

**Demystifying the Law of Causation:
*Resurfice Corp. v. Hanke****

Introduction

Causation is one of the essential elements in a plaintiff successfully establishing negligence. However, trying to come to grips with what constitutes causation has proved to be one of the more murky and difficult issues in tort law. A variety of terms have been used to try to define the concept of causation ranging from proximate cause, “legal cause”, “judicial cause” and “cause in law”.¹ Professors Prosser and Keeton described the problems as follows:

There is perhaps nothing in the entire field of law which has called forth more disagreement or upon which the opinions are in such a welter of confusion. Nor, despite the manifold attempts which have been made to clarify the subject, is there yet any general agreement as to the best approach. Much of this confusion is due to the fact that no one problem is involved, but a number of different problems, which are not distinguished clearly, and that language appropriate to a discussion of one is carried over to cause a shadow upon the others.²

The “But For” Test

Initially the test of directness was applied and the issue was whether the consequence or the damage suffered by the plaintiff was the direct or indirect result of the defendant’s negligence.³ Eventually, the “but for” test or the “sine qua non” rule was adopted which was perhaps best expressed as:

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¹ G.H.L. Friedman, *The Law of Torts in Canada*, Carswell at p.420

² *The Law of Torts*, (St. Paul, Minn. West Publishing Co.) at pp.263-264

³ *Winnipeg Electric Tly. Co. v. C.N.R.* (1919), 59 S.C.R. 352 at 257, and Friedman, *opt. cit.* 421

The defendant's conduct is a cause of the event if the event would not have occurred but for that conduct; conversely, the defendant's conduct is not a cause of the event, if the event would have occurred without it.⁴

Professor Linden explained the test as follows:

The most commonly employed technique for determining causation-in-fact is the "but for" test, sometimes called the *sine qua non* test. It works like this: if the accident would not have occurred but for the defendant's negligence, this conduct is a cause of the injury. Put another way, if the accident would have occurred just the same, whether or not the defendant acted, this conduct is not a cause of the loss. Thus the act of the defendant must have made a difference. If the conduct had nothing to do with the loss, the actor escapes liability.⁵

In *Athey v. Leonati*⁶, Major J. defined the test as follows:

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.

As Sopinka J. pointed out in *Snell v. Farrell*,⁷ causation is simply 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.

Although the test, at first blush, seems beguilingly simple and straightforward, its application proved to be difficult and at times resulted in harsh results. Professor Klar has argued that the reason for this is that the but for test is evaluative and speculative in that it requires the trier of fact to predict what would have happened to the plaintiff had the

⁴ Prosser and Keeton, *opt.cit.* at p.266

⁵ Allen M. Linden and Bruce Feldthusen, *Canadian Tort Law* (8th ed.) (Lexis Nexis: Toronto, 2006) at p. 116

⁶ [1996] 3 S.C.R. 458 at p.11

⁷ [1990] S.C.R. 311

defendant not acted unreasonably.⁸ The decision of *Barnett v. Chelsea & Kensington Hospital Management Committee*⁹ is a clear example of the inequity that can result from the rigid application of the but for test. The plaintiff, Barnett, had consumed tea and began vomiting shortly thereafter. At the hospital seeking treatment, the attending physician negligently instructed Barnett to return home without even assessing him. Barnett died before noon that morning. The defendant physician escaped liability for Barnett's death because the court accepted that even if the defendant had not acted negligently, it could not be said that the plaintiff would have survived because appropriate treatment might not have been provided forthwith anyway.

In the famous rescue case, *Horsley v. MacLaren*, the issue was whether the operator of the cabin cruiser could be held liable for the death of the rescuer who had dived into the water to rescue another guest who had fallen overboard. The Supreme Court of Canada upheld the dismissal of the action, on the ground, among other things, because it could not be shown that the delay occasioned by the wrong rescue procedure used by MacLaren prolonged the time within which a successful rescue could have been effected.¹⁰

In addition to the injustice occasionally resulting from the application of the but for test, it became clear that the "but for" test was unable to cope with certain situations. One of these cases is where there were concurrent or multiple causes.¹¹ This was the situation in

⁸ Lewis N. Klar, *Tort Law* (Thomson Carswell) at p.391

⁹ [1968] 1 All ER 1068 (Q.B.)

