for” test: if the plaintiff proves on a balance of probabilities that but for the defendant’s breach the loss would not have occurred, then the causation element has been met.

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<sup>1</sup> This paper is the updated version of previous papers by the authors Kerry Nash and Stephen Moore. Some additional comments have been added by Roderick Winsor but any references to “the authors” are references to Kerry Nash and Stephen Moore.

<sup>2</sup> *Snell v. Farrell*, [1990] 2 S.C.R. 311, at para. 26.

Stated in this way the principle appears reasonable and simple. However in some situations this test has raised concerns that it sets the bar for liability too low or too high. For example in some cases it may be impossible for a plaintiff to satisfy the test in circumstances where it is clear that some defendant's wrong has caused the loss, but not which defendant. There are other cases where the probability that a defendant's wrong has caused the loss is less than would be required to satisfy the test. There are also cases where a wrongdoer's acts are sufficient to have caused the loss but not necessary and therefore the "but for" test cannot be satisfied.

It should therefore not be surprising that the "but for" test has been found unsuitable to achieve the policies underlying the principles that liability requires that the wrong has caused the loss for which compensation is awarded and that persons who have been injured by the wrong of another should compensate the injured person for its loss.

In this paper the role of the "but for" test in the causation analysis and some alternative approaches will be considered, focusing on the Supreme Court of Canada case of *Hanke* and more recent decisions.

Where there is only one possible cause of the damages the causation issue is straight forward. However where there is more than one cause, or where there may be more than one cause, questions arise which the courts have had to address. The courts have had to consider policy issues and articulate legal principles to determine the result in some such cases.

Some of these questions are:

1. Where the plaintiff can only show that one of two or more possible causes resulted in the loss, has the plaintiff failed to meet the onus to prove causation on a balance of probabilities?
2. Where more than one cause contributed to a loss, is a defendant responsible for the entire loss, part of the loss or none of the loss?
3. Is the result different if in the absence of the material cause a lesser loss would have occurred?

4. Is there a minimum contribution cause must make to a loss, failing which the wrongdoer is not held to have caused the loss?

The “but for” test articulated by the courts has, at least from a logical perspective, set the bar quite low in most cases. A plaintiff can meet this test where a defendant’s wrong is one of many necessary causes and relatively a small contributing factor. Thus defendants may be exposed to large liabilities as the result of relatively minor breaches in a long chain of events giving rise to a loss.

However, in some situations the “but for” test can defeat a claim entirely where a plaintiff has certainly suffered significant loss, a defendant has committed a serious wrong and the loss may have been caused by one or more such wrongs.

Where, for example, two defendants have committed wrongs and one of those caused the loss, but it is impossible for the plaintiff to prove which of the two, the plaintiff cannot satisfy any test requiring causation to be proved on a balance of probabilities. So either the wronged plaintiff cannot be compensated for the loss, or some other test must be adopted.

The difficulty is compounded where one of the two causes is unrelated to a breach, or at least a breach by an identified available defendant. Again the plaintiff cannot satisfy the basic test. So again either the wronged plaintiff cannot be compensated for the loss, or some other test must be adopted.

If such alternative test results in the defendant’s liability for the loss, the defendant may be liable for the full loss even though there is a 50% chance he did not cause any of the loss. If the test does not result in the defendant’s liability for the loss, the defendant will be liable for the none of the loss even though there is a 50% chance he did cause the loss. Put another way, the plaintiff will recover nothing even though it has sued a breaching defendant and there is a 50% chance its breach did cause the loss. In fact in some cases it may be 100% certain that one of the two defendants caused the loss but not possible to show that either probably did.

Other scenarios cause similar difficulties. For example, a loss can occur as a result of the actions of two defendants in circumstances where the actions of either defendant would have been sufficient to cause the loss. For example, two polluters may contaminate a single property in circumstances where the contamination caused by either would be sufficient to make the property worthless require the same remediation. The “but for” test would not make either defendant liable as the loss would have occurred in the absence of such defendant’s wrong.

In practice few cases fall into these precise scenarios but the underlying issues arise in a large number of cases. While we are accustomed to speaking in terms of *the* cause of a loss, in fact almost all losses have multiple causes and even more possible causes.

The courts can address the broad competing policy concerns in different ways, utilizing concepts such as foreseeability, proximity, probability, possibility and apportionment. Each may be appropriate in trying to articulate principles which address the underlying questions in a coherent and predictable manner, that provide practical results which are consistent with the goals of tort and that are perceived to be fair. However we will only consider some of the questions relating to the “but for” test and some of the alternatives.

## **BRIEF RECAP**

In this and previous papers<sup>3</sup> the authors have examined some of these questions focusing on the decisions of the Supreme Court of Canada in *Hanke*.<sup>4</sup> Their thesis in the initial paper was that the Supreme Court’s discussion of causation in *Hanke* failed to alleviate some of the confusion that had followed its earlier ruling on causation in *Athey v. Leonetti*<sup>5</sup> (hereafter “*Athey*”). Specifically, it was their position that the *dicta* of the Supreme Court of Canada provided little in the way of necessary guidance. In that paper they expressed some concerns and made some tentative predictions as to how lower courts might approach causation in light of *Hanke*.

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<sup>3</sup> Stephen R. Moore & Bianca Matrondola, “The Supreme Court of Canada and the Law of Causation”, 3<sup>rd</sup> Annual Update Personal Injury Law and Practice 2007, Osgoode Professional Development CLE, 2007

<sup>4</sup> *Resurfice v. Hanke* [2007] 1 S.C.R. 333 [*Hanke*]

<sup>5</sup> *Athey v. Leonetti* [1996] 3 S.C.R. 458 [*Athey*].

In a later paper<sup>6</sup> the authors re-examined their thesis on the basis of decisions subsequent to *Hanke*. In this paper the authors have updated their previous review and added additional comments.<sup>7</sup> This paper should be read together with the earlier assessments, particularly in the 2007 paper.

In this paper we have expanded the previous paper and addressed some of the more recent decisions.

### ***Resurfice v. Hanke***

*Hanke* was a products liability case. As the operator of an ice resurfacing machine *Hanke* was seriously injured after he negligently poured hot water into the gasoline tank of the machine. An overhead heater ignited the gas released into the air when *Hanke* filled the wrong tank and caused an explosion which left *Hanke* seriously burned. *Hanke* sued the manufacturer alleging negligent design. At trial, the trial judge dismissed the action having found that *Hanke* did not establish that the accident was caused by the negligence of the defendant. The Court of Appeal set aside the judgment and ordered a new trial, concluding that the trial judge had erred in both his foreseeability and causation analyses.

Although the Supreme Court agreed with the trial judge's findings that there was no liability in the circumstances since it was not reasonably foreseeable that an operator of the ice resurfacing machine would mistake the gas and hot water tanks, the Supreme Court nevertheless took the opportunity to discuss the law with respect to causation.

In *Hanke* the Court of Appeal had held that the "material contribution" test was the appropriate test to apply in this case on the basis that there were multiple potential causes of leading to *Hanke's* injuries. The Supreme Court responded that "to accept this conclusion is to do away with the "but for" test altogether, given that there is more than one potential cause in virtually all litigated cases of negligence."<sup>8</sup>

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<sup>6</sup> Kerry W. Nash & Stephen R. Moore, "The Supreme Court of Canada and the Law of Causation", Annual Update Personal Injury Law and Practice 2009, Osgoode Professional Development CLE, 2009

<sup>7</sup> In fact, this paper is an update of the paper delivered last year by Roderick Winsor at this same conference and provides comments on more recent cases and comments further on several issues. The changes in this paper from last year's were authored by Stephen Moore.

<sup>8</sup> *Resurfice v. Hanke* [2007] 1 S.C.R. 333 at para. 19.



## *Athey*

Previously in *Athey* the Supreme Court of Canada had stated the general principles as follows:

Causation is established where the plaintiff proves to the civil standard on a balance of probabilities that the defendant caused or contributed to the injury...

The general, but not conclusive, test for causation is the "but for" test, which requires the plaintiff to show that the injury would not have occurred but for the negligence of the defendant...

The "but for" test is unworkable in some circumstances, so the courts have recognized that causation is established where the defendant's negligence "materially contributed" to the occurrence of the injury....A contributing factor is material if it falls outside the de minimis range....

In *Snell v. Farrell*, supra, this Court recently confirmed that the plaintiff must prove that the defendant's tortious conduct caused or contributed to the plaintiff's injury. The causation test is not to be applied too rigidly. Causation need not be determined by scientific precision ....it is "essentially a practical question of fact which can best be answered by ordinary common sense". Although the burden of proof remains with the plaintiff, in some circumstances an inference of causation may be drawn from the evidence without positive scientific proof.

It is not now necessary, nor has it ever been, for the plaintiff to establish that the defendant's negligence was the sole cause of the injury. There will frequently be a myriad of other background events which were necessary preconditions to the injury occurring.

.... As long as a defendant is part of the cause of an injury, the defendant is liable, even though his act alone was not enough to create the injury. There is no basis for a reduction of liability because of the existence of other preconditions: defendants remain liable for all injuries caused or contributed to by their negligence ....

The law does not excuse a defendant from liability merely because other causal factors for which he is not responsible also helped produce the harm ....

This position is entrenched in our law and there is no reason at present to depart from it. If the law permitted apportionment between tortious causes and non-tortious causes, a plaintiff could recover 100 percent of his or her loss only when the defendant's negligence was the sole cause of the injuries. Since most events are the result of a complex set of causes, there will frequently be non-tortious causes contributing to the injury. Defendants could frequently and easily identify non-tortious contributing causes, so plaintiffs would rarely receive full compensation even after proving that the defendant caused the injury. This would be contrary to

established principles and the essential purpose of tort law, which is to restore the plaintiff to the position he or she would have enjoyed but for the negligence of the defendant

It does appear from these reasons and that the court referred to “materially contributing” in the context of recognizing limitations in the “but for” test. However, it is not clear from the reasons what circumstances were contemplated.

It is understandable that some courts interpreted this section to mean that there was an alternative test to the “but for” test, the material contribution test, and that this test provided that it was sufficient that a defendant’s negligence materially contributed to the loss. As the section implies that the two tests are different, it appeared to follow to some that the material contribution test was significantly lower than the “but for” test, notwithstanding that the “but for” test is typically satisfied where a defendant’s negligence materially contributes to an injury. Thus plaintiffs who felt they were in trouble under the “but for” test, argued that in their circumstances it was appropriate to adopt a lower standard: the material contribution test. Precisely how this was a lower test was not clear. Nor was it clear in what circumstances the material contribution test could be applied.

In this context, the Supreme Court in *Hanke* articulated the following principles with respect to causation<sup>9</sup>:

- The basic test for causation remains the “but for” test even in multiple-cause injuries. The plaintiff bears the onus of proving, on a balance of probabilities, that “but for” the negligence of each defendant, the injury would not have occurred.
- However, in “special circumstances” the “material contribution” test may be utilized as an exception to the bad faith test. These special circumstances involve two requirements:
  1. It must be impossible for the plaintiff to prove that the defendant’s negligence caused the plaintiff’s injury using the “but for” test. The impossibility must be due to factors that are outside of the plaintiff’s control.
  2. It must be clear that the defendant breached a duty of care owed to the plaintiff, thereby exposing the plaintiff to an unreasonable risk of injury, and the plaintiff must have suffered from that form of injury.

