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CAUSATION IN CANADA IN THE THIRD MILLENNIUM: NOTHING *IS* NOW ENOUGH

SCRAPING THE SURFACE: THE CONSEQUENCES OF RESURFICE CORP. V HANKE, 2007 SCC 7

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This article is an on-going analysis of the current state of Canadian law on factual causation, primarily in tort, as a result of the Supreme Court of Canada decision in *Resurfice* Corp. *v Hanke*, [2007] 1 S.C.R. 333, 2007 SCC 7, released February 8, 2007.

The judicial jurisprudential morass is getting worse. There is no doubt that it was the Supreme Court's intent in *Resurfice* to begin to clarify some aspects of causation jurisprudence. There should be no doubt that it failed. The caldron which had begun to bubble in 1990 with *Snell v. Farell*, and to roil in 1996 with *Athey v. Leonati*, but then seemed to have been tamped by a string of subsequent provincial appellate and Supreme Court decisions, boiled over with the addition of *Resurfice*.

It will soon be one and one-half years since the release of the *Resurfice* reasons. The debates within the Canadian legal community over the proper test for causation in negligence, specifically, and tort, broadly, continue unabated. The topic is a recurring theme, or nightmare, at continuing legal education conferences. Even more judicial, academic, academic-manqué, and practitioner ink has been spilled in public forms and forums. More will be spilled in the future. To date, none of that ink comes from the Supreme Court, except the limited amount required to dismiss applications for leave to appeal.

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* Email: david.cheifetz@rogers.com. I have greatly benefitted from and continue to benefit greatly from ongoing discussions with Professors Lewis Klar, Vaughan Black, and Russell Brown, and from discussions with and among other members of the online Obligations Discussion Group. As ever, all mistakes are mine. Copyright © 2007, 2008, 2012 David Cheifetz. All rights reserved. Permission is hereby granted to copy for noncommercial use, and court use, as long as appropriate citation is made to this publication.

Regardless of what the Supreme Court intended, it is, bluntly, wrong for anyone to claim that *Resurfice*, in fact, clarified anything that needed clarification. It is, more bluntly, wrong for anyone to claim that *Resurfice* did not change anything about the Canadian common law governing causation in, at least, tort. And, even more bluntly, it is even more wrong for any Canadian judge or lawyer to continue to assert that tort liability *always* requires that the plainitiff show that the defendant's tortious conduct *caused the plaintiff's injury*.

The duties of the Supreme Court of Canada are set out in the *Supreme Court Act*, s. 3. Part of those duties is the "better administration of the laws of Canada". The Supreme Court has failed, if not forgotten about, its duty to this part of Canadian law, the Canadian legal system, and Canada. In 1623, John Donne wrote in Meditations XVII: "Never send to know for whom the bell tolls; it tolls for thee." The causation bell has been tolling for the Supreme Court for almost 20 years. The Court has yet to answer, adequately.

Significant changes: The Table of Contents has "new", "revised**"** or "updated" where there are significant revisions since the last posted version. "Updated" means I have added a decision and commentary. "Revised" might mean a new decision but need not. Minor changes that do not affect substance are not noted. The article has bookmarks to ease the use of the electronic version of the article. Clicking on section headings will take you back and forth between the section headings and the table of contents. **There are significant additions to portions of the paper to deal since the last posted version: rev. 3, dated February 2, 2008.**

Do not assume that the posted version necessarily has the most recent law. I am attempting to keep this article as current as is reasonably practicable, for me, but I no longer post revisions on a daily or even weekly basis. My practice, now, is to post a revision when there is an important new decision or other development, or I have changed my opinion on something written in the current posted version. There is no schedule for revisions apart from that. The posted article has a version number at the top left and a date at the top right. If the date differs from the version you have, I have made changes to the text of the posted version even if the version number has not changed. The posted version will always have the substance of my current analysis on the particular point. You can easily find if there are new cases that are not in the article by checking on CanLII or any of the subscription services. I attempt to check CanLII on a Monday-to-Friday basis. CanLII is extremely current; however, there is usually a gap of a few days before the decisions posted to the various Canadian courts' official web-sites appear on CanLII.

The article has sections for each Canadian jurisdiction in which, to my knowledge, judges have considered the issues since the release of *Resurfice*. Cases which merely include *Resurfice* in a list of citations, with or without a quotation, or refer to *Resurfice* on some issue other than causation, are in the case list, only, if mentioned at all. Please advise me of any significant decision which I have missed. My search parameters are outlined at the end of the article.

I am aware of three articles about the consequences of *Resurfice* in Canadian law reviews. The most recent is Professor Russell Brown's (Faculty of Law, University of Alberta) "Material Contribution's Expanding Hegemony: Factual Causation after *Resurfice Corp. v. Hanke*" (2007), 45 Can. Bus. L. J. 432. *Hegemony* is an in-depth examination. *Hegemony* contains a trenchant summary of the core consequence *of Resurfice*: "*if the plaintiff's only obstacle to recovery is causation, then causation is no obstacle*". Professor Brown's point isn't that *Resurfice* has clarified any uncertainties in causation jurisprudence; unless, by "clarification", one means eliminating any need for causation. I recommend that all active members of the Canadian legal profession immediately get a copy of *Hegemony* and read it. The second article was jointly written with Professor Vaughan Black of Dalhousie Law School: Black and Cheifetz, "Through the Looking Glass, Darkly: *Resurfice Corp. v. Hanke*" (2007), 45 Alta. L. Rev. 241. "Looking Glass" is the sequel to the third article which is a joint comment with Professor Black on *Resurfice* in the Alberta Court of Appeal: "Material Contribution and Quantum Uncertainty: *Hanke v. Resurfice Corp.*" (2007), 43 Can. Bus. L. J. 155. In addition, Professor Lara Khoury's (Faculty of Law, McGill University) "Causation and Risk in the Highest Courts of Canada, England and France" (2008), 124 L.Q.R. 103 is a comparative review which touches briefly on *Resurfice*.[a]

It is perhaps poignant that in their text released in mid-2007, in words probably written in 2006 before the release of *Resurfice*, Justice Ellen Picard and Professor Gerald Robertson wrote in *Legal Liability of Doctors and Hospitals in Canada* (4th): "Given that negligence is usually defined as the creation of an unreasonable risk of injury, it is arguable that the *McGhee* test would be satisfied in every case (once negligence and injury had been established" and "in light of these decisions, it is likely that the Supreme Court of Canada will have to revisit its interpretation that *McGhee* does not create any new principle of law and illustrates only a robust inference from established facts." Justice Picard and Professor Robertson were writing about the consequences of the House of Lords decision in *Fairchild v. Glenhaven Funeral Services Ltd.*, [2002] UKHL 22, [2002] 3 All E.R. 305.

Anybody with the inclination can easily find a significant amount of significant recent and not-so-recent scholarship on causation. At least some of the material has been written by people even Canadian judges and practitioners should listen to. I have written some material. Others have written more. I am not going to claim the judges should listen to me. I do assert that our judges should have and still should listen to the others. If you are going read only one current article on the subject, read Professor Brown's. If you are inclined to read more about *Resurfice* and its consequences, the two case comments that I wrote jointly with Professor Black are brief enough. If you want more, The Continuing Legal Educations Society of British Columbia has sponsored a conference dealing with

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[a] *Resurfice* appeared too late for a full discussion: 124 L.Q.R. 103 at 108, fn. 27. Professor Khoury wrote: "This decision … is open to criticism since it confuses the concepts of material contribution to the injury and material increase of risk … as well as the notions of cumulative and alternative causation" (124 L.Q.R. 103 at 108, fn 27) and that it is "now unclear what the position of the highest Canadian court is with regard to findings of causation based solely on negligently increased risk in the face of causal uncertainty" (124 L.Q.R. 103 at 108).

causation after *Resurfice*. Details are available on the CLEBC website: www.cle.bc.ca/Pdfs/CausationTortAfterResurfice.pdf.

The URL for this article is: www.bbburn.com/articles/Resurfice_status.pdf. Updates will appear as required.* They will be available from the Bennett Best Burn LLP web site at www.bbburn.com. The current posted version of the article will always be available by clicking on the link,** by cutting and pasting the URL into your browser, or however else you get to the web site. *SEPT 24, 2012 - NO UPDATES EVER POSTED

You are free to quote from and refer to this article, provided you attribute blame appropriately. Please include both the date and version number. If you intend to use "Scraping" in court or to refer to it in an article to be published in a reputable law journal, then please contact me by e-mail to find out if there is newer version on the horizon.

This article is written on the assumption that readers are acquainted with the basic principles of factual causation and legal causation. Although it is impossible to avoid some discussion of the basics, the article is not intended to be an analysis, from first principles, of the meaning of factual causation within and without law. Also, the article is written as if I were using it as the basis for a lecture. The tone is conversational and, in places, irreverent. Feel free to invite me to give the lecture. I might accept.

David Cheifetz July 29, 2008

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Summary

Causation, in some sense, is a requirement in all civil actions in which a plaintiff seeks compensation for injury from a defendant. The action must fail if the plaintiff is not able to satisfy the causation requirement.

Snell v. Farrell held: "[c]ausation 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."[1] Before *Resurfice Corp. v. Hanke*,[2] a plaintiff had to show, on the balance of probability, that the wrongful conduct of the particular defendant (or wrongful conduct for which that defendant was vicariously liable[3]) "actually caused the loss complained of."[4] That principle also applied to actions for breach of contract.[5] There were two tests for proof or disproof of the existence of factual causation in tort: the but-for test and the *Athey* material- contribution test.[6]

Resurfice altered that law. *Resurfice* created a different version of a "material contribution" test. Unlike the *Athey* version, the *Resurfice* version *is not* a test for tortious conduct that contributes to the injury. *It is a test for tortious conduct which does nothing more than contribute to the risk of the occurrence of the injury which later occurred*.[7] In *Resurfice*, the Supreme Court of Canada declared that, in certain circumstances, a plaintiff will satisfy the causation requirement by doing no more than establishing, on the balance of probability, that a defendant is at fault and that that fault created the risk of the occurrence of the very injury that the plaintiff suffered.[8] The Supreme Court described

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[1] *Snell v. Farrell*, [1990], 2 S.C.R. 311 at 326 [*Snell*].
[2] 2007 SCC 7, [2007] 1 S.C.R. 333 *[Resurfice]*.
[3] *Bazley v. Curry*, [1999] 2 S.C.R. 534.
[4] *Stewart v. Pettie*, [1995] 1 S.C.R. 131 at para. 60; *Resurfice*, *supra*, footnote 2, at para. 23; *Athey v. Leonati*, [1996] 3 S.C. R. 458 at paras. 13-20 [*Athey*]; *Snell*, *supra*, footnote 1.
[5] *Martel Building Ltd. v. Canada*, [2000], 2 S.C.R.860 at para. 102, 2000 SCC 60. "To be recoverable, a loss must be caused by the contractual breach in question."
[6] *Athey, supra,* footnote 4.
[7] Russell Brown, "Material Contribution's Expanding Hegemony: Factual Causation after *Resurfice Corp. v. Hanke*" (2007), 45 Can. Bus. L. J. 432 at 447 [*Hegemony*]; Vaughan Black and David Cheifetz, "Through the Looking Glass, Darkly: *Resurfice Corp. v. Hanke*" (2007), 45 Alta. L. Rev. 241 at 252 [*Looking Glass*].
[8] *Resurfice*, *supra*, footnote 2, at paras. 24-28. *Resurfice* was a tort action. However, the consequences in practice will be wider because causation, in some sense, is an aspect of all common law causes of action. *Fairchild v. Glenhaven Funeral Services Ltd*., [2002] UKHL 22, [2002] 3 All E.R. 305 and *Barker v Corus (UK) Plc.*, [2006] UKHL 20, [2006] 2 AC 572 esablished the United Kingdom version of this fault-and-risk based material-contribution test. In *Brett v University of Reading*, [2007] EWCA Civ 88 at para. 1, the England Court of Appeal summarized what English law now calls "the *Fairchild* exception": " …. the House of Lords in *Fairchild* … decided that an employer was liable if it had materially and tortiously contributed to the risk of producing the mesothelioma, without need to prove direct causation of the condition. Any unlawful exposure of the employee to airborne asbestos will ordinarily constitute such a contribution if mesothelioma develops." (citation omitted). The Court also wrote, at para. 26: "In a case such as this, *Fairchild* exceptionally relieves a claimant who has proved exposure and breach of duty from having to prove causation. What it does not do is to relieve him from proving the other elements." In

this principle as "a material-contribution test".[9] In *Sam v. Wilson*, the British Columbia Court of Appeal stated that the *Resurfice* material-contribution "principle … is not a test of causation at all; rather, it is a rule of law based on policy."[10]

The Supreme Court did not explain whether the use of the indefinite article "a" rather than "the" means there are other valid versions of a material-contribution test in Canadian tort jurisprudence. It said nothing about the status of the material-contribution test it had established in *Athey*, unless we infer, from the use of "a material-contribution test" in *Resurfice*, that there may be more than one version so that the *Athey* version still exists. The *Athey* version of the material-contribution test is another manner of proving that the tortious conduct is a factual cause of the injury. It was accepted that the *Athey* material-contribution test was easier to satisfy than the but-for test.[11] The general rule was that the *Athey* material-contribution test applied only where the but-for test was unworkable. However, the Supreme Court had indicated that there could be cases where the plaintiff could resort to the more-easily satisfied material-contribution test, even though the but-for test was not unworkable on the facts.[12]

The *Resurfice* test is not applicable to facts to which the but-for test applies.[13] The *Resurfice* material-contribution test applies to claims in tort where two "requirements"[14] are met. (1) The defendant owed a duty of care to the plaintiff, breached that duty, and the type of injury suffered by the plaintiff is of the type that that breach could have caused.[15] (2) It is impossible for the plaintiff to prove that the defendant's negligence caused the plaintiff's injury using the but-for test due to factors that are outside of the plaintiff's control.[16]

According to *Resurfice*, the but-for question now involves asking whether there is a substantial connection between the conduct of the defendant and the injury suffered by injured person.[17] The *Athey* material-contribution test applies where the but-for test is

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Barker, Lord Hoffmann wrote, at para. 1, that the *Fairchild* exception is "an exceptional and less demanding test for the necessary causal link between the defendant's conduct and the damage."