¹⁰ [1972] S.C.R. 441. However, the primary reason for the decision was the defendant's error was one of judgment and not negligence and that in the existing circumstances, namely and emergency, his conduct should be excused.

¹¹ David Cheifetz, in his excellent article "Nothing is Now Enough" found at dcheifetz@bbburn.com October 27, 2007 at p. 16 calls these situations "duplicative causation cases".

the classic case of *Cook v. Lewis*.¹² The Supreme Court of Canada, in *Cook*, was faced with a situation whereby two hunters negligently fired their weapons in the direction of a plaintiff who was hit by only one bullet. Under the traditional approach, if the plaintiff was unable to establish which of the defendants caused his injury then the action failed in the absence of special circumstances. The Court recognized the unjustness of allowing these negligent defendants to escape liability. Rand J. concluded that the “onus shifted to the wrongdoer to exculpate” himself and the question of liability was a matter between the two defendants.¹³

In short, one of the ways of dealing with the inadequacy of the but for test in multiple cause cases was to shift the burden of proof to the defendants to determine between them which is liable. Another solution developed by the courts to solve this difficulty was the development of the “substantial factor test”. Under this approach, where the acts of two people are both substantial factors or materially contributed to bringing about the result, then liability would be imposed on both.¹⁴ As we will see later, this reasoning was subsequently applied by the Supreme Court of Canada in *Athey v. Leonati* to deal with situations where there was both tortious conduct and a non-tortious cause.¹⁵

¹² [1951] S.C.R. 830

¹³ *Ibid.* at 832

¹⁴ Prosser and Keeton, *opt. cit.* at p.268, Linden, *opt.cit.* at p.121

¹⁵ [1996] 3 S.C.R. 458 at para.17

The Material Contribution Test Emerges in the United Kingdom

One of the earliest and clearest applications of this rule is *Bonnington Castings Limited v. Warlaw*.¹⁶ In this case, the plaintiff was an employee in a foundry operated by the defendant. The plaintiff developed pneumoconiosis from inhaling air which contained minute particles of silica. There were two sources for the silica that he inhaled. The first was floor grinders but the dust which escaped from these machines was negligible due to a dust extraction process at the plant. The other source was swing grinders and the evidence showed that the dust extraction plant for these grinders was not kept free of obstructions and it frequently became obstructed and ineffective. It was admitted that the defendant was in breach of the regulation governing machinery.

The trial judge and the appeal court decided the case on the basis that there was an onus on the defendants to show that the swing grinders did not cause the plaintiff's disease. In short, they used a reverse onus approach, much like the court did in *Cook v. Lewis*. Lord Reid rejected this approach and instead adopted the material contribution test which proved to be the basis for the test propounded by the Supreme Court of Canada 30 years later in *Athey v. Leonati*:

It appears to me that the source of his disease was the dust from both sources, and the real question is whether the dust from the swing grinders materially contributed to the disease. What is a material contribution must be a question of degree. A contribution which comes within the exception of *de minimus non curat lex* is not material, but I think any contribution which does not fall within that exception must be material. I do not see how there can be something too large to come within the *de minimus* principle and yet too small to be material.¹⁷

¹⁶ [1956] 1 All E.R. 615 (H.L.)

¹⁷ *Ibid.* at p.851

Another situation in which the traditional but for test failed was where the scientific or medical evidence was inadequate. In *McGhee v. National Coal Board*¹⁸ a brick kiln worker developed dermatitis as a result, he alleged, of his employer's negligence in not providing on-site showers where he could wash before traveling home. The trial court held that the plaintiff had to prove that his additional exposure to injury by his having to bicycle home unwashed caused the disease. This could not be shown on the basis of the medical evidence. Had the House of Lords adhered to the traditional but for test, the plaintiff's claim would have failed. In short, McGhee could not establish that but for the defendant's negligence in not providing shower facilities, he would not have developed his condition.