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<sup>9</sup> *Resurface v. Hanke* [2007] 1 S.C.R. 333 at para. 25.

The Supreme Court of Canada provided some examples of what it had in mind including the situation in *Cook v. Lewis*<sup>10</sup>, where it was unclear which of two negligent hunters shot the plaintiff, and “where it is impossible to prove what a particular person in the causal chain would have done had the defendant not committed a negligent act or omission, thus breaking the “but for” chain of causation”. The first has long been a recognized exception to the “but for” test. However it is not clear what the principled basis for the second example is.

It is beyond the scope of this paper to revisit the earlier discussion of *Hanke* and its likely impact on the law of causation in Canada. Nevertheless, one may consider two important aspects of that decision which raised concern.

### IMPOSSIBILITY OF “BUT FOR”

The authors suggested that *Hanke* had clearly confirmed the “but for” test as *the* default test for causation, even in cases of multiple tortious causes. While this would likely be welcomed for bringing some much needed certainty to the law of causation, the authors expressed concern that the Supreme Court had not gone far enough. Although it was clear in *Hanke* that the “material contribution” test was now clearly limited to situations where it was impossible for reasons beyond the plaintiff’s control to determine causation under the “but for” test, the authors argued the decision failed to shed sufficient light on what exactly the Court meant by the terms “impossible” and “beyond the plaintiff’s control”. The second case alluded to by the Supreme Court in *Hanke* as examples of sufficiently impossible situations where resort to the “material contribution” test would be appropriate was of limited value in this regard.<sup>11</sup>

In particular, the concern was that lower courts might take liberties with any ambiguity left in the wake of the *Hanke* decision and continue to find the “material contribution” test applicable in situations where the application of the “but for” test is difficult but not truly “impossible.” Initial reaction by lower courts immediately following *Hanke*’s release

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<sup>10</sup> *Cook v. Lewis*, [1951] S.C.R. 830.

<sup>11</sup> Stephen R. Moore & Bianca Matrundola, “The Supreme Court of Canada and the Law of Causation”, 3<sup>rd</sup> Annual Update Personal Injury Law and Practice 2007, Osgoode Professional Development CLE, 2007, at 10 and 11 for discussion of the Supreme Court’s reference to *Walker Estate v. York Finch General Hospital*, [2001] 1 S.C.R. 647 (S.C.C.) and *Cook v. Lewis*, [1951] S.C.R. 830 (S.C.C.).

however suggested that, if any such ambiguity lingered, it would not necessarily result in lower courts automatically reverting to the “material contribution” test.<sup>12</sup>

Now that more time has passed since *Hanke* it is important to ask whether this initial trend has continued. In other words, how broadly (or narrowly) are lower courts interpreting “impossibility” as the gate-keeper to the “material contribution” test? Put another way, what situations do the courts consider exceptional enough to warrant a “material contribution” approach to causation?

### **MATERIAL CONTRIBUTION TEST**

The *Hanke* decision is not clear on what the material contribution test is and specifically how it varies from the “but for” test. It appears that in both cases a plaintiff must prove that the loss would not have occurred in the absence of the defendant’s wrong. Yet it appears that the material contribution test is commonly understood to be a lower test than the “but for” test notwithstanding that it is not clear how they are different.

It is possible that it is intended to be that if a plaintiff cannot possibly prove a defendant’s wrong caused a loss, either because the defendant’s actions are such as to make this impossible or the cause of a given loss, such as a particular health condition, is uncertain due to limits in human knowledge, that a different test should be utilized. The first is demonstrated by *Cook v. Lewis*.

One can argue that the second contemplates situations where there are two causes each of which is sufficient to have caused the loss. In other words each is sufficient but not necessary, though one of the two is necessary. However, curiously the example given by the Supreme Court of Canada was to facts from a case where “there was no need to rely on the “material contribution” test” (the blood donor case where “it was impossible to prove the donor” would not have donated in the absence of negligence).

While it appeared that *Hanke* would help clarify *when* it is appropriate to resort to the “material contribution” test, it was the authors position that *Hanke* fell short of providing

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<sup>12</sup> Stephen R. Moore & Bianca Matrondola, “The Supreme Court of Canada and the Law of Causation”, 3<sup>rd</sup> Annual Update Personal Injury Law and Practice 2007, Osgoode Professional Development CLE, 2007.

much needed clarity and direction to lower courts regarding *how* the “material contribution” test ought to be applied.

The authors predicted that *Hanke* may have abandoned factual causation once a plaintiff proved the “but for” test was unworkable. The second part of the “material contribution” test articulated in *Hanke* curiously focused on whether the defendant “exposed” the plaintiff to an “unreasonable risk of injury”. In the authors’ view, this *dicta* failed to distinguish two different tests for causation. The result feared was that by focusing on whether the defendant materially increased the risk of injury, rather than on whether the defendant materially contributed to the actual injury, liability would likely be imposed in a substantial number of cases where a defendant had not in fact caused the injury.

Our question now then is whether the Supreme Court’s decision in *Hanke* has effectively done away with a plaintiff’s need to demonstrate factual causation whenever the “but for” test is deemed unworkable. More specifically, are the lower courts conflating the “material contribution” test with the “material increase in risk” test? If so, what are the consequences?

#### **BUT FOR “IMPOSSIBILITY” – THE GATE-KEEPER CONCERN**

As mentioned, initial reaction by lower courts to the Supreme Court’s ruling in *Hanke* were promising and suggested the decision in *Hanke* could be used to prevent over use of the “material contribution” test that had become commonplace following *Athey*. There is at least some evidence that this initial trend has continued, particularly in cases such as medical malpractice, which have traditionally been the type of case where courts tended to resort to “material contribution” to determine causation in factually complex situations.

On the other hand, we will also consider some cases where a finding of “impossibility” may be unsupported by the facts and which suggest initial fears may have been well founded.

#### ***Frazer v. Haukioja*<sup>13</sup>**

In *Frazer v. Haukioja* (hereafter “*Frazer*”), the plaintiff was injured in a (non-tortious) motorcycle accident, treated at the hospital and released. The defendant physician neglected to inform the plaintiff about a small talar fracture in his right ankle. After returning to work,

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<sup>13</sup> *Frazer v. Haukioja* [2008] W.D.F.L. 2259, 58 C.C.L.T. (3d) 259 (Ont. S.C.J.) [*Frazer*].

the plaintiff soon began experiencing severe pain. It was not until the plaintiff followed up with other doctors that he learned of the severity of his injuries. The plaintiff brought an action in negligence against the defendant physician claiming damages for pain and suffering, and emotional and psychiatric illness.

Liability in this case turned primarily on the issue of factual causation. Turning to *Hanke* for guidance, the trial judge commented that the two the cases cited by the Supreme Court in *Hanke* as examples where the “but for” test was properly deemed unworkable were of no assistance.<sup>14</sup> The trial judge noted that this was a type of case unforeseen in *Hanke* where the plaintiff’s damages were brought about by an act or omission of the defendant that was superimposed upon a loss sustained in an accident that was causally unrelated to the defendant’s negligent conduct.<sup>15</sup> The trial judge noted that prior to *Hanke*, “such a situation might well have been determined according to the material contribution test described in *Athey v. Leonati*.”<sup>16</sup> Post-*Hanke* however, the trial judge recognized there was now a clear need to seriously consider whether it would be impossible for the “but for” test to determine causation in the circumstances.<sup>17</sup> Although faced with difficult questions of causation, the trial judge in *Frazer* applied the “but for” test and found the defendant doctor responsible for the plaintiff’s damages.

This decision was upheld by the Ontario Court of Appeal.<sup>18</sup> The appeal court made several interesting pronouncements. First, it concluded that the trial judge should not have undertaken an analysis of the “material contribution” test once it had concluded that damages were established using the “but for” test. Second, it indicated that causation needed to be proven both factually and legally.<sup>19</sup> The issue of factual causation is usually determined by applying the “but for” test and legal causation involves an analysis of the question of remoteness. The Court also indicated that the difficulty of proving causation in psychiatric cases does not always amount to impossibility.

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<sup>14</sup> Stephen R. Moore & Bianca Matrondola, “The Supreme Court of Canada and the Law of Causation”, 3<sup>rd</sup> Annual Update Personal Injury Law and Practice 2007, Osgoode Professional Development CLE, 2007 at 10 and 11.

<sup>15</sup> *Frazer v. Haukioja* [2008] W.D.F.L. 2259, 58 C.C.L.T. (3d) 259 (Ont. S.C.J.) at para. 214.

<sup>16</sup> *Fraze Ibid.r*

<sup>17</sup> *Frazer Ibid.* at para 215.

<sup>18</sup> 2010 CarswellOnt 1996, 73 C.C.L.T (3d) 167

<sup>19</sup> It made specific reference to the S.C.C. decision in *Mustapha v. Culligan of Canada Ltd.*, [2008] 2 S.C.R. 114.

This case is one of several that will be discussed where an appellate court has been careful to apply the “but for” test rather than find that it was impossible to apply and resort to the “material contribution test”.

Just as an aside, in a later case the Ontario Court of Appeal indicated that it would be improper to provide instructions to the jury to apply the two tests in the alternative. These two cases suggest that in Ontario the trial judge, particularly where there is a jury must decide which test is applicable and analyze the case utilizing the appropriate test. To do otherwise may amount to a reversible error.<sup>20</sup>

### ***Bohun v. Segal***<sup>21</sup>

In *Bohun v. Segal* the defendant physician failed to order a biopsy of the plaintiff’s breast lump which later metastasized into a cancerous tumour killing the plaintiff. At trial the judge found that when the plaintiff first attended the defendant physician she had about a 79% chance of survival and a 21% chance of death from her undiagnosed breast cancer. After considering the Supreme Court’s ruling in *Hanke*, the trial judge concluded that, since the plaintiff was unable to prove whether the cancer had metastasized before or after she first saw the defendant, the “material contribution” test of causation was appropriate in the circumstances. Accordingly, the defendant was found liable.

On appeal however, the British Columbia Court of Appeal noted that the trial judge had erred in determining “impossibility” in the circumstances and had failed to appreciate unique scientific evidence available that was capable of establishing proof of causation under the “but for” test. The Court of Appeal held that it was possible in this case for a unique prognostic tool to predict, within one per cent, the outcomes for patients with breast cancer. As a result, the plaintiff was required to prove that it was more probable than not that she would likely have lived longer had the defendant not been negligent.<sup>22</sup> Having failed to establish this, there was no causation in the circumstances.

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<sup>20</sup> *Lyness v. Wang*, 2010 CarswellOnt 8339 (Court of Appeal). In both cases the Court of Appeal concluded that the error did not lead to any miscarriage of justice.

<sup>21</sup> *Bohun v. Segal* [2008] B.C.J. No. 97 (C.A.) [*Bohun*].

<sup>22</sup> *Bohun v. Segal* [2008] B.C.J. No. 97 (C.A.) at para. 52.