[9] *Resurfice*, *supra*, footnote 2, at para. 24.

[10] 2007 BCCA 622, at para. 109 per Smith J.A.

[11] *Aristorenas v. Comcare Health Services* (2006), 274 D.LR. (4th) 304 at para. 60, 2006 CanLII 33850 (Ont. C.A.), leave to appeal refused 2007 CanLII 10550 (SCC) *[Aristonrenas]*. In *Sam v. Wilson*, 2007 BCCA 622, at para. 109, Smith J.A. described *Athey* material-contribution as a "causal yardstick" and as a synonym for but-for. See also Brown, *Hegemony*, *supra*, footnote 7, at 434, and Black and Cheifetz, *Looking Glass*, , *supra*, footnote 7.

[12] *Walker Estate v. York Finch General Hospital*, [2001] 1 S.C.R. 647, 2001 SCC 23 [*Walker Estate*].

[13] *Resurfice*, *supra*, footnote 2, at para. 25.

[14] *Resurfice*, *supra*, footnote 2, at para. 24.

[15] *Ibid*., at para. 25. This is known as injury falling "within the ambit of the risk".

[16] *Ibid*., at para. 25. I have reversed the order of the requirements because causation is irrelevant absent fault or other breach of obligation owed to the plaintiff. The standard practice in common law courts is to deal with the breach of obligation issue first: see, Lewis Klar, *Tort Law*, 3d ed. (Toronto: Carswell, 2003) at 388-89, footnote 8 [*Tort Law*]. If there is no breach, the trial court does not have to deal with causation. However, in the appropriate case, the court might still decide the causation an damages issues. This might avoid the need for a new trial on these issues in the event the decision on breach of obligation is reversed on appeal.

[17] *Resurfice*, *supra*, footnote 2, at para 23.

unworkable. We do not have a useful explanation of the meaning of "unworkable"[18] Whatever "unworkable" meant, in practice the *Athey* material-contribution test was an easier test for the plaintiff to satisfy than the but-for test.[19] Where the *Athey* test applied, factual causation was established by the plaintiff showing, on the balance of probability, that the tortious conduct "materially contributed to the occurrence of the injury". The tortious conduct materially contributed if it is more than a *de minimis* contributing factor.[20]

In Canadian tort law, that there cannot be tortious fault without conduct that *unreasonably* increases risk. All conduct increases the risk of something. Reasonably increasing risk is not sufficient for the conduct to be held to be wrongful. There will not have been a duty of care, in respect of the injury that actually occurred, unless the injury was of the type whose risk of occurring would be foreseeably increased by the type of tortious conduct in issue. Accordingly, the second criterion for the *Resurfice* material-contribution test will always be satisfied wherever there is a breach of duty.[21] Absent any other defence, and assuming causation, "a negligent defendant in breach of a duty of care to the plaintiff will always be liable for foreseeable damage."[22] As a result, assuming breach of duty – that is, assuming a finding of tortious conduct – the only relevant criterion for the application of the *Resurfice* material-contribution test is the "impossibility of proof of factual causation using but-for" requirement.

The "nothing *is* now enough" subtitle, through the italicized "is", asserts that *Resurfice* has created a new situation in Canada: one where liability may be imposed on defendant(s) in the absence of factual causation. Tortious conduct (fault) may be enough. The *Resurfice* material-contribution test allows one or more defendants to be held liable even though, in fact, it is not possible to show that the plaintiff's injury was probably caused by *any* defendant, or even by anybody's tortious conduct. In this respect, the consequences of the *Resurfice* material-contribution test differ from both *Cook v. Lewis*[23] and *Hollis v. Dow Corning Corp.*[24] The necessary premise in both is that the injury was actually caused by at least one of the defendants. The reverse-onus rule in *Cook* applies only where the plaintiff's injury was actually caused by the conduct one or the other of the defendants. The only issue is which one. In the *Hollis* learned-intermediary situation, the injury was actually caused by the use of the manufacturer's product. However, the

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[18] Brown, *Hegemony*, *supra*, footnote 7, at 434-38, Ken Cooper Stephenson "Justice in Saskatchewan Robes: The Bayda Tort Legacy" (2007), 70 Sask. L. Rev. 269 at 303 ("there is nowhere ... any sensible description of what is meant by 'material contribution'"). See also David Cheifetz, "The Snell Inference And Material Contribution: Defining The Indefinable And Hunting The Causative Snark – A Not Excessively Subtle and Theoretical Examination of Proof of Factual Causation in Canadian Tort Law" (2005), 30 Adv. Q. 1 at 103 ("the content of the material contribution doctrine has all of the substance of gossamer … and a thimble is all we need to contain it.")

[19] *Aristorenas*, *supra*, footnote 11, at para. 60.

[20] *Athey*, *supra*, footnote 4, at paras. 13-16.

[21] Brown, *Hegemony*, *supra*, footnote 7, at 449; Black and Cheifetz, *Looking Glass*, *supra*, footnote 7, at 247; Klar, *Tort Law*, supra, footnote 22, at 581.

[22] Brown, *Hegemony*, *supra*, footnote 7, at 445.

[23] [1951] S.C.R. 830.

[24] [1995] 4 S.C.R. 634.

manufacturer is precluded from establishing that its negligence did not make a legal difference, even if it did not.

The *Resurfice* material-contribution test was not announced so that the Supreme Court could apply that test to the facts of *Resurfice*, in order to decide the appeal. It was not required and not applied. The *Resurfice* material-contribution test is a statement of judicial policy with no stated Canadian antecedents and no explanation for its existence other than the Supreme Court's assertion that it is required by "basic notions of fairness and justice".[25] The *Resurfice* material-contribution test is not an incremental change in Canadian common law tort jurisprudence. However, rather than explaining why it was revising some 400 years of causation jurisprudence, the Supreme Court chose to advise the profession that "[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. It suffices at this juncture to simply assert the general principles that emerge from the cases."[26] The *Resurfice* material-contribution test does not assert any general principles that emerge from any Canadian cases, common law or civil law. *Resurfice* does not tell us what other cases the Supreme Court might have had in mind. It is inconsistent with recent, prior, Supreme Court of Canada decisions pronounced by the majority of the judges who composed the *Resurfice* panel.

It is not clear that there are currently any principled limits on the reach of the *Resurfice* material-contribution test. "*Resurfice* appears to represent the evolution of "material contribution" in causation into a generic and comprehensive alternative to the traditional but-for test, applicable to all cases where the plaintiff cannot demonstrate probable cause under the but-for test."[27] "[I]f the plaintiff's only obstacle to recovery is causation, then causation is no obstacle".[28] If fault is not an issue, and causation is not an issue, the only remaining issue is damages.

In the *Resurfice* version of the material-contribution test,[29] which is stated to apply only in "exceptional cases"[30] or "special circumstances"[31] liability may be "imposed"[32] on the basis of fault and the creation of risk, "even though the 'but for' test is not satisfied".[33] The stated justification is that "it would offend basic notions of fairness and justice to deny liability by applying a "but for" approach."[34] The facts of *Resurfice* do not provide a context for any discussion of the scope of the new version of the test. The "exceptional cases"[35] and "special circumstances"[36] labels used in *Resurfice*

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[25] *Resurfice*, *supra*, footnote 2, para. 25.
[26] *Resurfice*, *supra*, footnote 2, para. 20.
[27] Brown, *Hegemony*, *supra*, footnote 7, at 433.
[28] Brown, *Hegemony*, *supra*, footnote 7, at 445.
[29] So labelled by the court without saying anything about the status of the *Athey* material-contribution test.
[30] *Resurfice*, *supra*, footnote 2, at para. 25
[31] *Ibid*., at para. 24.
[32] *Ibid*., at para. 25.
[33] *Ibid*., at para. 25.
[34] *Ibid*., at para. 25.
[35] *Resurfice*, *supra*, footnote 2, para. 25.

are devoid of useful content. The "impossibility" requirement only appears to restrict the test to the rarest of situations. The Supreme Court wrote: "[t]he impossibility must be due to factors that are outside of the plaintiff's control; for example, current limits of scientific knowledge."[37] However, the use of "for example" suggests that "current limits of scientific knowledge" is *not* a necessary pre-condition. In addition, the two examples that court gave are not, in fact, cases that necessarily have gaps in the evidence due to any issue involving the limits of scientific knowledge.[38]

It is necessarily implicit in the second of the *Resurfice* material-contribution prerequisites – fault and injury within the ambit of the risk – that the tortious conduct be capable of causing the injury complained of. The injury would not, otherwise, be within the ambit of the risk. There could not be a duty of care in respect of injury which could not possibly be caused by the defendant's conduct. However, this possibility of factual causation does not eliminate the competing possibility of no factual causation. *Resurfice* says nothing about the situation where the possibility that the injury was not actually caused by a defendant's tortious conduct is at least equal to or greater in some relevant quantitative or qualitative sense than the possibility it was actually caused. In fact, *Resurfice* says nothing about any quantitative or qualitative threshold for sufficient possibility.

Where there is more than one potential wrongdoer, the injury in respect of which the *Resurfice* material-contribution test is invoked will always be the same injury. That creates two issues. The first is the nature of the liability as between the injured person and the wrongdoers: solidary (joint) or proportional (several). The second is the issue of contribution between the wrongdoers, if their liability to the injured person is solidary. *Resurfice* says nothing about these issues, either.

Causation is also an issue in damages assessment. Future damages are assessed on possibility, not probability.[39] In addition, there is a distinction between causation of injury and causation of the losses that are the consequences of the injury.[40]

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[36] *Ibid*., para. 24.
[37] *Ibid*., para. 25.
[38] David Cheifetz, "*Risk As Legal Causation: Causation In Tort In Canadian Common Law After Resurfice Corp. v. Hanke*" (Law Society of Upper Canada Special Lectures, April 2008)
[39] *Athey*, *supra*, footnote 4, at para. 27.
[40] "It is important to distinguish between causation as the source of the loss and the rules of damage assessment in tort": *Blackwater v. Plint,* [2005] 3 S.C.R. 3 at para. 78, 2005 SCC 58.

I. Introduction: What Is Legal Factual Causation?

Friends, lawyers and judges:
I come to bury *Resurfice* not praise it.
The good that this case did will live after it,
But only if the harm is interred with its bones.[41]

There are some courts of last resort,
Which sometimes furl my forehead.
When they are good,
They are very very good.
But when they are bad, they are horrid.[42]

"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." *Snell v. Farrell,* [1990] 2 S.C.R. 311 at 326.

The ability to pay "is not an appropriate basis for the determination of tort liability between litigating parties." *Dobson v. Dobson*, [1999] 2 S.C.R. 753 at para. 74.

"[I]f the plaintiff's only obstacle to recovery is causation, then causation is no obstacle". Russell Brown, "Material Contribution's Expanding Hegemony: Factual Causation after *Resurfice Corp. v. Hanke*" (2008), 45 Can. Bus. L. J. 432 at 445.