McGhee nevertheless succeeded against his employer. Both majority and minority *ratios* substantially influenced the framework upon which causation law subsequently evolved in Canada. Lord Reid's reasons are noteworthy because he argued for a broader view and more common sense approach to causation:

But I think that in cases like this we must take a broader view of causation. The medical evidence is to the effect that the fact that the man had to cycle home caked with grime and sweat added materially to the risk that this disease might develop. It does not and could not explain just why that is so. But experience shews that it is so. Plainly that must be because what happens while the man remains unwashed can a causative effect, though just how the cause operates is uncertain.

.....

From a broad and practical viewpoint I can see no substantial difference between saying that what the respondents did materially increased the risk of injury to the appellant and saying that what the respondents did made a material contribution to his injury.¹⁹

¹⁸ [1972] 3 All E.R. 1008 (H.L.)

¹⁹ *Ibid.* at 1010-1011

Lord Wilberforce approached the problem from a different perspective. He noted that in many cases, such as the one before the court, it is impossible to prove causation because medical science was incapable of segregating the causes of illness between multiple causes. In such a case, justice required that the creator of the risk should bear the consequences:

And I must say that at least in the present case, to bridge the evidential gap by inference seems to me something of a fiction, since it was precisely this inference which the medical expert declined to make. But I find in the cases quoted an analogy which suggests the conclusion that, in the absence of proof that the culpable addition had, in the result no effect, the employers should be liable for an injury, squarely within the risk which they created and that they, not the pursuer [the plaintiff], should suffer the consequence of the impossibility, foreseeably inherent in the nature of this injury, of segregating the precise consequence of their default.²⁰

Bonnington Castings and *McGhee* were important developments in tort law as they signalled the inception of the “material contribution” test. Instead of forcing claimants to prove that but for defendants’ negligence injuries would not have occurred, claimants were now able to meet a far less stringent causation threshold by simply showing that such negligence materially increased the risk of damages incurred.²¹ In addition, Lord Wilberforce suggested that where the defendant created a risk of harm and the injury occurred within that ambit of risk, then an inference of causation should be made. This reasoning was based on the argument that there was no practical difference between materially contributing to the risk of harm and materially contributing to the harm itself.

²⁰ *Ibid.* at 1012

²¹ *Supra* note 5 at 118

The issue was revisited by the House of Lords ruling, *Wilsher v. Essex Area Health Authority*.²² *Wilsher* involved an infant suffering from anoxia that required oxygen to prevent brain damage. Hospital staff negligently administered excessive amounts of oxygen with the claimant later developing an inoperable retinal disorder. The complexity of the proceedings revolved around the fact that the medical evidence identified another five non-negligent possibilities might have realistically caused the retinal condition.

In ordering a new trial, the House of Lords in *Wilsher* held that *McGhee* did not introduce any new principles but in fact reaffirmed that the onus of proving causation rested with the plaintiff. Lord Bridges concluded that the *McGhee* case was simply an example of adopting a robust and pragmatic approach to the facts of the case.²³

In the recent decision of *Fairchild v. Glenhaven Funeral Services Ltd.*,²⁴ the House of Lords further clarified its stance on the law of causation. In this industrial disease precedent involving multiple defendants, the court reaffirmed that a claimant is entitled to recovery where they can prove that defendants contributed to the risk that a claimant might contract an industrial disease. *Fairchild*, then, effectively reaffirms the earlier holding in *McGhee* through preferring the but for test over the material contribution test.

²² [1988] 1 All E.R. 871 (H.L.)

²³ *Ibid.* at 881

²⁴ [2002] 3All E.R. 305 (H.L.)