***Fullowka v. Royal Oak Ventures Inc***<sup>23</sup>

*Fullowka v. Royal Oak Ventures Inc* (hereafter “*Fullowka*”) was not a case involving medical malpractice. It is however notable for its treatment of *Hanke* and its application of the “but for” test in a situation requiring consideration of human behaviour as a causative factor in bringing about the plaintiffs’ harm. This is especially interesting given the Supreme Court’s specific reference to *Walker Estate v. York Finch General Hospital*<sup>24</sup> (hereafter “*Walker*”) in *Hanke* as an example where the “but for” test might not prove workable because prediction of human behaviour was required in order to establish causation.

In *Fullowka* the plaintiffs were surviving family members of miners killed in an explosion from a bomb that was deliberately set by a striking miner during a labour dispute. The defendants were the bomber and other miners, various union entities, the owner of the mine, the security company responsible for safety of the mine and the Government of the Northwest Territories. At trial, the judge found that the conduct of all of the defendants in failing to prevent the bomber from planting the bomb had “materially contributed” to the damage suffered by the plaintiffs.

One of the central issues on appeal was whether the trial judge had applied the proper test to determine causation. Although the Court of Appeal found that the defendants did not owe a duty of care to the plaintiffs in the circumstances, the court also ruled that the trial judge, having rendered his decision prior to *Hanke* and who “therefore did not have the benefit of the Supreme Court of Canada's restatement and clarification of the law on causation”<sup>25</sup> had failed to use the proper test for determining causation. Interestingly, on this point the Court of Appeal cited *Walker* for the proposition that the “but for” test “was not rendered unworkable simply because the hypothetical inquiry involved another person’s reaction to the conduct of the defendant as an element of the chain of causation.”<sup>26</sup> In *Hanke* the Supreme Court referenced precisely this type of situation in *Walker* as one where it might be

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<sup>23</sup> *Fullowka v. Royal Oak Ventures Inc* [2008] N.W.T.J. No. 27 (C.A.) [*Fullowka*].

<sup>24</sup> *Walker Estate v. York Finch General Hospital* [2001] 1 S.C.R. 647 [*Walker*].

<sup>25</sup> *Fullowka v. Royal Oak Ventures Inc* [2008] N.W.T.J. No. 27 (C.A.) at para. 197.

<sup>26</sup> *Fullowka v. Royal Oak Ventures Inc* [2008] N.W.T.J. No. 27 (C.A.) at para. 196.



impossible to prove what a particular person in the causal chain would have done “but for” the defendant’s negligent act or omission.<sup>27</sup>

In *Fallowka*, the Court of Appeal ruled that it was possible to lead direct and circumstantial evidence sufficient to overcome the burden of proof concerning the bomber’s likely course of conduct. In this respect, the trial judge had failed to ascertain whether the bomber would have set the blast that killed the miners if the defendants had acted differently. The Court of Appeal held that the trial judge ought to have considered whether the bomber would have diverted from his intended course of conduct if any of the defendants had acted reasonably. Further, the trial judge had failed to ask whether each of the defendants’ negligent acts or omissions was a cause of the plaintiffs’ harm. This was a fundamental error in approach. Ultimately, the trial judge ought to have assessed causation in this case using the “but for” test and therefore erred in applying the “material contribution” test.

This result was upheld by the Supreme Court of Canada.<sup>28</sup> Although the Supreme Court was asked to conclude that this was one of those cases where it was appropriate to utilize the “material contribution” rather than the “but for” test it declined to do so. There is no discussion of the *Walker* case in the Supreme Court’s decision.

In some situations the courts may be too quick to find “impossibility” and resort to a “material contribution” test. Where, for example, a close scrutiny of the facts suggest that what at first glance might be a set of circumstances deserving of a material contribution approach to causation, is, in fact, suitable for a “but for” analysis. Ultimately, in such situations it may still be possible to achieve a similar finding of causation under the higher standard test. We will discuss below the factual circumstances in two cases where the “material contribution” test has been employed and present our alternative analysis under the “but for” test.

### ***Ball v. Imperial Oil Resources***<sup>29</sup>

In *Ball v. Imperial Oil Resources* (hereafter “*Ball*”) the plaintiff’s cattle became ill after the defendant oil and gas company conducted repair work on pipelines running underneath the

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<sup>27</sup> *Resurice v. Hanke* [2007] 1 S.C.R. 333 at para. 28.

<sup>28</sup> [2010] 1 S.C.R. 132

<sup>29</sup> *Ball v. Imperial Oil Resources* [2009] A.W.L.D. 1336 (Q.B.)[*Ball*].

plaintiff's ranch. The plaintiff alleged that the defendant's negligence had contaminated the soil with hydrocarbons which subsequently injured the plaintiff's cattle. The court held that this was an exceptional case where the "material contribution" test ought to be applied because it was impossible for the "but for" test to establish that hydrocarbons had, in fact, injured her cattle. Hydrocarbons have a half-life of ten hours or less. Unless an exposed cow was euthanized and autopsied almost immediately following exposure, it would be impossible to verify the presence of meaningful amounts of hydrocarbons sufficient to cause injury. Ultimately, the trial judge held that the defendant's negligence was a significant contributing factor to the harm suffered by the plaintiff.

The trial judge in this case also held that because the defendant had breached a duty of care owed to the Plaintiff it "thereby exposed the Plaintiff's [cattle] to an unreasonable risk to injury which it in fact suffered."<sup>30</sup> The authors will return to explore the significance of this statement later in this paper's examination of the whether courts have, in certain situations, migrated to a "material increase in risk" approach to causation under the auspices of material contribution causation.

For now, let us reconsider for a moment the trial judge's assessment that, on the facts of this case, the "material contribution" test was necessary in order to determine causation specifically because there was conflicting expert opinion about whether there was sufficient detectable hydrocarbon contamination to cause the injuries complained of.<sup>31</sup> The authors respectfully disagree with this assessment. Moreover, the authors submit that, despite language to the contrary, the trial judge in this case actually found causation based on a classic "but for" analysis.

The authors do not dispute the fact that evidence necessary to show that hydrocarbons, in fact, caused the injuries to the plaintiff's cattle was technically unavailable through scientific means. However, all the authors need do is recall the principles of causation outlined in *Snell v. Farrell*<sup>32</sup> (hereafter "*Snell*") for guidance. In *Snell*, Sopinka J. expressly stated that

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<sup>30</sup> *Ball Ibid.* at para. 133.

<sup>31</sup> *Ball Ibid.* at paras. 133 and 140. This section of the paper was written before the Alberta Court of Appeal's decision in this case. We have left it in as this section largely predicted the Alberta Court of Appeal's approach to the causation issue.

<sup>32</sup> *Snell v. Farrell* [1990] 2 S.C.R. 311 at para. 15[*Snell*].

“Causation need not be determined by scientific precision”<sup>33</sup> and that a common sense approach to causation is to be preferred.<sup>34</sup> Arguably, there was no reason why, given the circumstances of this case, a judge considering all of the evidence could not have reached the same result by different and (arguably) more appropriate means.

Consider the following evidence in this case: hydrocarbons *could* cause the injuries complained of; hydrocarbons were a known by-product of the defendant’s repair work; otherwise healthy cows, which were well cared for, began to suffer symptoms of illness that *could* be related to hydrocarbon exposure; and the illnesses complained of began appearing soon after the defendant’s repair work.

In our analysis, it does not matter that the evidence necessary to establish with certainty that hydrocarbons (*i.e.* the harm-causing agent) were actually present or detectable in the cows was scientifically unavailable. Arguably the substantial scientific and circumstantial evidence presented at trial easily allowed for the ‘common sense’ conclusion that the cows would not have become ill “but for” the presence of the hydrocarbons which likely resulted from the defendant’s negligence. In other words, the evidence in this case, even despite the absence of ‘smoking gun’ scientific certainty that hydrocarbons were present in the cows, established the substantial connection necessary for “but for” causation.

Finally, we suggest that the trial judge in this case actually applied “but for” causation, despite use of the term “material contribution” test<sup>35</sup>. This was not a case where it was suggested some ‘other’ source of hydrocarbons may have also contaminated the cows. However, the trial judge’s reasons suggest that, in the end, he ultimately concluded that there was a substantial connection between the hydrocarbons negligently released by the defendant and the illness that later developed in the cattle. The trial judge’s language regarding causation has the hallmarks of a common sense “but for” analysis. For instance, regarding causation the trial judge notes:

The onus is on the Plaintiff to establish causation based on a balance of probabilities and not conclusively...In light of the evidence adduced on behalf of the Plaintiff...the only reasonable conclusions to be drawn is that the [cattle’s] exposure

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<sup>33</sup> *Snell Ibid.* at para. 29.

<sup>34</sup> *Snell Ibid.* at para. 44.

<sup>35</sup> *Ball v. Imperial Oil Resources* [2009] A.W.L.D. 1336 at para. 133.

to the BTEX hydrocarbons was a significant factor in its subsequent compromised health...The Plaintiff does not have to prove conclusively that exposure to the hydrocarbons or ingestion of them led to the problems subsequently suffered by a portion of her heard - the test is the balance of probabilities. There must be more than conjecture for an inference to be drawn in the absence of exact proof. Such inference must be reasonable. However, the inability of the experts to give a firm diagnosis or to agree on a diagnosis is not fatal such [sic] an inference.<sup>36</sup>

This result was upheld by the Alberta Court of Appeal albeit in a split decision.<sup>37</sup> The Court of Appeal referred to *Snell* and concluded that the “but for” test could be applied even to infer causation through the application of common sense, and without the need for scientific proof. It went on to conclude that the trial judge’s reasons actually established causation using the “but for” test notwithstanding his professed use of the “material contribution” test.

### *Clements (Litigation Guardian of) v. Clements*<sup>38</sup>

In *Clements (Litigation Guardian of) v. Clements* the plaintiff was a passenger who suffered a severe brain injury when she crashed on a motorcycle driven by the defendant husband. In this case, at least four ‘potential’ causes were identified that may have contributed to the creation of an ‘instability weave’ leading to the crash, specifically two non-tortious causes (a rapid rear tire deflation because of a nail puncture and inclement weather) and two tortious causes (speeding and excessive weight on the motorcycle).

The trial judge accepted expert opinion that it was, in fact, the rapid deflation of the rear tire that had actually caused the weave<sup>39</sup> which the defendant driver could then not control, despite his best efforts. However, the judge was also concerned with what part the defendant’s breaches (*i.e.* speeding and overloaded weight) played in his inability to recover from the weave.<sup>40</sup>

Ultimately, the trial judge held that a “material contribution” test was necessary to determine causation in this case because “after the fact, it is not possible through accident reconstruction modeling to determine at what combination of lower speed and lesser weight

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<sup>36</sup> *Ball v. Imperial Oil Resources* [2009] A.W.L.D. 1336 at para. 138-141.

<sup>37</sup> 2010 CarswellAlta 642 (Court of Appeal)

<sup>38</sup> *Clements (Litigation Guardian of) v. Clements* [2009] B.C.W.L.D. 5641, [2009] B.C.J. No. 166 (S.C.)[*Clements*].

<sup>39</sup> *Clements Ibid.* at paras. 37 & 58.

<sup>40</sup> *Clements Ibid.* at para.59.

recovery from the weave instability would have been practicable.”<sup>41</sup> Applying this test the defendant was found liable.

However, as our analysis of *Ball* suggests, lack of available scientific evidence sufficient to prove the existence of a causative agent does not by any means suggest that the “impossibility” of “but for” causation is appropriate. The decision in *Snell* confirms this.