"There is therefore no uniform causal requirement for liability in tort. Instead, there are varying causal requirements, depending upon the basis and purpose of liability. One cannot separate questions of liability from questions of causation. They are inextricably connected. One is never simply liable; one is always liable *for* something and the rules which determine what one is liable for are as much part of the substantive law as the rules which determine which acts give rise to liability. It is often said that causation is a question of fact. So it is, but so is the question of liability. Liability involves applying the rules which determine whether an act is tortious to the facts of the case. Likewise, the question of causation is decided by applying the rules which lay down the causal requirements for that form of liability to the facts of the case." *Kuwait Airways Corporation v. Iraqi Airways Co*., [2002] UKHL19 at para. 128 per Lord Hoffmann.

There is nothing special or mysterious about the law of causation. One decides, as matter of law, what causal connection the law requires and then one decides, as a question of fact, whether the claimant has satisfied the requirements of the law. There is, in my opinion, nothing more to be said. Lord Hoffmann, "Causation" (2005), 121 L.Q.R. 592 at 603 (Blackstone Lectures, 2005).

"[A] case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all." *Quinn v. Leathem*, [1901] A.C. 495 at 506 (H.L.)

Causation is "essentially a practical question of fact which can best be answered by ordinary common sense rather than abstract metaphysical theory." *Alphacell Ltd. v. Woodward*, [1972] 2 All E.R. 475 at 490 (H.L.).

"[L]aw's view of causation is less concerned with logical and philosophical considerations than with the need to produce a just result to the parties involved." *Birkholz v. RJ Gilbertson Pty Ltd.* (1985), 38 SASR 121 at 130 (South Australia S.C.).

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[41] Antony was dissembling. I am not.
[42] Anonymous. Judges have senses of humour and like good poetry, right?

Legal certainty is not scientific certainty. *Snell v. Farrell*, [1990] 2 S.C.R. 311 at 328.

"The traditional approach to causation has come under attack in a number of cases in which there is concern that due to the complexities of proof, the probable victim of tortious conduct will be deprived of relief." *Snell v. Farrell* [1990] 2 S.C.R. 311 at 320.

Some people "perceive" that the current principles of factual causation are depriving injured people of compensation they ought to obtain. "I would suggest that it is because too often the traditional 'but-for', all-or-nothing, test denies recovery where our instinctive sense of justice — of what is the right result for the situation — tells us the victim should obtain some compensation." Hon. B. McLachlin, "Negligence Law — Proving the Connection" in Mullany and Linden, eds., *Torts Tomorrow, A Tribute to John Fleming* (Sydney, LBC Information Services, 1998), at 16.

"Close don't count in baseball. Close only counts in horseshoes and grenades.[43]

"Goo goo g'joob." "I Am The Walrus", John Lennon (Lennon and McCartney) (1967)

Propositions For Legal Factual Causation In Tort After *Resurfice*

I believe that the extent of the current morass is archly captured in this article's title: "Nothing *Is* Now Enough". It is better captured in Professor Brown's witty summary of the consequences of *Resurfice* in his recent article "Material Contribution's Expanding Hegemony: Factual Causation after *Resurfice Corp. v. Hanke*". "In short, if the plaintiff's only obstacle to recovery is causation, then causation is no obstacle: a negligent defendant in breach of a duty of care to the plaintiff will always be liable for foreseeable damage."[44]

Most of this article is descriptive of what judges have said the law on factual causation now is, with commentary about some of the problems in those assertions. However, this section contains, in the list of propositions, a limited attempt to extract or create out of the morass – create, because once again what is here might require us to ignore what some cases actually say – some statements of the law that are coherent enough to be useful. In most cases, most of these propositions will be wrapped up in one or the other of the few propositions that matter, and there will be no issue that triggers any need to consider many of them; or, if there is an issue, the answer is clear on the facts of the case.

Finally, this is not an article about the meaning of cause outside of law, in general,

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[43] Mindless Crap (accessed September 30, 2007) states the original version first appeared in baseball in the mid 1930s. The quoted version is credited to baseball's Frank Robinson by *Thinkexist.com* (accessed Sept 30, 2007). Wikipedia (accessed Sept 30, 2007) states: "In horseshoes, there are two ways to score: by throwing 'ringers,' or by throwing the horseshoe nearest to the opposite stake. This scoring system gives rise to the popular expression 'Close only counts in horseshoes, hand grenades, slow dancing and nuclear war'." The material-contribution test is not the equivalent of horseshoes or slow-dancing; although its successful use might result in some more endorphins for some people, or at least an endorphin-like effect.

[44] (2007), 45 Can. Bus. L. J. 432 at 445.

or about the meaning of cause to science. The literature on that subject is enormous. The words used to express these propositions will usually be mine, but the content is not.[45]

1. Factual causation is a scientific statement about a sufficient historical relationship between a factor (an event or condition) and a subsequent state (an event or condition).[46] Where that sufficient relationship exists, the antecedent factor event is a historical cause of the subsequent state.[47]

2. *Legal* factual causation is a conclusion of law that a particular state is a probable (more likely than not) consequence of one or more antecedent factors.[48]

3. Status as a historical cause is not necessarily sufficient to make an antecedent factor a legal factual cause.

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[45] The online Stanford Encyclopedia of Philosophy contains a series of reasonably brief articles about causation. A useful overview, for lawyers, of the meaning of cause both inside and outside of law is Honoré, Antony, "Causation in the Law", *The Stanford Encyclopedia of Philosophy (Winter 2005 Edition)*, Edward N. Zalta (ed.), URL = < http://plato.stanford.edu/archives/win2005/entries/causation-law/ >. Essentially, a cause is either an empirical or metaphysical statement about the nature of the relationship, if any, between prior and subsequent events or conditions. In the Stanford article, Honoré,describes one view of the definition of cause as an explanatory statement about "which earlier conditions best account for some later event or state of affairs". There is a list of readings at the end of this Stanford article. Valuable works for Canadian lawyers interested in acquiring a better understanding of the philosophical issues, in addition to what is in the leading Canadian tort texts, include (listed in alphabetical order): Allan Beever , Rediscovering The Law of Negligence (Oxford, Hart Publishing, 2007) and Beever, "Cause-In-Fact: Two Steps out of the Mire" (2001), 51 U.T.L.J. 327, available online through JSTOR, H.L.A. Hart & T. Honoré, Causation in The Law, 2d ed. (Oxford, Oxford University Press, 1985); R. Fumerton and K. Kress, "Causation And The Law: Preemption, Lawful Sufficiency And Causal Sufficiency" (2001), 64 Law & Contemp. Prob. 83 (< http://www.law.duke.edu/journals/64LCPFumerton >); Jane Stapleton, "Occam's Razor Reveals an Orthodox Basis for *Chester v. Afshar* (2006), 122 Law Quarterly Review 426; Stapleton, "Cause-in-Fact and the Scope of Liability for Consequences" (2003), 119 Law Quarterly Review 388, Stapleton, "Legal Cause: Cause-in-Fact and the Scope of Liability for Consequences" (2001), 54 Vand. L. Rev. 941, Stapleton, "Lords a'Leaping Evidentiary Gaps" (2002), 10 Torts Law Journal 276, Stapleton, Unpacking Causation', in Relating to Responsibility, P. Cane and J. Gardner (eds), Oxford, Portland, OR: Hart Publishing, 2001, pp. 145-185 and, Stapleton, "Perspectives on Causation" in Oxford Essays in Jurisprudence, 4th Series, ed. J. Horder, 2000 ; Ernest J. Weinrib, The Idea of Private Law (Boston, Harvard Press, 1995), E. J. Weinrib, "E. J. Weinrib, "A Step Forward in Factual Causation" (1975) 38 Mod. Law Rev. 518; Richard W. Wright, "Possible Wrongs" (forthcoming 2008 Fordham Law Review); Wright, "'Once More into the Bramble Bush: Duty, Causal Contribution and the Extent of Legal Responsibility" (2001), 54 Vand. L. Rev. 1071 [Wright, *Bramble Bush II*]; Wright, "Causation, Responsibility, Risk, Probability, Naked Statistics, and Proof: Pruning the Bramble Bush by Clarifying the Concepts" (1988) 73 Iowa L. Rev.1001 [Wright, *Bramble Bush I*]; Wright, "Causation in Tort law" (1985), 73 California Law Review 1737 [Wright, *Causation*]; and, Wright, 'Actual Causation vs. Probabilistic Linkage; The Bane of Economic Analysis' (1985), 14 Journal of Legal Studies 435 [Wright, *Actual Causation*]. Professor Wrights's articles are online: < http://works.bepress.com/richard_wright/ >. For more articles by others, see also, (2001), 64 Law and Contemporary Problems, special issue on Law and Causation in Science, John M. Conley (ed.).

[46] The European tort law term for factual causation is "natural causation". See, *Digest of European Tort Law*: *Essential Cases on Natural Causation*, B. Winger H. Koziol, B. A. Koch, R. Zimmerman (eds.) vol. 1, 2007.

[47] Hart & Honoré, Causation in The Law (2d) at ____ , Wright, *Causation,* at _____

[48] Hart & Honoré, Causation in The Law (2d) at ____ , Wright, *Causation,* at _____

4. An antecedent factor cannot be a legal factual cause unless (a) it is a historical cause or (b) is a capable of satisfying the requirements for historical cause. The assertion that an antecedent factor is capable of satisfying the requirements for historical cause necessarily implies that a possibility exists that the factor can satisfy the requirements.

5. Canadian tort law has two tests for legal causation. The but-for test is the test for the existence of a relationship between antecedent factor and subsequent state that is capable of satisfying the requirements for legal factual causation. The *Resurfice* material-contribution test[49] is the test for the existence of a relationship capable of satisfying the test for legal causation, even though there is no relationship which satisfies the requirements for legal factual causation. The but-for and material-contribution tests are, currently, the only tests recognized by Canadian jurisprudence for proof of legal causation in its common law jurisdictions.

6. Legal causation is a prerequisite for liability in tort.[50] However, legal causation is not equivalent to legal factual causation. There can be legal causation without legal factual causation.[51]

7. No relationship is capable of satisfying the requirements of legal causation unless there is a possibility that that relationship could satisfy the requirements for legal factual causation in a particular situation, notwithstanding that it not does not, in fact, satisfy the requirements for legal factual causation in that situation.

8. Legal factual causation may be actual or deemed.

9. The but-for test produces a finding of actual cause or deemed actual cause.[52]

10. "Factual causation" and "factual cause" are terms which include both varieties of actual cause.

11. "Actual cause" describes the situation where the conclusion of the legal causation inquiry is that the relevant antecedent factors are a probable (more likely than not) cause of the condition.

12. "Deemed actual cause" describes the situation where an applicable rule of law requires the court to determine the factual causation question on a set of facts that are necessarily or probably different from what actually happened, or probably would have happened, under an objective but-for counterfactual analysis. For

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[49] "Material-contribution test" or "material contribution" always refer to the *Resurfice* usage unless the context indicates otherwise.

[50] *Snell* (legal factual causation), *Athey* (legal factual causation), *Resurfice* (legal causation)

[51] The *Resurfice* material-contribution test does not apply where the but-for test applies.

[52] See proposition 12 and its footnote [___] for the meaning of "deemed actual cause".

example, a rule of law might prevent a person from adducing evidence which would establish that the person's conduct was probably not an actual cause. [53]

13. The but-for and material contribution-tests are mutually exclusive. The material-contribution test applies where the but-for test does not and *only* where the but-for test does not.

14. The but-for test is the primary and the default test.

15. The but-for test tests for the existence of a probable connection between the conduct of the defendant and the harm suffered by the plaintiff.[54] "Conduct" includes both commission (action) and omission (failure to act).

16. Where the but-for test is satisfied, the conclusion is that an antecedent factor is a probable cause of subsequent state.

17. Factual causation established under the but-for test is a conclusion that the conduct of *the* defendant is a factual cause of the harm sustained by *the* plaintiff.

18. There may be more than one factual cause for harm. More than one of those factual causes may be legal causes of that harm. It is not necessary that all of the factual causes be legal causes.

19. In order for any factual cause to be a legal cause of some harm, it must be held to be made a relevant difference, in law, to the existence of that harm. Thus, there are factual causes which are not legal factual causes.