Snell v. Farell and Inferring Negligence

The proof of causation debate crossed the Atlantic and was taken up in Canada in *Snell v. Farell*.²⁵ In *Snell* the plaintiff underwent cataract surgery. During the surgery, after injecting a local anaesthetic the defendant noticed a small retrobulbar bleed. Despite the bleeding, the defendant proceeded with the operation. Following the surgery there was blood in the vitreous chamber of the eye. When the blood cleared up after approximately nine months, it was discovered that the plaintiff's optic nerve had atrophied and the plaintiff had lost the vision in the right eye. One possible cause for the optic nerve atrophy was pressure due to retrobulbar haemorrhage. The expert witnesses could not state with certainty what caused the atrophy or when it occurred. The trial judge relied on the *McGhee* case and held the plaintiff had *prima facie* proved that the defendant's actions had caused her injury and that the defendant had failed to discharge the onus that had shifted to him. The trial judge found the defendant liable and the New Brunswick Court of Appeal dismissed his appeal.

Justice Sopinka framed the issue before the court as to whether a plaintiff in a malpractice case had to prove causation according to the traditional principles or whether some less onerous standard could be utilized. He pointed to the criticism of the traditional causation test, namely that in cases where there were complexities in proof that the plaintiff could be deprived of relief. He also noted that in the United States, the liberalization of the rules for recovery in malpractice cases led to the medical malpractice crisis of the 1970's. Finally, Justice Sopinka remarked that in the United Kingdom, a

²⁵ [1990] 2 S.C.R. 311

proposal to reverse the burden of proof in malpractice cases was rejected by the Royal Commission on Civil Liability and Compensation for Personal Injury.

Justice Sopinka concluded that the principles governing causation were “adequate to the task” and did not need to be revised. He pointed out that causation need not be proved with scientific precision and that often in medical malpractice cases, the facts lie within the defendant’s knowledge. In these circumstances very little affirmative evidence is required by the plaintiff before an inference of causation can be drawn in the absence of evidence to the contrary. In short, Justice Sopinka rejected the *McGhee* approach and refused to adopt a reversal of onus approach. Rather, where the facts lie in the knowledge of the defendant, he lowered the quantum of evidence required to draw an inference of causation.

***Athey v. Leonati* and the *Walker Estate* cases: The Introduction of the Material Contribution Test into Canada**

In 1996, the Supreme Court of Canada released the judgment of *Athey v. Leonati*²⁶ which reaffirmed the but for test in Canada. However, Major J. noted that the test was unworkable in certain circumstances and so causation could be established where the defendant’s negligence “materially contributed” to the occurrence of the injury. He also held that a contribution factor was material if it fell outside the *de minimus* range. Following Justice Sopinka’s dictum in *Snell v. Farrell*, Justice Major emphasized that the causation test did not need to be determined with scientific precision. He then turned his attention to the multiple cause cases and relying on *McGhee* he concluded:

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

²⁶ *Supra* note 6

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.²⁷

In essence, the Supreme Court of Canada adopted the *McGhee* material contribution test in certain narrow circumstances.

In 2001 the Supreme Court of Canada decided *Walker Estate v. York Finch General Hospital*,²⁸ a case that involved three plaintiffs claiming damages related to their contraction of HIV from tainted blood products. The trial found liability on the Canadian Red Cross Society (CRCS) in two of the actions but dismissed the *Walker* claim. The Court of Appeal overturned the trial judge and relied on the principles in *Hollis v. Dow Corning Corp.*²⁹ The Supreme Court of Canada rejected the applicability of the “learned intermediary rule” but the Court concluded that the proper test should be the material contribution test:

With respect to negligent donor screening, the plaintiffs must establish the duty of care and the standard of care owed to them by the CRCS. The plaintiffs must also prove that the CRCS caused their injuries. The unique difficulties in proving causation make this area of negligence atypical. The general test for causation in cases where a single cause can be attributed to a harm is the “but for” test. However, the but for test is unworkable in some situations, particularly where multiple independent causes may bring about a single harm.