In the end, this case may arguably represent one of those scenarios that initially gave us cause for concern following *Hanke’s* unclear *dicta* on “impossibility”. A judge found the room necessary in the ambiguity left in the wake of the *Hanke* decision to find “impossibility” in order to resort to a lower threshold test for causation.

The Court of Appeal disagreed with the trial judge and concluded that he ought to have applied the “but for” test. Since the trial judge could not find liability applying it and this was not an appropriate case for the application of the “material contribution” test, the Court of Appeal reversed the trial judge and dismissed the plaintiff’s case. The Court of appeal reviewed the cases and academic literature since *Resurface* and indicated that the “material contribution” test should only be utilized in what Professor Knutsen calls circular causation and dependency causation situations.<sup>42</sup>

The first thing the Court of Appeal points out is that the “material contribution” test, unlike the “but for” test, does not lead to proof that the defendant’s conduct factually caused the plaintiff’s loss. As the Court of Appeal points out the “material contribution” test provides a basis for finding legal causation when there is a possibility that the defendant’s negligent actions could have been the factual cause of the plaintiff’s loss.

The Court of Appeal went on to state that it did not read *Resurface* as indicating that the material contribution test should be applied to find causation when it is impossible for the plaintiff to prove that the defendant’s negligence was the factual cause of the injury. “To do so would substantially alter the existing law and would have the effect of displacing but-for as the primary test for determining causation. It is only in exceptional circumstances that resort to the material-contribution test will, as a matter of policy, be appropriate.”

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<sup>41</sup> *Clements Ibid.* at para. 66.

<sup>42</sup> Professor Erik S. Knutsen “Clarifying Causation in Tort”, (2010), 33 Dal L.J. 153.

According to Professor Knutsen and the Alberta Court of Appeal *Cook v. Lewis* is an example of circular causation. In *Cook v. Lewis* the attempt to determine which shooter caused the injury leads to an endless circular answer which justifies the use of the material contribution test.

Dependency causation according to Professor Knutsen is exemplified by the *Walker* decision. The “but for” test may be impossible to prove when one must determine what a party would have done had the defendant not been negligent, and thus how the party’s decision affects the plaintiff’s resulting injury.

The Court of Appeal further agreed with Professor Knutsen’s assertion that the “material contribution” test is not a solution for evidentiary insufficiency. It is only appropriate where there is evidentiary insufficiency and there is either circular or dependency causation.

The Court of Appeal also quoted the following passage from Professor Knutsen’s article:

"Current limits of scientific knowledge" should not be read out of context to mean that the material contribution test is appropriate in any case where the science involved is difficult, complex, or "just not there yet." Frankly, that is just about any case where personal injury is involved. The science of medicine as it relates to the interaction of disease, medication, and trauma on the body is more of an art than a science. It is constantly evolving. Indeed, one might argue it will always have current limits that soon get eclipsed by future, unknowable limits. But the Supreme Court's statement is nothing more than an example of one reason why there may be a logical impossibility in proving causation with the "but for" test. It is an explanatory reason, so to speak, for the existence of circular causation. It is not a reason to turn to the material contribution test. It is certainly not a gatekeeper for the material contribution test. The gatekeeping function is met by the two pre-conditions which must be satisfied in instances of circular or dependency causation.

The above passages, if accepted by the Courts would dispel many of the fears that the defense bar has with respect to the questions of “impossibility”. However, the above quoted passage, in particular is somewhat difficult to reconcile with the actual words used by the Supreme Court in the *Resurface* case. In June of this year the Supreme Court of Canada

granted leave to appeal in this case. Hopefully, the Supreme Court of Canada will clarify its position on the “material contribution” test in the next year.<sup>43</sup>

In an article released in June 2008, Karey Brooks and Robert Easton reported that of approximately 75 cases that had considered *Hanke* up to that time only nine went on to apply the “material contribution” test.<sup>44</sup> This suggests that the tide has turned decidedly in favour of “but for” as the default test for causation and that courts are not necessarily shying away from the use of this test in difficult situations. In truth however, it is impossible to say with precision to what extent this has been the case in the absence of a detailed statistical study of the case law.

Nevertheless, any effort by the judiciary to tackle difficult questions of causation under the “but for” test post-*Hanke* may be welcomed by defendants. It is generally understood that demonstrating that a cause materially contributed to a plaintiff’s loss is a lower standard than the substantial connection required under the ‘but for’ analysis.<sup>45</sup> That said, any good news this may represent for defendants must be tempered with the realization that if impossibility of the “but for” test is established by the plaintiff, the defendant’s chances of avoiding a finding that his negligence caused the plaintiff’s loss may diminish. It is to a discussion of these issues that this paper now turns.

#### **MATERIAL CONTRIBUTION V. MATERIAL INCREASE IN RISK**

The “material contribution” test requires a plaintiff to demonstrate that a defendant’s negligent conduct was ‘material’ to the loss complained of. In other words, on analysis of the facts, the defendant’s negligent act or omission must fall outside of the *de minimis* range and amount to something more than a mere trivial contribution to the harm suffered by the plaintiff.<sup>46</sup> On the other hand, the “material increase in risk” test assesses whether the defendant’s conduct materially increased the plaintiff’s risk of injury. While a material increase in risk approach to causation has been accepted as applicable in very exceptional

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<sup>43</sup> The approach taken by the Court of Appeal in *Clements* commented on favourably in *Goodman v. Viljoen*, 2011 CarswellOnt 754 (OSCJ).

<sup>44</sup> Karey Brooks and Robert Easton, “Test misnomer in Resurfice creates confusion”, *The Lawyers Weekly* 28:8 (20 June 2008).

<sup>45</sup> *Anderson v. British Columbia*, [2008] B.C.J. No. 42 at para.38 (S.C.); Also see *Bobun v. Segal* [2008] B.C.J. No. 97 (C.A.) at para. 53.

<sup>46</sup> Philip H. Osborne, *The Law of Torts*, 3rd ed. (Toronto: Irwin Law Inc., 2007) at 57.

and fact specific cases in England,<sup>47</sup> there remains considerable debate about whether such an approach is valid as a standalone test for causation in Canada.<sup>48</sup>

As Lewis Klar notes, the main distinction between a “material increase in risk” test and a “material contribution” test is that

“[the material increase in risk approach represents a] radical departure from the way the law normally connects the defendant’s negligence to the plaintiff’s injury, since it focuses on the defendant’s negligence contributing to a risk of injury rather than the injury itself.”<sup>49</sup>

Just a few years before the Supreme Court’s ruling in *Hanke*, the British Columbia Court of Appeal cautioned that to allow a material increase in risk approach to determine causation would be “to dispense as a matter of law with proof of causation”<sup>50</sup> and that this represented “a radical step”<sup>51</sup> that should only be employed in the rarest of cases.<sup>52</sup>

It is curious therefore that such a radical step forward in the law of causation would come in the form of *Hanke*, a relatively short decision where it was arguably unnecessary for the Court to comment on causation in order to dispose of the appeal.

The Supreme Court’s discussion of causation in *Hanke* was likely brief because in that case the Court held that it was “neither necessary nor helpful to catalogue the various debates” regarding causation. Rather it was enough “to simply assert the general principles that emerge from the cases.”<sup>53</sup> By choosing to gloss over “the various debates” however, some important considerations and distinctions regarding the different tests for causation may have been overlooked. In particular, while the decision in *Hanke* has restored the primacy of the “but for” test in Canadian causation law, it appears to have also recognized, without serious consideration or discussion, the “material increase in risk” test for causation.

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<sup>47</sup> *B.M. v. British Columbia (Attorney General)*, [2004] B.C.J. No. 1506 (C.A.) [*Mooney*], leave to appeal to S.C.C. refused, [2004] S.C.C.A. No. 428; see also *McGhee v. National Coal Board*, [1973] 1 W.L.R. 1 (H.L.); *Fairchild v. Glenhaven Funeral Services*, [2003] 1 A.C. 32 (H.L.) [*Fairchild*]; *Barker v. Corus (U.K.) plc*, [2006] UKHL 20 (H.L.) [*Barker*].

<sup>48</sup> Lewis Klar, *Tort Law* 4<sup>th</sup> ed. (Toronto: Thomson Canada Limited, 2008) at pg. 441.

<sup>49</sup> Lewis Klar, *Ibid.* at pg. 441.

<sup>50</sup> *B.M. v. British Columbia (Attorney General)*, [2004] B.C.J. No. 1506 (C.A.) [*Mooney*], leave to appeal to S.C.C. refused, [2004] S.C.C.A. No. 428 at para. 156.

<sup>51</sup> *B.M. Ibid.* at para. 157.

<sup>52</sup> *B.M. Ibid.* at para. 158.

<sup>53</sup> *Resurfice v. Hanke* [2007] 1 S.C.R. 333 at para. 20.



So the question remains, are lower courts finding causation based on whether a defendant's negligent conduct materially increased the risk of injury to the plaintiff? Generally speaking, the courts have by no means openly embraced this approach to causation. There is however some scant evidence in the case law suggesting that a material increase in risk approach to causation may be beginning to take hold post-*Hanke*.

***Bowes v. Edmonton (City)***<sup>54</sup>

In *Bowes v. Edmonton (City)*, the defendant city had failed to provide the three plaintiff property owners with a geological report detailing the risks of landslides on their property. The court found the city negligent for not providing the plaintiffs with this report. The three plaintiffs then built their homes that were later destroyed when land on their property gave way.

In order to determine causation, the court had to assess on whether the plaintiffs would still have built their homes if they had been given the report. The court concluded that the “but for” test was deemed incapable of making this determination. Under the “material contribution” approach, the court held that since the report would likely have made the plaintiffs aware of the risk of landslide and, since this was the type of risk or injury that actually occurred, the defendant could be said to have contributed to that risk and therefore responsible for the plaintiffs' losses.<sup>55</sup> However, because of a limitations issue in this case, the plaintiffs action was ultimately out of time.

One should ask why the analysis used to address “material contribution” was not appropriate to a “but for” analysis.

***Zazelenchuk v. Kumleben***<sup>56</sup>

In *Zazelenchuk v. Kumleben* (hereafter “*Zazelenchuk*”), the plaintiff attended the hospital with symptoms suggesting to the defendant physician the plaintiff was suffering from acute coronary syndrome (“ACS”). The plaintiff however said he was not experiencing any chest pain, and an ECG did not show any significant abnormality. The defendant diagnosed the plaintiff's condition as acute anxiety and hyperventilation, admitted him to the hospital

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<sup>54</sup> *Bowes v. Edmonton (City)* [2007] A.J. No. 1500 (C.A.).

<sup>55</sup> *Bowes v. Edmonton (City)* [2007] A.J. No. 1500 (C.A.) at paras. 231 to 245.

<sup>56</sup> *Zazelenchuk v. Kumleben* [2007] A.J. No. 1204. (Q.B.)[*Zazelenchuk*].

overnight and prescribed anti-anxiety medications. The next day it was discovered that the plaintiff had suffered a massive heart attack and was left with permanent damage to his heart.

At trial, it was recognized that there were some difficulties with proof of causation under the “but for” test in this case. Various treatments called for at different stages to treat heart attack sufferers were generally successful for most but not all patients. It could not be established whether the plaintiff would have avoided the heart attack that caused permanent damage to his heart had he received appropriate alternative treatment. It was also difficult to know whether and when these treatments would have been applied to the plaintiff.