20. In order for any antecedent factor to be considered part of the basis for a finding of legal causation so as to justify the imposition of liability on a defendant, the factor must be held to have made a relevant difference, in law, to the existence of that harm. Where the test for legal causation is the material-contribution test, the

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[53] "Deemed actual causation" exists because of cases such as *Hollis v. Dow Corning Corp*., [1995] 4 S.C.R. 634 and *Cook v. Lewis*, [1951] S.C.R. 830, 1951 CanLII 1. Where *Hollis* applies, it bars a defendant from establishing the counterfactual. *Hollis* bars a defendant from proving that the defendant's conduct probably did not cause the harm – from establishing that the defendant's conduct probably did not make a difference – even if that is probably what would have happened.. Essentially, what *Hollis* does is deem possibility to be probability. It does so because it is impossible to say with 100% certainty that proper conduct by the defendant would or would not have made a difference. So, the consequences of *Hollis* could be described as "deemed" actual causation. *Cook v. Lewis* is an example of a different type of deemed actual causation, notwithstanding that *Resurfice Corp. v Hanke*, [2007] 1 S.C.R. 333, 2007 SCC 7 has declared *Cook* to be an example of facts invoking the new material-contribution test. However, if we assume that *Resurfice* is wrong about its description of *Cook*, then the *Cook* situation is an example of deemed actual causation, if both hunters are held liable. We know that one of the two hunters in *Cook* did not shoot the victim.

[54] For the reasons set out in footnote ___ (the note to proposition 12), *Hollis v. Dow Corning Corp.* and *Cook v. Lewis* (as it was understood before *Resurfice*) produce what I call "deemed" actual (or factual" causation.

relevant difference is the possibility that the antecedent factor made a difference to the existence of the harm. As a result, the material-contribution test requires only the possibility of a relevant connection (which by definition is less than a probable connection) between the conduct of *the* defendant, or conduct of another for which the defendant is held responsible, and the harm suffered by *the* plaintiff. It is a necessarily implicit in this use of "possible" that material-contribution requires evidence that the conduct *could be a probable cause* of that type of harm to *a* person in the plaintiff's position.

21. The *Resurfice* material-contribution test is a test for the existence of a relationship which will satisfy the requirements for legal causation in the absence of a finding of factual causation. The material-contribution test identifies instances where liability may be imposed, even though factual causation *may not or even does not exist*, so long as there is a possibility that conduct for which the defendant is being held liable could have satisfied the requirements for legal factual cause.[55]

22. The material-contribution test does not produce a finding of actual cause or deemed actual cause. The legal relationship between conduct and harm established under the material-contribution test is *not* a conclusion that the conduct of *the* defendant was a legal factual cause of the harm sustained by *the* plaintiff. It is a conclusion that a relationship between conduct and harm exists that is sufficient to just the use of that relationship as a part of the basis for a conclusion that a defendant is liable to a plaintiff for harm sustained by that plaintiff. It is a conclusion that the defendant's conduct may be *deemed to be* a legal cause (even if it is not a legal factual cause) of the plaintiff's harm so that the plaintiff's action does not fail on a causation basis as against that defendant, for torts containing a causation requirement in respect of that defendant.

23. At least in causes of action based on negligence, the but-for test does not apply when (i) it is impossible, for reasons outside of *the* plaintiff's (injured person's) control, to establish factual causation on a probability basis using the but-for test and (ii) the harm that materialized was within the in-advance (*ex ante*) foreseeable ambit of risk of the wrongdoer's conduct.

24. There is nothing in *Resurfice* that suggests or requires the conclusion that the *Resurfice* material-contribution test does not apply to intentional or strict liability torts. An argument could be made that the justification for applying possibilistic causation is greater where the wrongdoer intended to injure.

25. It is probable that the *Athey v. Leonati*[56] material-contribution test, whatever that

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[55] Again, we know that one of the two hunters in *Cook v. Lewis* did not shoot the victim. We will continue to know that even if both hunters are held liable. We believe, based on current medical knowledge, that only one of the three possible sources of asbestos in *Fairchild v. Glenhaven Funeral Services Ltd*., [2002] UKHL 22, [2002] 3 All E.R. 305 was the source of the asbestos fibre(s) that caused the mesothelioma.

[56] [1996] 3 S.C.R. 458.

test meant, is no longer good law.[57].

26. The *Snell v. Farrell* explanation of how the but-for test is to be applied – the robust and pragmatic, common sense, inference, approach – is still good law.[58]

27. There may be more than one version of the but-for test. In this proposition, "version" means that there may be qualifications on what the plaintiff has to establish to satisfy the but-for -test, or the what the defendant may argue to prevent the but-for conclusion that the impugned conduct amounts to a but-for cause.

28. It is not clear whether the *Cook v. Lewis* reverse-onus variation of the but-for test is still good law. This becomes more significant if liability under the possibilistic *Resurfice* material-contribution test is proportional liability rather than solidary (*in solidum*) liability.

29. It is not clear whether the *Hollis v. Dow Corning* learned-intermediary variation of the but-for test is still good law. There is nothing in *Resurfice* that necessarily affects the status of the *Hollis* learned-intermediary rule. Where it applies, *Hollis* prevents a defendant from denying that the defendant's conduct is a factual cause.

30. *Hollis* is capable of applying to facts that invoke the *Resurfice* material-contribution test, rather than the but-for test. In addition, the fact-pattern that resulted in *Hollis* is capable of being analyzed as a pattern that invokes the material-contribution test rather than the but-for test. The rationale used by the majority supports an argument that Hollis might be handled as a material-contribution test pattern if it arose today.[59]

31. There are three conceptually difficult categories of factual causation case: cumulative causes, whether overlapping or sequential; alternative causes; and independently sufficient causes (also described as multiple sufficient causes). (a) The cumulative cause category could invoke either of the probabilistic but-for or possibilistic material-contribution tests.[60] That will depend on the strength of the evidence. (b) Alternative causes are, by definition, possibilistic, only, so long as the evidence does not permit the proper elimination of all but one of the

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[57] The *Athey* test is a separate test for the existence of factual causation. Whether *Athey* still provides some guidance on the issue of how the judge or jury is to determine whether there is enough evidence to satisfy the but-for probability requirement is a separate question. I suggest that *Athey* does not, if only because it never did provide any useful guidance on that question

[58] [1990] 2 S.C.R. 311. Even if it is difficult to find a core of meaning to the explanation beyond "you'll know it when you see it".

[59] Whether it would be might depends on whether the facts present a "limits of scientific knowledge" problem. See *infra* (But For: Variations: *Hollis v. Dow Corning).*

[60] I use "probabilistic" as synonym for "more likely than not". I use" possibilistic" as they synonym for all degrees of likelihood less than "more likely than not"; in other words, for all possibilities whose likelihood, expressed numerically, is not greater than 50%.

alternatives. It is not clear whether *Resurfices*'s assertion that *Cook v Lewis* (an alternative cause case) was intended to mean that all alternative cause cases are now to be handled under the possibilistic material-contribution test or there will be some examples which, for certain for some policy reasons, will be treated as one or the other. Again, this issue becomes very important if *Resurfice* material-contribution causation produces only proportional liability. Pre-emptive causes are not alternative causes. If the evidence permits the valid conclusion that one candidate cause pre-empted the other, the latter is no longer a causal candidate.[61] (c) Independently sufficient causes could invoke either of the probabilistic but-for or possibilistic material contribution tests. That will depend on the strength of the evidence.

32. Assuming causation of the harm (damage) is established using the applicable test, damages "causation" remains on a possibility basis.

33. This proposition is not a "causation" proposition but it is included because of its importance. At present, a defendant's liability for harm found to have been caused using the *Resurfice* material-contribution test is *in solidum* (solidary, joint and several) with any other defendant also held liable for that damage and not proportional (several), whether causation has been established against that other defendant using but-for or material contribution.

Prior versions of this list of propositions dealt differently with the description and categorization of the relationship that could be found to exist between conduct and harm under *Resurfice*. This version reflects my current views. I recast the current version to make to make a number of propositions explicit. (1) The *Resurfice* material-contribution test does not produce a finding of any form of factual causation. However, it is applicable only when there is at least a possibility of factual causation under some conditions. (2) Factual causation, which is now the sole domain of the but-for test, always requires probability.

The scope and meaning of the new material-contribution test is unclear. The reasons in *Resurfice* do not tell us, expressly, whether the Supreme Court meant to assert that the conclusion about legal causation that results from the application of the *Resurfice* material-contribution test is the legal fiction that the defendant's conduct amounts to a factual cause. I believe the panel did *not* intend to suggest that fiction. This is implicit in the concluding sentence of paragraph 25, in the use of "liability may be imposed". The Court wrote: "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 notions of fairness and justice to deny liability by applying a 'but for'

[61] Pre-empted causes do not pose difficult conceptual problems. They may be difficult to identify because of uncertainty in the facts but that is a different question. Once identified, a factor which had the potential to be a factual cause but was pre-empted by something else is simply not a factual cause. This is not a matter of defining a problem out of existence. It is necessary premise to any meaningful discussion of the meaning of factual cause.

approach." I suggest that if the Court had intended the fiction that the impugned conduct in fact was a factual cause – notwithstanding that the reason that the material-contribution test is applicable at all is because the evidence does not exist to show that the conduct probably is a factual case – then McLachlin C.J. would have written something to the effect of "factual causation will be deemed to exist so that liability may be imposed". McLachlin C.J. did not.

As of April 2008, there is explicit Canadian appellate authority that the conclusion about the *legal-causation* relationship between conduct and harm produced under the *Resurfice* material-contribution test does not amount to any form of factual causation of any kind whatsoever. The *Resurfice* material-contribution test "is not a test of causation at all: rather, it is a rule of law based on policy": *Sam v. Wilson*.[62] Not surprisingly Canadian appellate jurisprudence being what it is,[63] there is now also appellate authority that holds, in effect, the relationship found to exist between conduct and harm as the result of the application of the *Resurfice* material-contribution test is factual causation, maybe even actual causation: *Bowes v. Edmonton (City)*.[64] And, to compound the confusion, some appellate judges in Ontario continue to insist that *Resurfice* did not "alter" anything about the *Athey* material-contribution test or the basis principles of factual causation in tort.[65] One case asserts that *Resurfice* only "confirmed that the basic test for determining causation remains the but-for test".[66] Another asserts that *Resurfice* only "clarified the exceptions to the "but for" causation test and the circumstances in which the material contribution test may be applied."[67]

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[62] *Sam v. Wilson*, 2007 BCCA 622 at para. 109, released December 17, 2007.

[63] John Donne would qualified the five-word assertion that begins his famous adage, were he an observer of the Canadian judicial scene. "No man is an island, entire of itself; every man is a piece of the continent, a part of the main." John Donne, Meditation XVII, 1623.

[64] *Bowes v. Edmonton (City)*, 2007 ABCA 347 at paras. 227-230, released December 28, 2007. *Bowes* does not refer to *Sam* or any other case decided since February 8, 2007 interpreting *Resurfice*; or the English jurisprudence; or any extra-judicial scholarship. *Bowes* does not actually say that the conclusion amounts to some sort of finding of factual causation. It is my view of the necessary implications of the majority reasons. To be fair to the Alberta panel, it seems unlikely that they were asked to, or did, consider this issue. If, however, one accepts the proposition asserted by the Ontario Court of Appeal (twice, albeit one of those occasions was by a single judge on a procedural matter) that *Resurfice* did not change anything about Canadian causation law, but only clarified it, then, of course, *Bowes* is correct on this narrow point since there was nothing other than factual causation before *Resurfice*. None of *Bowes* or the Ontario cases are correct.

[65] The leading cases are *Monks v. ING Ins. Co. of Canada*, 2008 ONCA 269 at paras. 85-86 and *Barker v. Montfort Hospital*, 2007 ONCA 282, 278 D.L.R. (4th) 215 at para 51. See the section on Ontario material-correspondence jurisprudence for detailed discussion of *Monks* and *Barker*.

[66] *Barker v. Montfort Hospital*, at para. 51 (internal quotation marks omitted) per Rouleau JA, Blair J.A. concurring. Weiler J.A. dissented. Weiler, J.A. appears to have recognized that *Resufice* has changed the meaning of the material-contribution test: see paras 101-105.

[67] *Monks v. ING*, at para. 86. The reference to the "material contribution test" in the quotation appears to be to the *Athey* material-contribution test which applies where but-for is "unworkable: see Monks, para 85.

Does Legal Factual Causation Matter? If Yes, Why Does It Matter?