In cases of negligent donor screening, it may be difficult or impossible to prove hypothetically what the donor would have done had he or she been properly screened by the CRCS. The added element of donor conduct in these cases means that the but-for-test could operate unfairly, highlighting

²⁷ *Ibid.* at para. 17

²⁸ [2001] 1 S.C.R. 647

²⁹ [1995] 4 S.C.R. 634

the possibility of leaving legitimate plaintiffs uncompensated. Thus, the question in cases of negligent donor screening should not be whether the CRCS's conduct was a necessary condition for the plaintiffs' injuries using "but-for" test, but whether that conduct was a sufficient condition. The proper test for causation in cases of negligent donor screening is whether the defendant's negligence 'materially contributed' to the occurrence of the injury. In the present case, it is clear that it did. 'A contributing factor is material if it falls outside the *de minimus range*' (See *Athey v. Leonati*...) As such, the plaintiff retains the burden of proving that the failure of the CRCS to screen donors with tainted blood materially contributed to Walker contracting HIV from the tainted blood.³⁰

In conclusion, *Athey* held that "in some circumstances" the but for test was "unworkable" and therefore the material contribution test should be applied. In *Walker* the "unique difficulties in proving causation" and the danger that the but for test might "operate unfairly, highlighting the possibility of leaving legitimate plaintiff uncompensated" resulted in the application of the material contribution test. The combined effect of these two decisions was to seriously undermine the traditional but for test and to supplement it with the material contributed test. Although the impetus for this change was laudable, it left much uncertainty as to when the material contribution test would be applied. The Court offered no guidance as to when the traditional test would be unworkable or unfair. Clearly, clarification was required.

The Resurfice Corp v. Hanke Case

In its recent decision of *Resurfice Corp. v. Hanke*,³¹ the Supreme Court of Canada attempted to clarify the law of causation. The facts of the *Hanke* case were relatively straightforward. Ralph Hanke was employed by the City of Edmonton as a rink attendant at a skating facility where he was severely injured by a workplace accident. As part of his

³⁰ *Ibid.* at para. 87-88

³¹ [2007] 1 S.C.R. 333

duties, Hanke was required to prepare an ice resurfacing machine by filling its hot water reservoir used to smooth the rink. Although Hanke was aware that the machine contained two similar looking tanks located next to one another, one being for hot water and the other for gasoline, he errantly filled hot water into the gas tank. The inflow of hot water vaporized stored gasoline which, in turn, triggered an explosion when the flammable gas was ignited by an overhead heat source.

Hanke brought a product liability claim against both the manufacturer and the marketer of the ice resurfacing machine on the basis that the machine had been negligently designed and/or marketed. He argued that caps for the two tanks were negligently designed too close to one another without any substantial differences in shape or colour.

At trial, Wilson J. dismissed Hanke's lawsuit on the basis that the claimant "had failed to prove on the balance of probabilities that the Defendant who made the machine or the Defendant who marketed it, in design, manufacturing or marketing the machine created a foreseeable risk of harm."³² Though Wilson J. did not explicitly recite the but for test in his decision, it is clear the appellate courts considered that this test was used in determining causation at trial.

The Alberta Court of Appeal overturned the trial decision on grounds that the judge had relied upon an incorrect causation test in determining liability. The Court of Appeal reasoned that Hanke's injuries did not result from a single factor, but rather from a range

³² *Hanke v. Resurfice Corp.*, [2004] 333 A.R. 371 (Q.B.) at para. 58

of possible causes. As such, the appellate court unanimously held that “Where there is more than one potential cause, the “material contribution” test should be used”.³³

Chief Justice McLachlin delivered the Court’s relatively short unanimous decision. In restoring the trial judge’s verdict, Chief Justice McLachlin reaffirmed that the but for test remains the primary test for determining causation.³⁴ The but for test applies to multi-cause injuries. The but for test recognizes that:

Compensation for negligent conduct should only be made “where a substantial connection between the injury and the defendant’s conduct” is present. It ensures that a defendant will not be held liable for the plaintiff’s injuries where they “may very well be due to factors unconnected to the defendant and not the fault of anyone ...”³⁵

However, the Court acknowledged that in “special circumstances”, the case law has recognized that there are exceptions to the basic but for test and that the material contribution test should be applied. The Chief Justice then outlined two requirements before the material contribution test could be utilized:

First, 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; for example, current limits of scientific knowledge. Second, 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 that form of injury. In other words, the plaintiff’s injury must fall within the ambit of the risk created by the defendant’s breach. In those exceptional cases where these two requirements are satisfied, liability may be imposed, even though the “but for” test is not satisfied, because it would offend basic notion of fairness and justice to deny liability by applying a “but for” approach.³⁶