Ultimately, the trial judge relied on the decision in *Hanke* as authority for applying a lower standard test of causation because the plaintiff could not prove, for factors beyond his control, that he would have been one of the majority of patients who would have been successfully treated. Causation was established in this cases on the basis that the defendant’s negligence exposed the plaintiff “to a risk that developing ACS would not be discovered and treated and would lead to permanent heart damage.”<sup>57</sup> In other words, absent proof establishing factual causation the defendant’s negligent conduct increased the plaintiff’s risk of illness to such an extent that liability could be imposed.

This approach however significantly increases a defendant’s exposure. If increasing the risk is sufficient independent of having caused the injury, or more precisely, of being able to demonstrate causation one may want to ask what increase is sufficient to satisfy the causation requirement and whether the result should be different than where causation is established on some other basis.

## **OTHER CASES**

Although less compelling as evidence that the material increase in risk approach has firmly established roots in Canadian causation law post-*Hanke*, it is nevertheless insightful to examine briefly what some judges have said in *obiter* about finding causation based on the degree to which defendant’s negligence may have increased the risk of the plaintiff’s harm.

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<sup>57</sup> *Zazelenchuk Ibid.* at para. 149.

Returning to the trial decision in *Frazer*, where the plaintiff was injured in a motorcycle accident and not notified by the defendant physician regarding a fractured ankle, as discussed, causation was determined in this case by reference to the “but for” test. However, the trial judge opined that, in the alternative, he was of the opinion that this case was one that amounted to an exceptional situation suitable for a “material contribution” approach to causation in the event the application of the “but for” test was not appropriate.

In so saying, the trial judge remarked that of the two potential causes of the plaintiff’s injuries, the (non-tortious) motorcycle accident and the defendant’s negligence, the defendant’s negligence “certainly increased the risk that [the plaintiff] would suffer the illness, limitations and disability that he now certainly does.”<sup>58</sup> In fairness, the judge also referred to the defendant’s breaches as likely “contributing” to the plaintiff’s injuries suggesting that references to both the increase in risk of injury and contribution to the actual injury may be nothing more than semantics.<sup>59</sup>

### ***Cartner v. Burlington (City)***<sup>60</sup>

In *Cartner v. Burlington (City)* (hereafter “*Cartner*”) the plaintiff was injured when she slipped and fell on the city sidewalk, fracturing her right femur and causing extensive injuries. The plaintiff had slipped on muddy concrete slurry that had pooled on the sidewalk. The plaintiff’s action against the defendant city succeeded and causation was determined on the basis that “but for” the defendant’s failure to maintain the sidewalk the plaintiff would not have suffered injury.

In the alternative, the trial judge commented that this was “arguably the very kind of case that calls for the application of the “material contribution” test.”<sup>61</sup> The trial judge went on to comment that since the defendant city owed a duty of care to prevent unreasonable risk of injury to pedestrians using its sidewalks, a failure on the part of the defendant to maintain

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<sup>58</sup> *Frazer v. Haukioja* [2008] W.D.F.L. 2259, 58 C.C.L.T. (3d) 259 (Ont. S.C.J.) at para. 214.

<sup>59</sup> *Ibid.* at paras. 214 to 216.

<sup>60</sup> *Cartner v. Burlington (City)* [2008] O.J. No. 2986 (S.C.J.) [*Cartner*]; upheld on appeal 2010 CarswellOnt 3803 with a comment that the “material contribution” test should not have been used.

<sup>61</sup> *Cartner v. Burlington (City)* [2008] O.J. No. 2986 (S.C.J.) at para. 24.

its sidewalks in a good state of repair would result in liability if a pedestrian like the plaintiff suffered from the form of slip and fall injury the defendant had a duty to guard against.<sup>62</sup>

This decision in the alternative is notable because it illustrates the concern the authors expressed in our last paper that *Hanke*, by unnecessarily focusing on whether the defendant has exposed the plaintiff to an unreasonable risk of injury, may have injected a duty and/or standard of care analysis into causation where such analysis has no rightful place because they are ill suited to making cause-in-fact determinations.

Taken literally, the *obiter* in *Cartner* adopts somewhat circular logic to the effect that, if the defendant's conduct exposes a plaintiff to a risk that it is duty bound not to expose the plaintiff to, then any injury sustained by the plaintiff which falls within the ambit of that breach is compensable. The question of whether the breach of duty actually caused the plaintiff's injury is never even addressed.

#### **CONSEQUENCES OF ADOPTING A MATERIAL INCREASE IN RISK APPROACH TO CAUSATION**

In an earlier paper the authors cautioned that, based on the Supreme Court's articulation of the "material contribution" test in *Hanke*, that we could end up with the "material increase in risk" test being utilized by the courts without any meaningful discussion as to whether this was appropriate. The adoption of a "material increase in risk" test for causation was vigorously debated in the English courts and its acceptance came only after a considerable period and after extensive judicial consideration.

It would appear that, since *Hanke*, Canadian courts, particularly the trial courts, have shown some willingness to adopt the "material increase in risk" approach to causation. To date, it appears that the appellate courts are much less likely to accept that the "but for" test should be rejected in favour of the "material contribution" or "material increase in risk" tests.<sup>63</sup>

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<sup>62</sup> *Cartner v. Burlington (City)* [2008] O.J. No. 2986 (S.C.J.) at para. 25.

<sup>63</sup> See for example: *Seattle (Guardian ad litem of) v. Purvis*, [2007] B.C.J. No. 1401 (C.A.); *Barker v. Monfort Hospital*, [2007] O.J. No. 1417 (C.A.); *Jackson v. Kelowna General Hospital*, [2007] B.C.J. No. 372 (C.A.); *Nattrass v. Weber (2010)*, 23 Alta. L.R. (5<sup>th</sup>) 51 and *MacDonald (Litigation Guardian of) v. Goertz*, [2009] B.C.J. No. 1631(C.A.).

It may be pertinent therefore to briefly examine developments in English case law regarding the material increase in risk approach to causation in order to illuminate some of the issue that may lay on the road ahead for causation law in Canada.

In previous papers the authors briefly examined the House of Lords decision in *Fairchild v. Glenhaven Funeral Services Ltd.*<sup>64</sup> (hereafter “*Fairchild*”). In that case, the plaintiff contracted mesothelioma because of exposure to asbestos dust from two different employers. It was possible that the plaintiff developed the disease because of inhalation of only a single asbestos fibre. Accordingly, that fibre would only have come from one of the sources, in which case the defendant who created the second exposure did not contribute to the development of the disease in the plaintiff. In this case it could not be said that “but for” either employer’s negligence the plaintiff would have developed the disease or that either employer materially contributed to its development.

The House of Lords therefore developed what became known as the *Fairchild* Exception. Where a plaintiff has been tortiously exposed on more than one occasion to an agent capable of causing the entirety of his damages with only a single exposure and it was impossible for the plaintiff to prove which of the tortious exposures actually caused his damages, liability could be imposed on all tortfeasors based on their having materially increased the risk of the plaintiff’s exposure to the harm that caused the damages alleged.

Developments since *Fairchild* however have recognized the need to reign in some of the impact that a finding of causation based on a material increase in risk has on a defendant

***Barker v. Corus (U.K.) plc***<sup>65</sup>

The decision in *Barker v. Corus (U.K.) plc* (hereafter “*Barker*”) addresses the practical consequences of the *Fairchild* Exception recognizing both the conceptual and practical issues which arise. Such specific consideration remains to be given in Canada.

In *Barker* the plaintiff’s husband died of mesothelioma after having been exposed to asbestos during three periods in his working life; first while working for a company which had since become insolvent, second while working for the defendant and third while self-employed.

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<sup>64</sup> *Fairchild v. Glenhaven Funeral Services Ltd* [2003] 1 A.C. 32 (H.L.) [*Fairchild*].

<sup>65</sup> *Barker v. Corus* [2006] UKHL 20 (H.L.) [*Barker*].

Similar to the situation in *Fairchild*, the deceased could have developed the disease by inhalation of only a single asbestos fibre but it was scientifically impossible to determine at what point in time this actually occurred. Unlike *Fairchild* however, the deceased's first two exposures to asbestos resulted from breaches of duty by employers while the last exposure involved a failure on the part of the deceased to take reasonable care for his own safety.<sup>66</sup>

At trial the defendant was held jointly and severally liable with the insolvent company for the deceased's mesothelioma on the grounds that the defendant employer had materially increased the risk the plaintiff would develop the disease. Damages were reduced by 20% to account for the deceased's contributory negligence while self-employed. The decision at trial was upheld on first appeal.

One of the issues before the House of Lords was whether the defendant employer ought to be liable for all of the deceased's damages in the circumstances. After all, it could not be demonstrated that the defendant had, in fact, caused or contributed to causing the plaintiff's illness in the presence of the other tortious and non-tortious events. Important to this determination, and to our analysis regarding the impact of adopting a material increase in risk approach to causation, was the House of Lords' consideration of the impact on the defendant in adopting the material increase in risk approach to causation.

In its ruling in *Barker*, the House of Lords revisited the *Fairchild* Exception and imposed two important limitations on the material increase in risk approach test. First, Their Lordships found that tortious exposures which increased the risk of an injury occurring must emanate from the same agent or from agents which operated in the same way.<sup>67</sup> It should be noted that it was precisely this limitation that Justice Smith of the British Columbia Court of Appeal referred to in *Mooney*, a pre-*Hanke* decision, to dismiss the material increase in risk test as the appropriate test to determine causation in the circumstances of that case.<sup>68</sup>

Secondly, the House of Lords also recognized that in applying the material increase in risk approach to causation, the extent of the defendant's liability should only be linked to the

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<sup>66</sup> *Barker v. Corus* [2006] UKHL 20 (H.L.) at para. 3.

<sup>67</sup> *Barker v. Corus* [2006] UKHL 20 (H.L.) at para. 17.

<sup>68</sup> *B.M. v. British Columbia (Attorney General)*, [2004] B.C.J. No. 1506 (C.A.) [*Mooney*], leave to appeal to S.C.C. refused, [2004] S.C.C.A. No. 428 at paras. 153 & 169.

degree of risk created by that particular defendant since it was only the *chance of injury* which formed the basis of the actionable damages.

It follows then that where the “material increase in risk” test is used to determine causation, the defendant’s liability to the plaintiff is, in effect, several. In cases where liability was based on “material contribution” joint and several liability remained applicable since the justification underlying the joint and several liability rule is that “if you caused harm, there is no reason why your liability should be reduced because someone else also caused the same harm.”<sup>69</sup>

This, in essence, represents the fundamental demarcation in English. causation law between factual causation based on the “material contribution” test and ‘legal’ causation based on the “material increase in risk” test. In this case the harm is not the illness but the risk of illness. As the risk caused by each defendant is different, the damage caused is different. Hence holding a single defendant liable for the illness would not be appropriate.

Liability of the defendant in *Barker* was established by the lower courts on the basis that the injury to the deceased was a) an indivisible injury resulting from b) two concurrent joint tortfeasors (*i.e.* the actions of either the insolvent employer or the defendant employer were sufficient in and of themselves to produce the plaintiff’s damages).<sup>70</sup> As a result, according to orthodox negligence principles, the lower courts found the defendant employer was joint and severally liable for all of the plaintiff’s damages.