There is a tempest brewing in some parts of the Canadian legal universe on some aspects of what it means to say that there is a relationship between condition (antecedent) X and harm Y such that the law will say that X is a cause of Y, and what the legal tests are for determining the existence of that relationship, where the purpose of the inquiry is to determine whether a person sued may be held liable for that damage. That relationship is called legal causation. Legal causation is a "principle of responsibility".[68] Legal "[c]ausation 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": *Snell v Farrell*.[69]

The purpose of litigation is dispute resolution. Where the litigation involves a disputed allegation that harm resulted from wrongful conduct, the court will have to decide whether the conduct caused (whatever caused means in that jurisdiction) the harm. In many cases, it will be (or is) obvious why some event occurred. The correct answer to the question "what caused what" will strike the mind "with the force of a five-week-old, unrefrigerated dead fish": *Parts and Electric Motors, Inc. v. Sterling Electric Inc.*[70] In other cases, though, for a myriad of reasons, the mirror is broken, or at least cracked, or dark and the answers are less clear, with degrees of lack of clarity ranging from merely somewhat murky to impenetrable.

Once upon a time, factual causation always mattered, at least in theory. While it is true that, in practice, there were decisions that made one wonder about the disconnect between what some judges said and what they did,[71] nonetheless, the precept that factual causation was essential to liability in tort mattered enough that the judiciary at least paid lip service to the notion that some level of acceptable factual connection, beyond the merely speculative, had to be found to exist and stated to exist. Every jurisdiction through the Supreme Court has cases stating that mere possibility was not enough. I will refer to some of Supreme Court of Canada's explicit statements, made late as the early part of

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[68] From Wright, *Bramble Bush I*, at 1011 and following, and Wright *Causation*, at ___. Factual causation is not sufficient for liability: Klar, Tort Law (3d) at 417-25; see also "*The Wagon Mound" No.1* and "*The Wagon Mound*" *No. 2* for Canada, *Palsgraf v. Long Island Railway Co.*, 248 N.Y. 339, 162 N.E. 99 (N.Y.1928) for the U.S. There are factual causes which are not treated as legal causes. This may be because these factual causes not treated as capable of being legal causes; that is, not capable in general of being part of the basis for a conclusion of liability. Or, it may be because, in a particular cause, some overriding principle of policy mandates the conclusion that liability will not be imposed on a particular defendant for the certain (assumed or actual) consequences of conduct.

[69] [1990] 2 S.C.R. 311 at 326, 72 D.L.R. (4th) 289. I have added "legal" to the quotation to make clear the nature of the relationship that the quotation describes. It is a normative statement about a normative relationship: about what the law should require for a proper conclusion of law on liability. That point is made explicit in the use of "justify".

[70] 866 F.2d 228 at 233 (7th Cir., 1988).

[71] Professors Lelearned-intermediary d to produce findings of causation in circumstances and ways that made one wonder. The title of Professor Black's seminal pre-*Resurfice* article "The Transformation of Causation in the Supreme Court: Dilution and 'Policyization'" in T. Archibald and M. Cochrane, eds., Annual Review of Civil Litigation 2002 (Toronto: Carswell, 2003), 187 [*Policyization*] is proof enough.

this decade, later in this article.[72] It was easy to find assertions from all levels of the common law courts of Canada, that for tort "it is not sufficient to show that the defendant's [negligent] conduct possibly caused the accident."[73] Similar statements exist in breach of contract claims.[74]

The legal-causation relationship has two parts, traditionally called cause-in-fact and proximate cause.[75] "The second aspect of the causal connection is proximate cause, or 'cause-in-law'. Having determined that the defendant's conduct was, as a matter of fact, causally connected to the plaintiff's harm, the court must then determine the limits of the defendant's liability."[76] This article examines cause-in-fact. Cause-in-fact means factual or scientific (also known as historical) causation. Cause-in-fact describes one part of the "cause and effect" relationship: a relationship between some prior condition or conditions and some subsequent condition or conditions which relationship we understand to mean that the prior conditions or conditions are, in some meaningful sense, responsible for the existence of the subsequent condition or conditions. Putting this more simply, there is cause-in-fact, for law, when we conclude that what happened before makes a sufficient difference to what came after.[77]

I have used "sufficient difference" because "sufficiency" and not "necessity" defines the common law's use of the counterfactual shorthand that "did it make a difference means what would have happened if the misconduct had not occurred" analysis. The point is that the "made a difference" phrase means "made a difference to the manner in which the harm occurred or might have incurred in any way involving the alleged misconduct of the defendant." It is always possible to envisage some collection (set) of circumstances in which the harm could have occurred without the involvement of the defendant's alleged misconduct. Some of the sets may be real, in the sense that the circumstances existed, so it can be imagined that only those circumstances existed. However, none of those sets of circumstances actually came into existence. What did come into existence was the set of circumstances of which the defendant's alleged misconduct was a part. It is, therefore, in that context, that we examine the question of whether the wrongdoer's conduct is a factual cause. It is if it is necessary for that set of

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[72] See also *Risk As Legal Causation*, *Snark*, *Materially Contributing To Risk*.

[73] See, for example, in addition to the Supreme Court cases to be cited later: Danjanovich v. Buma [1970] 3 O.R. 604 at 605, 13 D.L.R. (3d) 556, 1970 CarswellOnt 803 (Ont. C.A.) (which does not quite say that though it is cited for the proposition);. Loder v. Somerton, 2003 CanLII 18142, [2003] 221 Nfld. & P.E.I.R. 199 at para. 59 (NL S.C.T.D.); Westcan Bulk Transport Ltd.v. Clarkson, 1994 CanLII 657 (B.C S.C.);

[74] See, for example, *Dulong v. Merrill Lynch Canada Inc*. 2006 CarswellOnt 178 at para. 31: "Causation is an essential element of any claim for breach of contract or negligence. To be recoverable, a loss must be caused by the contractual breach or breach of the duty in question. Causation must be proved to the satisfaction of the Court on the balance of probabilities. It is not enough to show that the plaintiff's loss as "possibly" caused by the defendant's negligence: *Martel Building Ltd. v. R.*, [2000] 2 S.C.R. 860 (S.C.C.) at 901; *Danjanovich v. Buma*, [1970] 3 O.R. 604 (Ont. C.A.) and 605." The statement in *Martel Building*, at 901, at para. 102, is: "To be recoverable, a loss must be caused by the contractual breach in question."

[75] I discuss the meaning of proximate cause, briefly, later in this section. I will not review the meaning of "proximate cause" except to the limited extent required by context.

[76] Klar, Tort Law (3d), at 388.

[77] See, Lewis Klar, *Tort Law* (3d) at 389. "if the defendant's conduct can be shown to have … made a difference to the plaintiff's *status quo ante*."

circumstances to be a cause of the harm, regardless of whether some other set of circumstances, that does not involve the defendant, is also sufficient.[78]

As many commentators and jurists have explained, the counterfactual can produce false negatives. It reveals if some factor is capable of being a factual cause. But it does not necessarily eliminate a factor. This is shown by the existence, within and outside of law, of consequences that have two independently (of each other) sufficient causes. This means, by definition, that each cause is sufficient for the existence of the consequence even if the other cause never existed. This also means, by definition, that each cause is not necessary for the existence of the consequence, except in the sense that that cause is necessary for the existence of the state where than cause is the reason for the existence of the consequence should there be some reason that it is necessary to assign responsibility to some person or thing for the existence of the consequence.

I am not going to attempt to more adequately define or describe cause-in-fact – factual or historical or scientific causation – in any sense other than the legal usage.[79] I do not need to because, in general, Canadian law accepts as its definition of historical cause, in a particular case, the definition that science would provide if it were necessary to formally obtain that definition. In short, we know it when we see it.[80] In this article, "actual causation" or "factual causation" or "causation" by itself means "cause-in-fact" unless the context indicates otherwise.

The seminal Commonwealth legal text on the meaning of causation in law is H.L.A. Hart and T. Honoré, *Causation in the Law*.[81] Hart and Honoré explain what it means to say that an event is a ***legal*** factual cause of an injury: "when each factor is

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[78] See, for example, Wright, *Causation*; Wright, *Bramble Bush I*, Wright, *Acts and Omissions as Positive and Negative Causes*, In Emerging Issues In Tort Law, Jason Neyers, Erika Chamberlain and Stephen Pitel, eds. (Hart Publishing, London, 2007), 307, at ____ [*Acts and Omissions*]; Wright, *Possible Wrongs* ____.

[79] Even if I could, adequately, which I cannot. By adequately, I mean a non-circular, non-normative definition or description of the essential concept of the factual causal connection. See below "Meaning of Factual Cause".

[80] In 1965, Mad Magazine published the rules for an unplayable game it called "43-Man Squamish". The rules can be found online, here , <http://en.wikipedia.org/wiki/43-Man_Squamish>, in summary, and in their complete, original, form here, http://www.collectmad.com/madcoversite/index-quiz_olympics-wide.html> (accessed in 2007 and last on February 11, 2008.). In passing: would that now have to be 43-Person Squamish? I am considering the utility of investigating the possibility of a one-to-one mapping between the rules for 43-Man Squamish – does that now have to be 43-Person Squamish? – and the rules for factual causation in Canadian jurisprudence, both common and civil law. I am considering the possibility that successful mapping could be used to account for the random effects of dark matter and WIMPs, an acronym for Weakly Interacting Massive Particles. There seems to be at least a surface attraction to the assumption that interactions amongst the senior appellate judiciary, either individually or in subsets of the whole (known as panels), could analogized to the quantum-level relationships amongst these important constituents of matter. That assumption might help to explain certain judgments. On the other hand, it might also get the writer in trouble. There might be some Bill 101 problems in Quebec, as there is no provision allowing the use of French rather than Spanish in the published rules for 43-Man Squamish. There is no known connection, in the jurisprudence, between 43-Man Squamish© and the city of Squamish, British Columbia. The fact that most of the causation cases are coming from British Columbia must be no more than an anachronistic coincidence.

[81] H.L.A. Hart and T. Honoré, *Causation in the Law*, 2d ed. (Oxford, Oxford University Press, 1985).

sufficient, with other normal conditions, to bring about the harm as and when it occurs, each is properly described as a cause of the harm."[82] We should read "legally" in front of "sufficient", or read "sufficient" as "sufficient in law". If a factor requires something more to produce a result, then it is not sufficient, in and of itself. However, the "normal conditions" that Hart and Honoré refer to must be pre-existing conditions which are, in fact, aspects of that factor, otherwise they would not be normal conditions. Hence, the "with other normal conditions" is helpful for clarification but does not add anything to the definition. "Normal" is a normative adjective. There is nothing about the use of "normal", absent context, that tells us what conditions are normal or not normal.

For example, in *Lumbermens Mutual Casualty Co. v. Herbison*, the Supreme Court affirmed the proposition that "that an intervening act may not necessarily break the chain of causation if the intervention can be considered a not abnormal incident of the risk created by use of the vehicle or is likely to arise in the ordinary course of things."[83] The House of Lords wrote, recently, in *Corr v. IBC Vehicles Ltd.*:[84]

> "The rationale of the principle that a *novus actus interveniens* breaks the chain of causation is fairness. It is not fair to hold a tortfeasor liable, however gross his breach of duty may be, for damage caused to the claimant not by the tortfeasor's breach of duty but by some independent, supervening cause (which may or may not be tortious) for which the tortfeasor is not responsible. This is not the less so where the independent, supervening cause is a voluntary, informed decision taken by the victim as an adult of sound mind making and giving effect to a personal decision about his own future. ... In such circumstances it is usual to describe the chain of causation being broken but it is perhaps equally accurate to say that the victim's independent act forms no part of a chain of causation beginning with the tortfeasor's breach of duty."[85]

As this article is about factual causation, I will discuss proximate cause only to the extent that it is necessary to clarify some aspect of the discussion of factual causation. Proximate cause issues are not relevant to the question of whether any cause is a factual cause. They are, instead, aspects of a legal decision as to whether something which is, or which is capable of being, a factual cause will be treated by the law as being, or as capable of being, a legal factual cause, or more broadly a legal cause, so as to permit the imposition of liability on a defendant for some harm sustained by a plaintiff, assuming the plaintiff is able to satisfy all of the other factors required for the imposition of liability on that defendant for that harm.

"Proximate cause" is a label for the issue that is goes under the rubric "remoteness" and the more general label "scope of liability". As indicated by the label

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[82] Hart and Honoré, *Causation in the Law* (2d), at pp. 235.
[83] 2007 SCC 47 at para. 13 (internal quotation marks omitted).
[84] [2008] UKHL 13.
[85] [2008] UKHL 13 at para. 15.