³³ *Hanke v. Resurfice Corp.* [2006] 380 A.R. 216 (C.A.) at para. 14

³⁴ *Ibid.* at para. 21

³⁵ *Ibid.* at para. 23

³⁶ *Ibid.* at para. 25

The Court then gave two examples of where the exception to the but for test should be permitted. First are the multiple cause cases where it is impossible to say which of the tortious sources caused the injury, such *Cook v. Lewis*. However, the Court cautioned that it must first be established that each of the defendants negligently created an unreasonable risk of the type of injury that the plaintiff in fact suffered.³⁷

A second example of the exceptional case exemption is 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. Thus, in the *Walker Estate* case where it was impossible to prove that the donor whose tainted blood infected the plaintiff would not have given blood if the defendant had properly warned him against donating blood. The impossibility of establishing causation and the element of injury-related created risk created by the defendant were central.³⁸ In the end result, since the Court of Appeal failed to apply the basic causation test, the but for test, it erred in applying the material contribution test when it was not necessary or justified. The Court allowed the appeal and restored the trial judge’s judgment.

The Policy Considerations underlying the Hanke case

A technical analysis of court decisions can only predict future verdicts with sub-optimal success. In order to better understand jurisprudential trends, one must consider the policy rationales underlying judges’ verdicts. The Supreme Court’s decision in *Hanke* was certainly motivated by several policy considerations.

³⁷ *Ibid.* at para. 27

³⁸ *Ibid.* at para. 28

The first consideration was to simplify the law of causation in order to reduce unnecessary litigation and provide more consistent verdicts while maintaining fairness for both plaintiffs and defendants. This aim is clear from the Chief Justice's lament in *Hanke* where she wrote "[m]uch judicial and academic ink has been spilled over the proper test for causation in cases of negligence. It is neither necessary nor helpful to catalogue the various debates."³⁹

A second, more intrinsic, policy rationale influencing the Court's decision might very well have been the recognition that Mr. Hanke was entitled to workers' insurance benefits.⁴⁰ Although the Supreme Court never acknowledged these benefits in its decision, the Court must have been aware of the fact that the plaintiff had access to other sources of compensation.

Finally, the *Hanke* case recognized the increasingly complex tort and environmental cases being brought in our courts. This was alluded to by Justice Sopinka in *Snell* where he referred to the challenges posed by non-traumatic injuries from man-made diseases resulting from the widespread diffusion of chemical products and product liability cases stemming from internationally manufactured and widely marketed goods. It may well be that the traditional but for test, developed in more simple times, may not be able to meet the challenges of modern commerce.

³⁹ *Ibid.* at para. 20

⁴⁰ *Supra* note 32 at para. 1

Despite the Court's attempts to "put the genie back in the bottle" and elevate the "but for" test to its original primacy, it is clear that the "material contribution" test is alive but restricted to extraordinary situations. How the courts will handle this "gate keeping" function remains to be seen. In two recent medical malpractice cases, *Barker v. Montford Hospital*⁴¹ and in *Seattle (Guardian ad Litem of) v. Purvis*⁴² the courts declined to apply the material contribution test.

Conclusion

It has now been 50 years since the decision of the House of Lords in the *Bonnington Castings*. It has been a long voyage and, as we have seen, the courts have exhibited substantial fluctuations in how the law of causation should be approached. Although the traditional "but for" test has regained its primacy, the material contribution test is alive although somewhat truncated for the time being. The elasticity of the "impossibility" exception as outlined in *Hanke*, coupled with a future case involving a sympathetic plaintiff or complex scientific or environmental facts, means that the material contribution test will see a revival.

It is also clear that the Supreme Court of Canada will have to revisit the material contribution test at some point to give further shape to several of the vague elements of this test. For example, what does "more than *de minimus*" mean? Much more ink will be spilled before these issues are resolved. The genie is indeed back in the bottle, but for how long?

⁴¹ [2007] O.J. No. 1417 (C.A.)

⁴² [2007] B.C.J. No. 1401 (C.A.)