The House of Lords recognized however that, while the injury suffered by the plaintiff was indivisible, this was *not* a case of concurrent joint tortfeasors. It was impossible in this case to prove that the actions of either would be sufficient in and of themselves to produce the harm suffered by the plaintiff.<sup>71</sup> Rather, resort to the “material increase in risk” test was appropriate in this case precisely because such proof was impossible.

As a result, while the lower courts were correct in resorting to the “material increase in risk” test based on the *Fairchild* Exception, the courts below had erred in assessing joint and several liability of the defendant in the same way as if the “material contribution” test had

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<sup>69</sup> *Barker v. Corus* [2006] UKHL 20 (H.L.) at para. 43.

<sup>70</sup> *Barker v. Corus* [2006] UKHL 20 (H.L.) at para 27.

<sup>71</sup> *Barker v. Corus* [2006] UKHL 20 (H.L.) at para. 29.

been used. Lord Hoffman noted it would be wrong “to proceed on the fiction that a defendant who had created a material increase in risk of mesothelioma was deemed to have caused or materially contributed to the contraction of the disease.”<sup>72</sup>

As a result of the elimination of this legal fiction, the defendant’s appeal succeeded to the extent the matter was remitted to trial in order to assess that percentage of the plaintiff’s damages the defendant *may* have contributed to by increasing the risk of exposure to asbestos. As the House of Lords noted the law was no stranger to apportionment of liability based on probabilities and probability lay at the heart of the material increase in risk approach to causation. Therefore the law was fully capable of apportioning liability based on the degree to which a defendant *may have* increased the risk of injury (vs. actually having caused the injury) to the plaintiff.

The House of Lords held that allowing several liability in cases where a defendant had materially contributed to the risk of the plaintiff’s harm (vs. materially contributing to the cause of the harm) “would smooth the roughness of the justice which a rule of joint and several liability creates.”<sup>73</sup> Lord Hoffman explained;

...The defendant was a wrongdoer, it is true, and should not be allowed to escape liability altogether, but he should not be liable for more than the damage which he caused and, since this is a case in which science can deal only in probabilities, the law should accept that position and attribute liability according to probabilities. The justification for the joint and several liability rule is that if you caused harm, there is no reason why your liability should be reduced because someone else also caused the same harm. But when liability is exceptionally imposed because you may have caused harm, the same considerations do not apply and fairness suggests that if more than one person may have been responsible, liability should be divided according to the probability that one or other caused the harm.<sup>74</sup>

Lord Hoffman’s reference to the principle of fairness to the defendant in *Barker* is reminiscent of the Supreme Court’s recognition in *Hanke* that fairness to the plaintiff requires a principled approach to causation in order to allow a lower standard test “where the “but for” test is not satisfied, because it would offend basic notions of fairness and justice to deny liability by applying a “but for” approach.”<sup>75</sup>

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<sup>72</sup> *Barker Ibid.* at para. 31.

<sup>73</sup> *Barker Ibid.* at para. 43.

<sup>74</sup> *Barker v. Corus* [2006] UKHL 20 (H.L.) at para. 43.

<sup>75</sup> *Resurface v. Hanke* [2007] 1 S.C.R. 333 at para. 25.



The decision in *Barker* and its appeal to fairness appears to recognize however that, if left unchecked, a material increase in risk approach to causation could result in injustice to the defendant who it can only be said at best *may* have injured the plaintiff by increasing the risk of injury. If a “material increase in risk” test has, in fact, found its way into Canadian causation law through the Supreme Court’s *dicta* in *Hanke*, then defendants in this country would be well served if courts here gave similar consideration to balancing the fairness already afforded to plaintiffs where the “but for” test is unworkable.

### **COMPARATIVE ANALYSIS: ENGLISH AND CANADIAN CAUSATION LAW & INCREASE IN RISK**

It may be useful to work through an example and compare how English causation law might apply to a case decided in Canada where it appears that the material increase in risk approach was applied.

We should return briefly to the Alberta Court of Queen's Bench decision in *Zazelenchuk* discussed above where the plaintiff attended the hospital with chest pain and was diagnosed by the defendant with acute anxiety and hyperventilation rather than the ACS he actually suffered from. Ultimately, causation was established on the basis that the defendant’s negligence exposed the plaintiff “to a risk that developing ACS would not be discovered and treated and would lead to permanent heart damage.”<sup>76</sup>

There was evidence that some, but not all patients, would have likely avoided the injury sustained by the plaintiff if afforded certain treatment in time. Resort to material increase in risk causation was determined on the basis that the plaintiff could not prove, for factors beyond his control, that he would have been one of the majority of patients who would have been successfully treated.

Applying the “material increase in risk” test as it has developed in England to the facts, it can be argued that a material increase in risk approach to causation would likely not have even been considered based on the facts. In both *Fairchild* and *Barker* there was no question that the harm-causing agent was inhalation of asbestos fibre leading to mesothelioma. What was unknown in both of those cases, and the reason for resorting to a material increase in

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<sup>76</sup> *Zazelenchuk v. Kumleben* [2007] A.J. No. 1204. (Q.B.) at para. 149.

risk approach to causation, was **which** defendants' negligent conduct (two tortious exposures in *Fairchild* and two tortious and one non-tortious exposures in *Barker*) actually exposed the deceased to the single fibre of asbestos necessary to cause his illness. Understandably, this was an impossible determination to make based on the facts. Therefore, each defendant was held liable for having increased the risk of the plaintiff suffering the illness.

In *Zazelenchuk* the harm-causing agent resulting in the plaintiff's heart attack was unknown. For example, it could have been the failure to administer an ACLS algorithm, including Aspirin, Heparin, or anti-thrombolytic therapy or none of these things. Moreover, it was unknown whether and to what extent a combination of these treatments administered at different times may have prevented the plaintiff's injury, if at all.

Whatever the case may be, *Zazelenchuk* was not a case akin to either *Fairchild* or *Barker* where the harm-causing agent was a known entity and all that remained to be determined was which defendants may have exposed the plaintiff to a risk of suffering his injury. This was not a case where the court had to determine whether a harm-causing agent 'emanated from the same agent or from agents which operated in the same way.' By appealing to a material increase in risk approach to causation in *Zazelenchuk* when it was arguably unnecessary to do so, liability in this case may have been imposed in the absence of facts necessary to support that finding.

## **CONCLUSION**

Ultimately, it would appear that at least some of the concerns the authors raised initially following the release of the Supreme Court of Canada's decision *Hanke* were well founded. While there is some evidence to suggest lower courts may be taking some liberties with what they consider "impossible" situations unsuitable for "but for" causation, appellate courts appear more resolved to work through difficult factual situations and follow the direction provided in *Hanke* that the "but for" test remains the default test for causation, even in difficult factual situations. It may be the case that still too little time has passed since the Supreme Court's decision in order to fully appreciate its consequences.

A lack of clarity remains with respect to a Material Contribution Test. Not only is it not clear in what circumstances the courts are to rely on such a test, it remains unclear what the test is and how it differs from the “but for” test.

While there may be some justification for a Material Contribution Test as distinct from a “but for” test and a material increase in risk test, such justification is likely to be much more limited than indicated by some of the cases in which courts have resorted to such a test. In most cases the “but for” test should be sufficient and one should not confuse cases where certain proof is not possible with impossible proof.

In those cases where the “but for” is considered inadequate for the reasons stated above, one should start with careful consideration of the accepted exceptions on a principled basis. A material increase in risk approach as articulated in England may be appropriate. While there may be justification for a third approach, it is likely that such a test is only necessary in the narrowest of circumstances, such as where there are two sufficient but not necessary causes.

Even the approach taken by the British Columbia Court of Appeal in the *Clements* case seems to be different than the approach in England. The British Columbia Court of Appeal is prepared to accept the use of the “material contribution” test in cases involving either circular or dependency causation. This approach may well explain the reference in *Resurface* to the *Cook* and *Walker* decisions. In fact, this suggests that the approach to “material contribution” in Canada is different than the approach taken in England. One could readily argue that the *Fairchild* case is an example of circular causation. However, it is somewhat more difficult to apply this analysis to the *Barker* case. It would also appear that the restrictions on recovery imposed by the courts in both *Fairchild* and *Barker* may not be applied by Canadian courts. We suspect that a full discussion of these restrictions may not occur until a toxic tort case is before the Supreme Court of Canada. It remains to be seen how much clarity will be brought to this discussion when the Supreme Court has an opportunity to consider *Clements*.

It is also unclear if the Supreme Court will adopt the approach to the question of “current limits of scientific knowledge” that has been espoused in *Clements*. If it does, then many of

the fears raised by this paper may well be put to rest. While we agree with the British Columbia Court of Appeal's comments on this question we do have serious concerns whether the analysis of the passage on "current limits of scientific knowledge" in *Resurface* by Professor Knutsen will find favour with the Supreme Court.

When addressing these questions it would be helpful to thoughtfully consider both the English law and the post *Resurface* academic commentary in Canada. As in Canada, the "but for" test is the predominant test for determining causation in England. In certain exceptional circumstances, where the "but for" test is incapable of determining causation alternative approaches may be taken. It should be understood however that both of these tests are considered cause-in-fact approaches to causation where joint and several liability between the defendants remains the normal practice.

In very rare and exceptional circumstances, chiefly in toxic tort situations where scientific evidence is unavailable to assist in determining which defendant has materially contributed to the plaintiff's loss, and as long as the risk of injury to the plaintiff emanates from the same agent or from agents which operate in the same way, the "material increase in risk" test may become the appropriate test to determine causation. In such cases however, it is important to understand that the damages owed by the defendant are several. The rationale for this is that fairness to the defendant requires that when traditional factual causation cannot be established the defendant ought not to be held responsible for more than the likelihood of his share of increasing the plaintiff's risk of injury, regardless of whether the plaintiff's injuries may have been the result of either tortious and/or non-tortious events.

Unlike the situation in the England, the climate in Canadian causation law is arguably less favourable to defendants given the references to material contribution. Further difficulties may arise if a material increase in risk approach to causation gains sway in the absence of necessary debate about its consequences for defendants. In this regard, debate in the United Kingdom and in particular *Barker*, is noteworthy.

As discussed, while defendants in Canada likely benefit from confirmation of the "but for" test which has so far tended to prevent overuse of the lower and unclear "material contribution" test, lower courts have nevertheless been prepared to move to alternative

causation tests more easily than appears justified under *Hanke* or on the basis of a rigorous application of traditional causation principles. Once a court concludes that a plaintiff has demonstrated the “but for” test as unworkable, it may be easier to find the required causation.

Arguably, if the “material increase in risk” approach to causation has arrived here, then it can be argued that *Hanke* has preserved a legal fiction that courts in England, since *Barker*, have effectively eliminated: a defendant who is found to have materially increased the risk of the type of damage the plaintiff actually suffers should also be deemed to have caused-in-fact the plaintiff’s injuries. In the United Kingdom elimination of this fiction represents the demarcation line between the two ‘material’ tests for causation.

When one considers the different approaches adopted to the application of the ‘material increase in risk’ causation test by Canadian and United Kingdom courts, interesting questions begin to surface regarding liability based on a finding that the defendant has materially increased the risk of the plaintiff’s harm.