"scope of liability", proximate cause traditionally[86] refers to the result of the inquiry through which the court decides whether some factor, which is a factual cause, will or will not be used as part of the basis of the but-for finding that a tort has been committed and liability will be imposed on the defendant held to be responsible for that tort. The Supreme Court of Canada wrote in *R. v. Goldhart*:[87]

> The happening of an event can be traced to a whole range of causes along a spectrum of diminishing connections to the event. The common law of torts has grappled with the problem of causation. In order to inject some degree of restraint on the potential reach of causation, the concepts of proximate cause and remoteness were developed. These concepts place limits on the extent of liability in order to implement the sound policy of the law that there exist a substantial connection between the tortious conduct and the injury for which compensation is claimed.[88]

Proximate cause "denotes the situation where a defendant has been found to have breached an applicable standard of care and has been found to have factually caused the plaintiff's injury, but where that injury (or perhaps just certain elements of it) might for some reason be ineligible for legal protection on the facts of the case. These reasons might include factors such as the number of steps in the causal chain between the initial negligence and the resulting injury, or the freakish nature of that causal chain."[89] "A proximate cause is typically defined as a cause that produces injury in a natural, direct, and continuous sequence without any superseding causes that break the causal chain.

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[86] "Traditionally" because, if the label "proximate cause" is ultimately also used for the finding of legal causation under the *Resurface* material-contribution test, then we have a category of proximate cause which refers to conduct which, while it necessarily must have the potential to be a factual cause is, in the circumstances, at most, only a possible factual cause and, in some circumstances (of alternative causes) may not be a factual cause at all. That is one reason why "scope of liability" is a better over-all term.

[87] [1996] 2 S.C.R. 463, 1996 CanLII 214

[88] *Ibid*., at para. 36 per Sopinka, J. The reach of "pure" factual, historical, causation is infinite. It goes back farther than the primeval slime and goes forward into infinity. We need only recall *In Re Polemis and Furness Withy & Co*., [1921] 3 K.B. 560 and why it was eventually overruled. A quotation from a 1929 Ontario Court of Appeal decision is clear enough. In *Harding v Tatisich* and *Edwards* (1929), 64 O.L.R. 98, [1929] 4 D.L.R. 598, 1929 CanLII 23 at para 16 (C.A.), affirmed [1931] S.C.R. 167, Middleton J.A. wrote: "Whatever doubt might have existed as to the defendant's liability for this entirely unexpected result of her negligence and misconduct, the law is now clearly settled by the decision of the Court of Appeal in England in the case of *In re Polemis and Furness Withy & Co*., [1921] 3 K.B. 560, which, as Sir Frederick Pollock remarks, *Torts*, 12th ed., p. 31, is 'the law in England, subject to review only in the House of Lords.' If it be proved that a wrongful act was the direct cause of the damnum, complained of, there is a right to recover. Liability ceases only when some new factor intervenes which is unconnected with the original culpable act or default." The "direct cause" test of *Polemis* was eventually discarded by the Privy Council in The "Wagon Mound" cases, *Overseas Tankship (U.K.) Ltd. v. Mort's Dock & Engineering Co. Ltd*. (The ''Wagon Mound" No. 1) [1961] A.C. 388 and *Overseas Tankship (U.K.) Ltd. v. Miller Steamship Co. Pty*. (The "Wagon Mound" No. 2), [1967] 1 A.C. 617. Canadian law eventually followed suit: see, for example, *Gray v. Cotic* (1981), 33 O.R. (2d) 356, 1981 CanLII 76 at paras. 83, 93-94 (Ont. C.A.), affirmed on other grounds, [1983] 2 S.C.R. 2, 1983 CanLII 57. See, also, *T.W.N.A. v. Canada (Ministry of Indian Affairs)*, 2003 BCCA 670 at para. 17, 235 D.L.R. (4th) 13 and *Wright v. Davidson* (1992), 88 D.L.R. (4th) 698 , 1992 CanLII 1020 (B.C C.A.)

[89] V. Black and D. Cheifetz "Through The Looking Glass, Darkly: *Resurfice Corp. v. Hanke* (2007), 45 Alta. L. Rev. 241 at 243 citing, at footnote 20, Lewis Klar, *Tort Law*, 3d ed. (Toronto: Carswell, 2003) at 163-71.

Alternatively, a proximate cause is defined as a tortious cause that results in a reasonably foreseeable injury to a reasonably foreseeable plaintiff. Sometimes the relationship between an action by the defendant and the injury to the plaintiff is simply too attenuated to sustain a judgment of legal responsibility and damages."[90]

In *Gray v. Cotic*,[91] the Ontario Court of Appeal stated: "But where the damage caused by an act was a direct or necessary consequence when viewed with hindsight but was nevertheless not foreseeable at the time, then no liability obtains. But where the damage caused by an act was a direct or necessary consequence when viewed with hindsight but was nevertheless not foreseeable at the time, then no liability obtains."[92] The Court added, citing *Wagon Mound* No. 2[93]: "If a risk can be reasonably foreseen, it cannot be "remote" in the sense that liability for damage is avoided, even though it is "remote" in the sense that the chances of the risk creating damage are small. In order to classify a risk as "remote" it must be shown that the risk was so "remote" that a reasonable man would be justified in neglecting it."[94]

Gray continues: "But even the American Courts recognize that the general rule, i.e., a break in the line of causation, is subject to the qualification that if the intervening act is such that it might reasonably have been foreseen or anticipated as the natural and probable result of the original negligence, then the original negligence will be regarded as the proximate cause of the injury, notwithstanding the intervening act".[95] *Gray* ends its discussion of proximate cause this way.

> The "Wagon Mound" No. 2 … has limited the scope of foreseeability to the real risk, "one which would occur to the mind of a reasonable man in the position of the defendant's servant and which he would not brush aside as farfetched". The requirement of foresight of a possibility of damage rather than reasonable probability has to be considered. The test was explained by Dickson J. A. (as he then was) in *School Division of Assiniboine South No. S v. Hoffer et al*. (1971), 21 D.L.R. (3d) 608 at p. 613, [1971] 4 W.W.R. 746, 1 N.R. 34; affirmed [1973] S.C.R. vi, 40 D.L.R. (3d) 480n, [1973] 6 W.W.R. 765n: "These words [Lord Reid's in The "Wagon Mound" No. 2] would suggest that recovery may be had, provided the event giving rise to the damage is not regarded as 'impossible', and even though it 'very rarely happened', 'only in very exceptional

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[90] Fumerton and Kress, *Causation And The Law*, at 87 (footnotes omitted). "Remoteness refers to the closeness of a direct and natural causal sequence between the negligence act and the damages": *Gray v. Cotic* (1981), 33 O.R. (2d) 356 at 368, 1981 CanLII 76 at para. 41 (Ont. C.A.).

[91] *Gray v. Cotic* (1981), 33 O.R. (2d) 356, 1981 CanLII 76 (Ont. C.A.) affirmed on other grounds, [1983] 2 S.C.R. 2, 1983 CanLII 57. The Supreme Court's decision does not discuss any law. It affirmed the trial and appellate results on the basis that the parties had necessarily agreed, as the underpinning that made the only question put to the jury sensible, that the suicide was foreseeable. Therefore, the only question was whether the defendant's conduct was a factual cause. The Supreme Court held that there was evidence to support the jury's decision that it was.

[92] *Gray*, 33 O.R. (3d) 356 at para. 41.

[93] *Overseas Tankship (U.K.) Ltd. v. Miller Steamship Co. Pty. (The "Wagon Mound" No. 2)*, [1967] 1 A.C. 617.

[94] *Gray*, 33 O.R. (3d) 356 at para. 78.

[95] *Gray*, 33 O.R. (3d) 356 at para. 88.

> circumstances'. The test of foreseeability of damage becomes a question of what is possible rather than what is probable".[96]

Before *Resurfice Corp. v. Hanke*,[97] the substance of what the plaintiff had to do to establish factual causation was easily described, even if there was jurisprudential uncertainty (sometimes) as to how it was to be done. The plaintiff had to satisfy the trier of fact (judge or jury) that, on the balance of probability, the defendant's faulty conduct (or the fault conduct of a person for whom the defendant was vicariously liable) was a factual cause (a cause-in-fact) of the harm (the injury, the loss) that the plaintiff had sustained. *Regardless of how it was that the plaintiff was to do that, if the plaintiff could not, the action was supposed to fail. The judge was supposed to dismiss the action.* The Supreme Court's decisions in *Snell v. Farell* and *Athey v. Leonati*, and the manner in which the lower courts applied these decisions, might have introduced uncertainty into how the plaintiff was to prove factual causation, but they did not formally eliminate the need for the plaintiff to prove factual causation. So, factual causation mattered. The question, after *Resurfice*, is whether factual causation still matters to Canadian law; that is, matters in the sense that proof of factual causation is a prerequisite to success in tort. That, in substance, is the question that runs through this article.

The third question in the section title is "why does causation matter?" One answer to that question – the practitioners' answer, the judges' answer, the legal system's pragmatic answer – is the answer that matters most in this article.[98] It is because the highest court in the land had said it does and, at least before *Resurfice*, had explicitly denied arguments that it did not. In addition, the Court had never disavowed those denials, before *Resurfice*, in its judgments.[99] There is, of course, another meaning to that question. It is whether causation *ought* to matter. The Supreme Court of Canada once said it *ought* to. "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."[100]

For those who believe the answer ought to be "yes, causation matters," here is Professor Ernest Weinrib's explanation why it ought to. "[C]ausality matters because it supplies the particular feature about the defendant that singles him out from the generality of those available for the shifting of the plaintiff's loss" from *that* defendant to *that* plaintiff.[101] "Causation, then, has the function of particularizing the plaintiff in relation to the defendant."[102] Professor Weinrib also wrote:

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[96] *Gray*, 33 O.R. (3d) 356 at para. 94 (words in brackets added). See also *John v. Flynn* (2001), 54 O.R. (3d) 774 at para. 28, (2001), 201 D.L.R. (4th) 500, 2001 CanLII 2985 (C.A.), quoting *Gray* at para. 88, and *Overseas Tankship (U.K.) Ltd. v. Moris Dock & Engineering Co. Ltd. (The "Wagon Mound" No.1)*, [1961] A.C. 388.

[97] 2007 SCC 7 [*Resurfice*].

[98] Outside of the footnotes.

[99] And, as I have written elsewhere, and will repeat in this article, did not mention those cases in *Resurfice*.

[100] *Snell v. Farrell*, [1990] 2 S.C.R. 311 at 326 (emphasis added).

[101] Ernest J. Weinrib, "Causation and Wrongdoing" (1987), 63 Chi.Kent L. Rev. 407 at 411, 412. I have combined portions of both pages. The quotation is from p. 411 where it is used for a different purpose.

[102] Weinrib, "Causation and Wrongdoing" (1987), 63 Chi.Kent L. Rev. 407 at 416

> Causation becomes pertinent only when we focus on the plaintiff's receipt from the defendant of an amount of money representing the harm suffered. This compensator transfer shows that tort law is not concerned solely with the defendant's emission of a harmful possibility but with that possibility's coming to rest on a particular plaintiff. Inasmuch as cause particularizes, it does so with reference to the plaintiff rather than the defendant.
>
> Tort litigation operates through and upon the relationship of plaintiff and defendant. Causation is the element in this relationship that functions to particularize the former as the victim of the latter's wrongdoing. The bilateral nature of tort litigation requires our asking not only "Why can this plaintiff recover from *this* defendant?" but also "Why can *this* plaintiff recover from this defendant?"[103]

Professor Weinrib's "Causation and Wrongdoing" is as good a place to start as any for those interested in going beyond the discussions of causation in the leading tort text books. The volume of the Chicago-Kent Law Review in which the article appeared is also as good a place as any. It is devoted to causation issues.

Professor Weinrib explains that causation connects the doer of the wrong and the sufferer of the injury in the moral relationship that is at the core of tort law. Consider this situation. Two people commit the same wrongful act. Fortuitously for one, the conduct does not injure anyone. Unfortunately, "unfortuitously", for the other, the conduct injures another person. Why should the latter face punishment and the former escape? Why does luck matter? Why should lack of luck matter? Professor Weinrib's answer – corrective justice's answer – is one rooted in the connection between the doer of the wrong and the sufferer of the injury: the connection which is causation. Causation "mark[s] an immediate normative connection between what the defendant has done and the plaintiff has suffered."104 Consider this statement referring to a well-known case. "Each hunter was equally culpable in shooting in the plaintiff's direction. That the bullet of the one and not of the other struck the plaintiff is the merest happenstance which in itself redounds neither to their moral credit nor to their discredit. And yet this element of fortune makes one liable and the other not. Causation thus functions to differentiate fortuitously between morally equivalent wrongs."[105] "To understand causation non-instrumentally is to grasp its role in the moral relationship between the litigants".[106] "Since causation links doer and sufferer, it must be understood in the context of the relationship of which it is part. Institutionally, this relationship is between plaintiff and defendant; conceptually it is between causation and wrongdoing."[107] Wrongdoing and causation are "interpenetrative aspects of unified conception of tort."[108] Tort law is "the expression of a single normative conception integrating the plaintiff's injury and the defendant's negligence."[109]

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[103] Weinrib, "Causation and Wrongdoing", at 414.
[104] Weinrib, "Causation and Wrongdoing", at 409.
[105] Weinrib, "Causation and Wrongdoing", at 408 (internal footnotes omitted).
[106] Weinrib, "Causation and Wrongdoing", at 409.
[107] Weinrib, "Causation and Wrongdoing", at 410.
[108] Weinrib, "Causation and Wrongdoing", at 444.
[109] Weinrib, "Causation and Wrongdoing", at 410.