To illustrate, in Ontario joint and several liability of negligent defendants can be found in section 1 of the *Negligence Act*<sup>77</sup> provides:

1. Where damages have been **caused or contributed to** by the fault or neglect of two or more persons, the court shall determine the degree in which each of such persons is at fault or negligent, and, where two or more persons are found at fault or negligent, they are jointly and severally liable to the person suffering loss or damage for such fault or negligence, but as between themselves, in the absence of any contract express or implied, each is liable to make contribution and indemnify each other in the degree in which they are respectively found to be at fault or negligent (emphasis added).<sup>78</sup>

This provision is commonly known as the 1% rule. If two or more persons are responsible for the plaintiff’s injuries, even if one of the defendants is only apportioned 1% liability in the circumstances, the plaintiff can seek to recover the full extent of the damages from that party. It is then incumbent on the defendants to seek contribution and indemnity amongst themselves according to the degree of liability apportioned between them.

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<sup>77</sup> *Negligence Act* (Ontario) R.S.O. 1990, c. N.1.

<sup>78</sup> *Negligence Act* (Ontario) R.S.O. 1990, c. N.1. at s. 1.

Applying English law with respect to the material increase in risk approach to causation it is arguable, given Lord Hoffman's discussion in *Barkeer*, that a defendant who has been found to have materially increased the risk of the plaintiff's injury cannot be said to have "caused or contributed to" the plaintiff's damages. In other words, section 1 of the *Negligence Act* may no longer hold sway over similarly assessed defendants in Ontario. In this respect, the common law (and more particularly defendants found liable in negligence based on material increase in risk causation) might then be set free from consequences of joint and several liability.

A common thread in tort claims is the proof of the required elements on the basis of a balance of probabilities. The reliance on balance of probabilities flows easily from the nature of civil litigation which are typically disputes between two persons where each asserts they are right. Any alternative to balance of probabilities risks favouring one person over another on procedural or arbitrary grounds.

The heavy reliance on balance of probabilities has always meant that the results may vary dramatically on the basis of a small shift in the view of the evidence. In a real sense 100% of the consequences may turn on the difference between a 51% and 49% finding of probability. Traditionally causation has been determined on this basis.

However balance of probabilities, with its "all or nothing" consequences, is not the only means of determining an issue in civil litigation. Nearly a century ago Ontario introduced relative negligence principles by statute which required the courts to weigh two or more faults which cause a loss, and then to apportion liability accordingly. Similarly, when addressing damages for future losses our courts may look at possibilities and apportion the damages based on relative probabilities, rather than requiring a plaintiff to prove the damages on a simple balance of probabilities basis.

What the English approach to addressing causation on the material risk basis does is to take a principled and practical approach which in effect apportions causation and the consequences. Arguably this is not only fairer to individual litigants, but represents a conceptually pure response. One may ask whether such a limited approach will lead to

unforeseen difficulties given the inconsistent of this approach to that taken to most issues in civil litigation.

## ADDENDUM

### Multiple Causes, Thin skulls, Crumbling Skulls and Indivisible Injuries

#### Tortious and Non-Tortious Causes

*Athey* was also a significant case for its discussion of the “thin skull” and “crumbling skull” principles and the assessment of damages. Although the plaintiff had a predisposed back weakness, the defendant was held fully liable for the disc herniation. This was based on the “thin skull” principle which requires that “even if a person of normal fortitude would withstand a certain blow to the head without serious injury, the defendant is fully liable for the unexpectedly serious consequences of her actions if her victim happens to experience catastrophic loss because he has an unusual thin skull.”<sup>79</sup> Essentially, the defendants were required to take their victim as they found him; subject to the pre-existing lower back problems as it was a latent weakness that was only made manifest through the tortious conduct of the defendants.<sup>80</sup> Presumably this was because “but for” the accident, he would not have suffered from the disc herniation; he would likely have continued on living, subject to his constraints but would not have suffered in such an aggravated state. Apportionment in these circumstances, between tortious and non-tortious causes, is considered contrary to the principles of tort law because the defendant would escape full liability even though he caused or contributed to the whole injury.<sup>81</sup>

As an aside, it is interesting to note that Demeyere believes that the *Athey* decision, in laying out the “thin skull” principle in a decision riddled with talk about “material contribution” led lower courts to conclude that it is only on application of the “material contribution” test that full recovery to a defendant where multiple causes have led to their injury would be

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<sup>79</sup> Mitchell McInnes, “Causation in Tort Law: Back to Basics at the Supreme Court of Canada” in (1997) 35 Alta. L. Rev. 1013 [McInnes, “Back to Basics”]

<sup>80</sup> Klar and Linden et al., *Remedies in Tort*, Toronto: Carswell, 2006 at §45.1 [Klar, “Remedies”]

<sup>81</sup> Klar, Remedies, see note 80 above at §45.3



allowed.<sup>82</sup> Perhaps, this is a reason why a proliferation or reliance on the “material contribution” test instead of the “but for” test was seen in the aftermath of *Athey*.

On moving forward to consider the issue of damages in *Athey*, Major J. stated that “had the trial judge concluded (which she did not) that there was some realistic chance that the disc herniation would have occurred at some point in the future without the accident, then a reduction of the overall damage award may have been considered.”<sup>83</sup> This is clearly a contemplation, at the stage of damage assessment, as to whether the plaintiff was in fact beyond just a thin skull but had in fact a “crumbling skull.” In the case of a “crumbling skull” the award of damages can be adjusted to account for the “crumbling skull”; where there is a measurable risk that the plaintiff would suffer the same injury in the future regardless of the defendant’s conduct.<sup>84</sup> Since the “crumbling skull” is determined to be inherent in the plaintiff’s original position, and the defendant must only compensate for the difference between the plaintiff’s injured position and their original position, damages are reduced.<sup>85</sup> The ultimate conclusion in *Athey* was that since he could not be said to be a “crumbling skull”, he was entitled to full compensation under the thin skull principle.

The problem with framing the “thin skull”/ “crumbling skull” distinction, as it was in *Athey*, is twofold. Firstly, it is practically impossible to meet the “crumbling skull” test. Secondly, it deviates from the compensation principle which requires that the plaintiff be put in the same position as if the injury had not occurred.<sup>86</sup>

From a practice standpoint, once causation is established, any good defence lawyer will always try to put evidence forward that the plaintiff would have suffered the same injury at some point in the future due to a crumbling skull so as to reduce the award of damages their client is left paying. The best assistance in achieving that result would typically be evidence

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<sup>82</sup> Demeyere, Immaterial Contribution, see note **Error! Bookmark not defined.** above at para. 35

<sup>83</sup> *Athey*, see note **Error! Bookmark not defined.** above at para. 48.

<sup>84</sup> Klar, Remedies, see note 80 above at §45.3

<sup>85</sup> *Athey*, see note **Error! Bookmark not defined.** above at para. 35. See also Richard M. Bogoroch and Tripta S. Chandler, “How Canadian Courts Have Turned “Thin Skull” Damages into “Crumbling Skull” Damages: What are the Implications” (September 2002) (at 10) and McInnes, Back to Basics, above at note 79 for further discussion .

<sup>86</sup> Klimchuk and Black, Causation, Damages see note **Error! Bookmark not defined.** above at para. 28.

gained from physicians about the likelihood that a similar injury would have occurred in the plaintiff had the tortious conduct not taken place. However, doctors are frequently very reluctant to opine that the same or similar result would occur; that the plaintiff would have gotten the same injury anyways. They may be more than willing to say that the plaintiff had a pre-existing condition which made them especially vulnerable to the injury (and therefore “thin skulled”), but do not like to make conjecture about future possibilities. As such, the plaintiff may be an accident waiting to happen, but the medicals necessary to prove it cannot be obtained. In the result, the defendant is left paying for the plaintiff’s thin skull without any reduction in damages.

As mentioned, once the “crumbling skull” defence was rejected by Major J. as speculative, the full quantum of damages assessed by the trial judge was imposed upon the defendants. As Klimchuk and Black point out, this was akin to giving an award to the plaintiff as if they did not suffer any pre-existing back injuries.<sup>87</sup> Although there was no evidence that the plaintiff would suffer the exact same injury in the future (as required to meet the “crumbling skull” test), it was not unreasonable to expect that the pre-existing back injury may have, at some time in the future, caused pain or back problems that would require him to alter his normal activities.<sup>88</sup> Quoting the court in *Graham v. Rourke*,<sup>89</sup> Klimchuk and Black highlight that such an award of damages created “the anomalous situation whereby [the plaintiff] was treated as particularly vulnerable “thin-skulled” victim for the purposes of assessing the effects of the accident on h[im], but as a normally healthy person for the purposes of assessing h[is] future pecuniary loss.”<sup>90</sup> As such, a contingency deduction should have been permitted to account for the less speculative future costs associated with the plaintiff’s pre-existing condition.<sup>91</sup> This would more appropriately accord with the compensation principle as it would only require defendants to be responsible for the “value of the difference

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<sup>87</sup> Klimchuk and Black, Causation, Damages see note **Error! Bookmark not defined.** above at para. 24.

<sup>88</sup> Klimchuk and Black, Causation, Damages see note **Error! Bookmark not defined.** above at para. 27.

<sup>89</sup> (1990), 75 O.R. (2d) 622 (C.A.).

<sup>90</sup> Klimchuk and Black, Causation, Damages see note **Error! Bookmark not defined.** above at para. 28.

<sup>91</sup> Klimchuk and Black, Causation, Damages see note **Error! Bookmark not defined.** above at para. 27.

between the back the plaintiff had at trial and the one he would have had but for the accidents.’<sup>92</sup>

### Multiple Tortious Causes

As we have seen, where there are multiple necessary causes, one of which is tortious and the balance are non-tortious, the defendant will be assessed liability for the whole of the injury. As it currently stands, the defendant will then be responsible for compensating the plaintiff on that basis, unless a deduction is considered appropriate for “crumbling skull” damages. When dealing with multiple tortious causes, however, the analysis has been less than clear as two conflicting approaches have been applied.

In *Alderson v. Callaghan*<sup>93</sup> the plaintiff suffered brain damage in a motor vehicle accident. The defendant claimed that the injury was actually the result of a series of domestic assaults inflicted upon her prior to and subsequent to the accident. On the basis of *Athey*, the court found that so long as the accident could be said to have materially contributed to her overall condition (which they concluded it did in these circumstances), the subsequent tortious acts would not relieve the defendant from full responsibility for damages. However, the *Negligence Act* would allow multiple tortfeasors to seek contribution and indemnity from one another. The question that was never addressed in *Alderson* was whether the different torts actually caused the same damage, a pre-requisite for contribution under the *Negligence Act*.

This was a case where multiple tortious events caused or contributed to the plaintiff’s injury. This approach is contrary to what is known as the global assessment rule applied in pre-*Athey* cases like *Long v. Thiessen*.<sup>94</sup> In global assessments, the plaintiff’s total or global damages, resulting from both tortious acts, are first valued. The first defendant would then be responsible for paying only the portion of the plaintiff’s damages up until right before the second incident, taking into consideration that they were not fully recovered yet. The second defendant would be responsible for the remainder. This would allow each defendant

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<sup>92</sup> Klimchuk and Black, Causation, Damages see note **Error! Bookmark not defined.** above at para. 21.

<sup>93</sup> (1998), 40 O.R. (3d) 136 (C.A.) [*Alderson*]; Please also see Terry Collier’s paper entitled “Causation, Sensation: An Updated Guide to *Athey*” presented to the Advocates’ Society Practical Strategies for Advocates X in February of 2001.

<sup>94</sup> [1968] B.C.J. No. 1 (C.A.).

to pay only for the damage they caused to the plaintiff, instead of making each responsible for the whole. It is implicit that if there is a missing tortfeasor, it is the plaintiff's recovery that is reduced.

The Supreme Court of Canada's decision in *Blackwater v. Plint*<sup>95</sup> seems to have renewed a similar approach. In that case, the plaintiff suffered psychological difficulties from sexual assaults committed against him in a residential school. He had also been beaten and suffered other trauma while in the residential school, but any action arising from such a tort was determined to be statute barred. The court found that the "plaintiff is entitled only to be compensated for loss caused by the actionable wrong."<sup>96</sup> As such, they approved the separation of the different sources of damages, confining the defendant's responsibility to only those damages associated with the actionable tort.<sup>97</sup> The plaintiff was therefore only permitted recovery for damages associated with the sexual abuse.

At this juncture, with the Supreme Court of Canada's ruling in *Blackwater*, it appeared that perhaps *Alderson*, with its reliance on *Athey*, had gotten it wrong; that a defendant should only be responsible for the portion of damages which were caused by the actionable wrong of the defendant. However, one needs to be careful in reading the *Blackwater* decision so widely. This was confirmed in the decision of *Hutchings v. Dow*.<sup>98</sup>

In *Hutchings*, the British Columbia Court of Appeal distinguished the *Blackwater* facts on the basis that in *Blackwater* there was evidence to suggest, that absent the sexual assaults, the plaintiff still would have suffered from serious psychological difficulties based on the other abuse he had experienced.<sup>99</sup> While not entirely explicit, *Blackwater* had therefore applied a type of "crumbling skull" deduction to the award; allowing the defendant to avoid compensating for effects that would have occurred anyways.

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<sup>95</sup> [2005] 3 S.C.R. 3 (S.C.C.) [*Blackwater*]

<sup>96</sup> *Blackwater*, see note 95 above at para. 74.

<sup>97</sup> *Blackwater*, see note 95 above at para. 82.

<sup>98</sup> [2007] B.C.J. No 481 (C.A.) [*Hutchings*]. This approach has been confirmed in at least two additional B.C.C.A. decisions: *B.(B.P.) v. B. (M.M.)*, 2009 CarswellBC 2171 and *Bradley v. Groves (2010)*, 326 D.L.R. (4<sup>th</sup>) 732

<sup>99</sup> *Hutchings*, see note 98 above at para. 14.

The court in *Hutchings* also provided another clue to the assessment of damages in multiple tort scenarios. They found that in the circumstances before them, the depression suffered by the plaintiff was a non-divisible injury, caused by the melding of both a motor vehicle accident and subsequent assault.<sup>100</sup> In this type of situation, on the basis of *Athey*, a defendant is liable for the whole of the injury, even if they were not the sole cause of the injury (and even where other tortious causes exist).<sup>101</sup> Thus, they said, “it was not possible (or logical) on the evidence to determine [the plaintiff’s] original position with respect to the depression in the absence of the car accident.”<sup>102</sup>

The *Blackwater* application, therefore, appears to be unavailable in situations where one act of tortious conduct was not enough to render the injury alone. As such, *Alderson* would stand on the basis that it was determined that both the car accident and assaults were necessary to produce the brain injury and no evidence was adduced that the assaults would have alone caused the injury in the absence of the car accidents. It is only where the injury is divisible, or where the plaintiff would suffer the same regardless of the tortious conduct of the defendant because they are essentially a “crumbling skull” due to the interference of other tortious effects, that damages will be apportioned based on their independent contribution.<sup>103</sup>

This analysis is of particular importance when dealing with plaintiffs who have suffered from multiple sexual and/or physical assaults or abuse. Plaintiffs’ counsel will attempt to adduce medical evidence that the plaintiff’s condition is an indivisible injury which was contributed to or occurred because of the individual assaults. If this can be accomplished, then the defendant(s) will be liable for all of the plaintiff’s damages notwithstanding that some of the assaults were not committed by them. This approach will significantly increase the risk of going to trial for the defendant. The defendant runs that risk that they will be held liable for all of the plaintiff’s injuries notwithstanding that the conduct of others may have contributed to the plaintiff’s condition. In fact, the conduct of others may constitute the major

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<sup>100</sup> *Hutchings*, see note 98 above at para. 11.

<sup>101</sup> *Hutchings*, see note 98 above at para. 11.

<sup>102</sup> *Hutchings*, see note 98 above at para. 15.

<sup>103</sup> Where the plaintiff has settled with one of the tortfeasors, notwithstanding an indivisible injury, the court will be obliged to apportion liability between the concurrent tortfeasors. How this is to be accomplished is unclear. See *Misko v. John Doe* (2007), 229 O.A.C. 124 (C.A.)

contribution to the plaintiff's current condition. The defence, on the other hand, will attempt to establish that the injury is divisible and that the global assessment approach should be used to apportion damages.

### Multiple Causes and the Crumbling Skull Conclusion: Where are We Now?

Unfortunately, the requirement that a defendant show a plaintiff would have suffered the same injury absent their tortious act, in order to qualify for a "crumbling skull" deduction, is incredibly challenging. This is due to the difficulty in obtaining a medical opinion which proffers proof that such an injury would have been likely to occur. As such, the defendant is made responsible for the whole of the damages, even where those damages are arguably excessive due to a "thin skull" plaintiff. Without allowing for a deduction for less speculative complications due to a pre-existing condition, the court in *Athey* has taken the unusual step of potentially placing the plaintiff in a better position that they would have otherwise been in. This is counter to the compensation principle and can result in overcompensating an injured plaintiff.

While *Athey* did not deal with the case of multiple tortious causes explicitly, it has also been used to support the theory that a defendant will be held liable for the whole of the injury regardless of whether the multiple causes are tortious or non-tortious. In the situation of multiple tortfeasors, however, each defendant may be entitled to seek contribution and indemnity from the other if they can establish that they contributed to the same damage (i.e., the injury was indivisible). The problem is that this conclusion may conflict with another substantial body of law which indicated that the proper approach was to assess damages on a global basis and then apportion only the part of the damage that could be said to have existed up until the second tortious act to the first defendant, with the remainder to the second. *Blackwater* certainly seemed to endorse this latter approach. However, given the *Hutchings* decision, the law may be more accurately summarized as follows: The general rule is that where an injury is indivisible and it was caused by more than one tortious factor, each tortfeasor will be responsible for the whole of the damages unless it can be said that the same injury would have occurred in any event.

## Loss of Chance

The law is clear that in medical malpractice cases the “loss of a chance” only is not compensable. Accordingly, where it is demonstrated that if a certain course of action had been taken by a doctor, then the plaintiff had a less than 50% chance of having a better result causation has not been proven.<sup>104</sup>

There have been a number of attempts, particularly outside of Ontario, to sidestep the “but for” evidentiary problem by using a combination of the loss of chance scenario and the “material contribution” test. The appeal courts in this country have declined to accept such analyses.

For example, in *Bobun v. Sennewald* the trial judge concluded that a doctor’s failure to diagnose a tumour earlier increased the plaintiff’s risk of death from the tumour from 21% to 25% in absolute terms or a 20% relative increase in her risk of death.<sup>105</sup> For reasons which the Court of Appeal indicated were inappropriate the trial judge dropped the “but for” analysis in favour of the “material contribution” analysis. The Court of Appeal concluded that the plaintiff needed to establish that the error in treatment changed her life expectancy. The statistical evidence fell far short of satisfying the “but for” test. The court concluded that a failure to satisfy the “but for” test on an evidentiary basis does not justify resort to the “material contribution” test.<sup>106</sup>

Some courts have used some ingenious methods to address these issues. Recently, a judge of the Ontario Superior Court of Justice found a doctor negligent notwithstanding that the statistical evidence suggested that the use of steroids would have only reduced the chances of twins developing cerebral palsy following birth by only 40%.<sup>107</sup> The trial judge was fully cognizant of the requirement to use the “but for” test and the Court of Appeal’s decision in *Cottrelle*. Nevertheless by analyzing the statistical evidence further and using the pragmatic approach to scientific evidence espoused by the Supreme Court of Canada in *Snell* the court

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<sup>104</sup> See *Cottrelle v. Gerrar*, [2003] O.J. No. 4194 (C.A.)

<sup>105</sup> 2008 CarswellBC 113

<sup>106</sup> To the same effect *Joinson v. Heran*, 2011 CarwellBC 1365 (BCSC) but see *Trillium Motor World Inc. v. General Motors of Canada Ltd*, 2011 CarswellOnt 1286 (per Strathy J.) which does not discuss the issue in detail. *Trillium* is not a medical malpractice case where a loss of a chance to avoid an outcome is clearly not compensable.

<sup>107</sup> *Goodman v. Viljoen*, 2011 CarswellOnt 754.

was able to conclude that the “but for” test had been satisfied. Whether this approach will survive appellate review remains to be seen.

It is clear that if a breach of contract is proven, then the damages can be assessed even if the chances such damages would be suffered is less than 50%. This is the classic expression of the “loss of chance” doctrine. In a 2008 case the question of whether a loss of chance approach could be utilized to justify a damage award in a solicitor’s negligence case was canvassed by the British Columbia Supreme Court.<sup>108</sup> In that case, the plaintiff complained that a settlement had been made negligently by her lawyer and she had lost a chance to take her case to trial and achieve a better result. Her trial counsel relied on the earlier Saskatchewan Court of Appeal decision in *Henderson v. Hagblom*.<sup>109</sup>

In that case, the Court of Appeal concluded that if a critical witness had been called at trial, then the plaintiff had a 75% chance of successfully defending the case. The Court awarded her 75% of her loss. In that case, the Court suggested that there was some disagreement in the authorities regarding whether in legal malpractice cases the loss of chance was considered as part of the causation analysis or in the assessment of damages. It was suggested that in this type of case “loss of a chance” might be sufficient even at stage of analyzing causation to permit the plaintiff to succeed. In that case, of course, having found that the chance of success was 75% the Court did not need to conduct that analysis.

Similarly, in the *Newton* case the court declined to apply a standard less than that required by the “but for” test. The court concluded that to succeed the plaintiff must prove that if she was provided with appropriate advice she would not have settled the case. If causation was proven in such a manner, then the court could evaluate, presumably on the loss of chance approach, what the case would have settled for or the amount she would have recovered at trial.

Although the *Cottrelle* decision currently makes it impossible to avoid the “but for” test for causation in medical malpractice cases, presumably for both the tortious aspects of the claim and the allegations of breach of contract, it is possible that the loss of chance approach to causation may have some life in other situations. The best example may be the alleged

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<sup>108</sup> *Newton v. Marzban*, 2008 Carswell BC 531.

<sup>109</sup> 2003 SKCA 40



negligence of counsel at trial. However, other breach of contract, especially with respect to negligent advice, raises serious fairness questions if the plaintiff cannot satisfy the “but for” test. I would point out that such cases may fall into Professor Knutsen’s classification of “dependency causation” cases.