Professor Weinrib's explanation of the purpose of "Causation and Wrongdoing" is succinct. "The present article sets out a non-instrumental understanding of the place of causation in negligence law. Here the central elements of negligence law are regarded not as indirectly furthering some independently identifiable combination of goals, but as categories that mark an immediate normative connection between what the defendant has done and what the plaintiff has suffered. The concept of causation, in this view, is simply what it purports to be, an expression of the transitivity of the defendant's injuring the plaintiff. To understand causation non-instrumentally is to grasp its role in the moral relationship between the litigants when this relationship is considered as such and not as an occasion for the promotion of external ends."[110] Those who believe that the purpose of tort law is corrective justice should and will find Weinrib's explanation compelling, even if they do not agree with all of it. Those who ascribe to instrumentalist analyses, such as those from the law and economics school, for example, will not. An example of the other position – that causation ought not to matter, at least in "mass torts" – can be found in J. Cassels & C. Jones, "Rethinking Ends And Means In Mass Tort: Probabilistic Causation And Risk-Based Mass Tort Claims After *Fairchild v. Glenhaven Funeral Services*".[111] The analysis in this article, which welcomes *Resurfice* in light of the consequences it might have for proof of causation in mass-tort claims, could be seen as instrumentalist. The authors, however, assert their analysis is also consistent with what they call "moralist" analyses of the purpose of tort law, notwithstanding their assertion that a probable linkage between causation and harm should not be required.[112]

This brief foray into the realm of "ought" is as far as I will take the formal, explicit, metaphysics, discussion in this article, lest I be accused of indulging in forbidden metaphysics, and of forgetting the admonition from on-high that Canadian law's version of factual causation is "essentially a practical question of fact which can best be answered by ordinary common sense rather than abstract metaphysical theory."[113]

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[110] Weinrib, "Causation and Wrongdoing", at 409.

[111] (2003), 82 Can. B. Rev 598.

[112] (2003), 82 Can. B. Rev 598 at 600-01. A passage is quoted later in this article.

[113] *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para. 16 and *Snell v. Farrell*, [1990] 2 S.C.R. 311 at 328 citing *Alphacell Ltd. v. Woodward,* [1972] 2 All E.R. 475 at 490. *Snell*, and sometimes *Athey*, are the usual Canadian citations but *Snell* was not the first Supreme Court of Canada decision to quote the *Alphacell* mantra. That honour belongs to *Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441 at para. 78, 18 D.L.R. (4th) 481. The complete passage from *Alpahcell*, at 489-90, is: "The nature of causation has been discussed by many eminent philosophers and also by a number of learned judges in the past. I consider, however, that what or who has caused a certain event to occur is essentially a practical question of fact which can best be answered by ordinary common sense rather than abstract metaphysical theory." *Operation Dismantle* is a historical anomaly on this point as it was decided three years before *Wilsher v. Essex Area Health Authority*, [1988] 2 W.L.R. 557 (H.L.), yet it contains a statement that seems to presage *Wilsher*'s recasting of *McGhee* as a case where causation was properly inferred from the facts. Wilson J. wrote, at para. 78 of *Operation Dismantle*: "An allegation that the lack of shower facilities at a defendant's brickworks probably resulted in a plaintiff employee's skin disease may in lay language appear to be merely an expression of medical opinion, but it is also in law a determination which the courts can properly infer from the surrounding facts and expert opinion evidence: see *McGhee v. National Coal Board*, [1972] 3 All E.R. 1008 (H.L.)." For Australia, see *Chappel v. Hart*, [1998] HCA 55, 195 CLR 232.

Canadian common law, until the mid-1990s, had only one test: the but-for test, which required proof of causation on the balance of probability.[114] Thereafter, it had two tests: the but-for test and the material contribution test.[115] Neither of the meaning nor scope of the material-contribution test were entirely clear prior to *Resurfice*. However, this much was clear. The material-contribution test was used to determine if conduct was a cause of injury and the standard of proof was probability: *Athey v Leonati*.[116] See, also, Lewis Klar, *Tort Law* (3d), c. 11, "Causal Connection"; Vaughan Black, "The Transformation of Causation in the Supreme Court: Dilution and 'Policyization'";[117] and David Cheifetz, "The Snell Inference And Material Contribution: Defining The Indefinable And Hunting The Causative Snark – A Not Excessively Subtle and Theoretical Examination of Proof of Factual Causation in Canadian Tort Law".[118]

Resurfice changed that. The but-for test still exists. The material-contribution test still exists. But, the *Resurfice* material-contribution test is not the *Athey* material-contribution test. The *Resurfice* material-contribution test is not used to determine whether the impugned conduct is an actually a cause of the harm. It is used to determine only whether the impugned conduct materially increased the risk of the occurrence (materialization) of the harm which the injured person in fact suffered, *in circumstances where it has already been determined that the trier of fact will be unable to make a valid finding that the impugned conduct was actually a cause of the harm.* Where the *Resurfice* material-contribution test is applicable at all, the situation is one in which, for relevant reasons, the but-for test cannot be used to determine if the impugned conduct is a probable factual cause of the harm. Where the *Resurfice* material-contribution test is held to be applicable, and where it is satisfied, the result will be a conclusion of law that the impugned conduct is deemed to be a legal cause of the plaintiff's harm, notwithstanding the absence of sufficient evidence to allow a valid conclusion that the impugned conduct was actually a cause of the harm. The Canadian judiciary is at last beginning to openly acknowledge the progression that Vaughan Black traced in *Policyization* from decisions based on asserted applications of objective science to decisions based on normative, subjective, policy. We have come this far. One of the leading provincial appellate courts – indeed, the province from which most of the leading-edge causation jurisprudence is coming – has explicitly acknowledged that the *Resurfice* material-contribution test "is not a test of causation at all: rather, it is a rule of law based on policy."[119]

The core meaning of the *Resurfice* material-contribution test is as simple and clear as that. Its application and parameters are neither.

My purpose is to show that too many Canadian judges and lawyers are not dealing with *Resurfice* properly, or at all, and to point fingers as needed. If you want a hint of

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[114] *Snell v. Farrell*.
[115] *Athey v. Leonati*, [1996] 3 S.C.R. 458, paras. 12-17. Civil law had and still has only one: causality, for which the standard of proof is probability.
[116] *Athey v. Leonati*, paras. 12-17.
[117] Supra.
[118] (2005), 30 Adv. Q. 1.
[119] *Sam v. Wilson*, 2007 BCCA 622 at para. 109.

what is in this article or in "Through the Looking Glass, Darkly" you will get it here, here, and here. The first link contains, I think, the pithiest advice that I will give, for the moment, about how to deal with *Resurfice*. I will repeat it: in the immortal words of that esteemed philosopher, Elmer Fudd, "be vewy, vewy, careful."

The essential facts of *Resurfice* are simple. Mr. Hanke worked at an ice rink in Edmonton. His duties included operating an ice-resurfacing machine. It had tanks for hot water and gasoline. Both tanks, and their filling-tubes, were on the same side of the machine. Somebody, either Mr. Hanke or a co-worker, mistakenly put the hot-water hose into the gasoline tank. Mr. Hanke was preparing the machine for his use. He turned on the hot water. The combination of hot-water and gasoline resulted in gasoline vapour. The vapour escaped the tank via the open filling-tube and was somehow ignited. There was an explosion. Hanke was badly burned. He sued the manufacturer and distributor of the machine. He alleged that the machine was unsafe because it was not designed properly. The trial judge dismissed the action.[120] The trial judge held that there was nothing wrong with the design. The trial judge also held that the design had nothing to do with Hanke's mistake. The Alberta Court of Appeal allowed Hanke's appeal and sent the case back for a new trial. Its primary reason was the assertion that applicable test for factual causation was the material-contribution test, not the but-for test, on the basis that the material-contribution test applied whenever there was more than one possible cause for harm.[121]

The Supreme Court of Canada allowed the defendants' appeal and restored the trial judgment dismissing the action. The Supreme Court held that there was no basis for the Alberta Court of Appeal's intervention. It held that the trial judge got the law and facts right. It held that but-for test was the correct test for the facts of *Resurfice* and that the trial judge had applied it properly. It also purported to explain the but-for and material-contribution tests, the latter just in general terms, and to provide a general outline as to when each is applicable.

What I do, here, is look at how the lower courts have dealt with factual causation since the release of *Resurfice*. This article is not a case-comment on *Resurfice*. I do not directly analyze what is right or wrong in what the Supreme Court said in *Resurfice*. If you want that, you will have to wait for the papers that I mentioned at the beginning of the article. Instead, you will find my views interlaced through my discussion of the subsequent cases.

I suggest that those who think *Resurfice* has clarified the meaning of material contribution; or that *Resurfice* has not muddied the but-for waters, too, or that *Resurfice* in its present guise will ultimately be a help for the insurance defence bar – any portion of the civil litigation defence bar – review the manner in which the reported cases, and too many practitioners' continuing legal education lectures, have dealt with causation issues since the release of the Supreme Court reasons in *Resurfice*. My searches, through the end of January 2008, for articles publicly available on the Internet about the Supreme

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[120] 2003 ABQB 616.
[121] 2005 ABCA 383, 53 Alta. L.R. (4th) 219.

Court's decision, written by Canadian lawyers or those related to the Canadian legal or insurance industries, produced a number of articles about *Resurfice* posted on law firm web sites or similar locations. Many of the pieces are merely advisory notices that law firms posted on their web sites very soon after the release of *Resurfice* – as Oscar Wilde is reputed to have said: any publicity is good publicity – quoting or paraphrasing portions of the reasons. Some come from lawyers or insurance-industry associations. Some are considered opinions produced for CLE programs.[122] Most of the earlier and some of the recent articles suggest that *Resurfice* clarified causation law. Time and events are proving the writers wrong. Most of the earlier and some of the recent articles miss the point of the *Resurfice* material-contribution pronouncements, treating the case as if it all it does is affirm the primary of the but-for test and restrict the application of the material-contribution test created by *Athey*, whatever that test meant. The articles focus on the statement in *Resurfice* that the material-contribution test will apply only to exceptional cases and then fail to examine what the Supreme Court said the test is to see if the "exceptional" cases assertion holds up. As I will show in this article, and others have and will elsewhere, it does not.[123]

For example, one article attributes the following statements to partners at Canadian law firms. "It's not intended to be a pro-defendant judgment, but it will certainly come as some comfort to companies facing tort actions." "By clarifying the law, this ruling raises the bar . . . As plaintiffs' counsel, you aren't going to be able to slip in material contribution." "Now with the court's decision, the 'but for' test will almost invariably be the test to prove causation except in very isolated circumstances." "Both exceptions are quite limited … They only apply when there is no way for the plaintiffs to prove their claims because they just don't know which of the defendant's actions caused the injury, but it's clear that one of them was the cause." There was, until recently, only one dissenting voice. (More are appearing in recent CLE articles.) That person wrote that *Resurfice* "doesn't really clarify the law … It affirms that the 'but for' test is the basic test in Canadian law and that the material contribution test is only available in exceptional circumstances, but beyond that, what material contribution means is still a matter of confusion." Despite that warning, the author concluded with this bit of advice, based on one of the other quotations. "For now, in-house counsel can rest a little easier knowing that plaintiffs face a higher burden to prove causation than in the past."

Right. Plaintiffs' counsel will not just slip into *Resurfice* material-contribution. They will dive into it head first. I think it will come as a shock to the business sector and

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[122] Some of the CLE pieces appear to have been written by (or at least the researched by) articling students or junior practitioners who, for whatever reason, did not take the required time to do the required research and reading. That approach, when transposed into the court room setting, is often an explanation for some of the problems in the jurisprudence that I outline in this article. That approach sometimes (but not often enough) produces consequences such as this. "Since neither counsel cited the binding decisions of the Court of Appeal (or indeed, any authority at all), neither party is entitled to costs of this motion." See, *Wilson v. Bobbie*, 2006 ABQB 22 at para. 42.

[123] Internet URLs for some these articles were included in previous copies of this paper. I assume that anybody who knows what he or she is doing will be able to find the articles from which I have quoted. If you want the URLs to satisfy yourself, contact me. Writing about *Resurfice* and causation is becoming a cottage industry. Do a web search and count the results.

its insurers that the risk of being held liable for all of a plaintiff's compensable damages, based on conduct which, as a matter of law, cannot be shown to be a probable cause and, in scientific and legal terms, did nothing more than increase the possibility that the plaintiff would sustain the type of injury the plaintiff in fact sustained, is "some comfort" for them and is a "higher burden" to the plaintiff.[124] Some cold comfort, maybe, but that is unlikely to be the type of comfort the companies had in mind.

What higher burden? The requirements for the but-for test have not changed. The material-contribution test has become a test which is satisfied by possibility rather than probability. Possibility is a higher burden than probability? Does anyone suggest there are cases, tried before *Resurfice*, in which plaintiffs were successful in proving causation that would fail under the *Resurfice* regime? Does anyone suggest that there are cases being dismissed on causation grounds, since *Resurfice*, where causation would have been found, before? I would like to know what those cases are.[125] On the other hand, there are cases that would have failed, before *Resurfice,* that *have not* failed. At least one of them, on the trial judge's own admission, would have failed on causation grounds before *Resurfice*. Those cases are listed in this article.[126]

You do not have to believe me. Believe Professor Russ Brown. Believe Professor Vaughan Black. As I mentioned, Brown's article in the influential Canadian Business Law Journal is titled "Material Contribution's Expanding Hegemony: Factual Causation After *Resurfice Corp. v. Hanke*."[127] Prof. Brown's summary of the effect of *Resurfice* is:

> My argument, in essence, is that the Supreme Court of Canada has converted its doctrine of "material contribution" in causation into a generic and comprehensive alternative to the traditional but-for test, applicable to all cases where the plaintiff cannot demonstrate probable cause [on a but-for basis].
>
> … Suffice to say that the Supreme Court has perpetuated the uncertainty which it introduced a decade ago in *Athey v. Leonati* about (1) the circumstances in which a finder of fact is entitled (or ought) to apply the "material contribution" test in lieu of the but-for test, and (2) what makes a contribution "material". In fact, in *Hanke* the Court adds a third element of uncertainty: (3) assuming the contribution is "material", need it go to actual harm or to risk of harm?[128]

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[124] Or, as in *Fairchild* and *Barker*, or *Cook v. Lewis*, being held liable with at least one other defendant even though it is necessarily the case that the conduct of at least one of the defendants held liable could not be a factual cause.

[125] *Fullowka et al v. Royal Oak Ventures Inc*., 2004 NWTSC 66, [2005] 5 W.W.R. 420, reversed 2008 NWTCA 4 and *Mainland Sawmills Ltd. v. USW Union Local - 1-3567*, 2007 BCSC 1433 bracket *Resurfice* very nicely. I suspect *Mainland Sawmills* will be appealed. The decision in *Fullowka* has been reversed. The NWTCA held there was no duty and that the trial judge should have applied the but-for test rather than the *Athey* material-contribution test. *Fullowka* is discussed in the Northwest Territories section.

[126] One, *Bohun v. Segal*, 2008 BCCA 23 was reversed on appeal. I discuss *Bohun* in some detail in the British Columbia section of this article.

[127] (2007) 45 Can. Bus. L. J. 432.

[128] <http://ualbertalaw.typepad.com/faculty/2007/06/tort_law_at_the.html> (words in brackets added). See, also, (2007), 45 Can. Bus. L. J. 432 at 433.

I agree with Professor Brown. What we have, here, is far more than just a mere "failure to communicate". The Supreme Court is, no doubt, entitled to remind the profession that it expects us to know something about the underlying law so that it does not have to provide us the "precise concatenation of details". But, as one commentator neatly summarized: "What is the law when the highest court says [that all of] P, ~P and "P are consistent with ~P"? Put more bluntly: what is the law when we are told by the courts that there is no difference in the meaning of mutually inconsistent, alternative, propositions "X" and "not X", and all of the shades of gray in between?[129]

There are at more than 80 reported cases mentioning the Supreme Court's *Resurfice* as of early May 2008. You will find a current list of most of them at the end of this article. There are cases in which trial judges have said that *Resurfice* explanation of material contribution has changed the law and have made decisions on factual causation, using the material-contribution test, that would not have been correct before *Resurfice*. There are other trial decisions in which the judges have referred to *Resurfice* and then applied the *Athey v Leonati*[130] formulation of the material-contribution test; stating (without ever mentioning but-for or probability) that the defendant's negligence "caused or contributed in a material way" to the injury, and so was a factual cause.

A CanLII search on July 3, 2007 produced 41 reported cases released after the release of *Resurfice* in which *Athey* is mentioned, without any mention of *Resurfice*. Later searches produce more. The searches also produced cases in which the causation question is decided without reference, in the reasons, to any case law. We have to assume that the judges' decisions to not mention any law were considered decisions. At least one of these cases is not a simple "who did what to whom and how" problem. Some of these cases deal with aspects of *Athey* other than material contribution – future hypotheticals, crumbling skull, for example – however, other cases discuss causation and material contribution without any mention of *Resurfice*, mentioning only older cases, or even no cases at all, but using the *Athey* (pre-*Resurfice*) framework. In some of these cases, the text of the reasons implies that the judge thought the meaning of "materially contributed" is different from the meaning of "caused". Some of these cases were tried and argued before the release of *Resurfice* reasons; some were tried after the release; some overlap the release.

What we still find, more than a year after *Resurfice* is some judges stating, in various ways, that the plaintiff is entitled to prove factual causation by showing that the defendant's negligent conduct "materially contributed" to the plaintiff's damage; sometimes adding the requirement that the proof that the conduct "materially contributed" be on the balance of probability but sometimes not; sometimes mentioning only *Athey* (especially in reasons released soon after *Resurfice*); and, sometimes, using wording that makes it impossible to tell which test the court applied.[131] As of May 2008,

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[129] < http://pithandsubstance.blogspot.com/2007/06/university-of-alberta-law-has-blog.html>, last accessed in January, 2008.

[130] [1996] 3 S.C.R. 458.

[131] The cases include: *Weafer v. Vancouver Coastal Health Authority*, 2007 BCSC 481 at para 86; *Sage v. Renner*, 2007 BCSC 1357 *McKinnon v. Grand River Hospital*, 2007 CanLII 23492 at paras. 160, 187 (Ont.

we have an appellate decision, *Sam v. Wilson*, in which the *Athey* version of the material-contribution contribution test (whatever that was), including the amorphous *de minimis* threshold-concept, seems to have been reintroduced as either a or the meaning of the but-for test.[132]

In addition, particularly in British Columbia trial decisions, we find judges quoting both *Athey* and *Resurface* as if the *Athey* "unworkable" formulation (whatever it meant) survived *Resurface* as a separate test: *Greenall v. MacDougall and HMTQ*;[133] or, as if the *Athey* formulation is now part of the *Resurface* statement of the material-contribution test: *Hall v. MacDougall*[134] citing *Nash v. MacDougall*.[135] This is still occurring more than one year after *Resurface*: see, Crane v. Surrey (City).[136] The recent decision of the British Columbia Court of Appeal in *Sam v. Wilson*[137] eliminates, for British Columbia law, the argument that the *Athey* version of the material-contribution test survives in the *Resurface* version. However, *Sam* inserts the *Athey* meaning of

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S.C.J.); *Hamasni v. Nagai*, 2007 CanLII 11315 at para. 60-61 (Ont. S.C.J.), appeal allowed on consent, 2008 ONCA 64 (no discussion of law, no explanation of the basis of the appeal, and no explanation of what the problem was with the trial judgment); *Hamo v. Insurance Corporation of British Columbia*, 2007 BCSC 854 at paras. 57-59; *Qualizza v. Lee*, 2007 BCSC 303 at para. 19; *Thiessen v. Selke*, 2007 ABQB 217 at para. 58; *Carrier v. Wan*, 2007 ABQB 279 at para. 23; *B & S Publications Inc. v. Hotzel*, 2007 ABQB 222 at para. 84; *McNaughton v. Ward*, 2007 NSCA 81, particularly para. 102; *Boulanger v. Johnson & Johnson Corporation*, 2007 CanLII 18018 at para. 11 (Ont. S.C.J.); *R.P. v. J.R.*, 2007 CanLII 37693 at paras. 73-74 (Ont. S.C.J.); *Arnold v. Cartwright Estate*, 2007 BCSC 1602 at paras. 5-6, 55-56; and *Stevanovic v. Sin*, 2007 BCSC 1797 at para. 51. *Randhawa v. Hwang*, 2008 BCSC 435 is as blatant an example as any. The trial judge made specific findings that the defendant's negligence was a "probable … contributing cause" and that "on a balance of probabilities … the defendant's negligence materially contributed to the occurrence of those injuries" (paras. 37-38); however, the trial judge held that causation was to be decided under the *Resurface* material-contribution test because it was "not possible for Ms. Randhawa to prove, using scientific evidence, that her injuries were caused by" the defendant's negligence (para 23). *O'Scolai v. Antrajenda*, 2008 ABQB 257 at paras. 54, 89 is worse. *Resurface* is not mentioned. The trial applied *Athey* and held that the accident "caused or materially contributed" to the plaintiff's injuries.

[132] *Sam v. Wilson*, 2007 BCCA 622. If you take the Ontario Court of Appeal at its word, nothing has changed in Ontario as of mid-April 2008. Material contribution as explained in *Athey* is still the law of the land. *Resurface* changed (as Corporal Schultz, of "Hogan's Heroes" might have said) nothing. See also *Barker v. Montfort Hospital*, 2007 ONCA 282 (released in July, 2007) and *Moore v. Weinecke*, 2008 ONCA 162 (released March 6, 2008) and Monks v. ING Ins. Co., 2008 ONCA 269 (released April 14, 2008).

[133] 2007 BCSC 339 at paras. 37-40.

[134] 2007 BCSC 1296 at paras. 9-12.

[135] 2007 BCSC 563 at paras. 62-68.

[136] 2008 BCSC 274 at para. 52: "The basic test for causation remains the "but for" test. This has been most recently reiterated in *Hanke v. Resurface Corp*., 2007 SCC 7. In that case, the Supreme Court of Canada reaffirmed and elaborated upon the test it set out in *Athey v. Leonati*, [1996] 3 S.C.R. 458. Under this test, it is for the plaintiff to demonstrate on a balance of probabilities that, "but for" the negligence of the defendant, the accident would not have occurred." The only explanation for *Crane* is that, somehow, cases such as *Sam v. Wilson* were not put before the trial judge or, they were and the trial judge misunderstood the issue. The Sam reasons were released on December 17, 2007. The Crane reasons, released on March 4, 2008, indicate that the case was heard in June and November 2007; however, written submissions were made in January and February, 2008. Alternatively, *Sam* was before the trial judge and that explains para. 52. However, the Crane reasons do not mention any cases on causation other than *Athey* and *Resurface*.

[137] 2007 BCCA 622.

"material contribution" (whatever that was) into the but-for test. The facts as recited in some of these cases probably justify the view that the decision on causation was correct but that is not the issue. A judge's obligation is to get to the right decision in the right way.

This article shows that, more than one year after *Resurfice*, many judges and lawyers still have not yet realized that the *Resurfice* material-contribution test does *not* identify wrongful (negligent, faulty) conduct that can be validly held to be an actual cause (a scientific, historical cause) of the harm.[138] Instead, since *Resurfice* does not formally assert that causation is no longer necessary, in some cases, the new material contribution test has to be understood to identify wrongful conduct that will be (1) *deemed* sufficient to satisfy the causation requirement (2) *because it materially increased (whatever materially means) the risk of the occurrence of the harm that occurred*, even though there has not been (and cannot be) a valid finding that the conduct is a factual cause of the plaintiff's harm, (3) so that the court may use the *deemed connection* as the basis for the imposition of liability, (4) assuming all other applicable criteria are satisfied. The reason for this is that, by definition:

> (1) the *Resurfice* material-contribution test becomes applicable only after the court has concluded that factual causation cannot be established using the but-for test; and
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> (2) but-for is the test to be used in all circumstances in which evidence exists or, current limits of science permit the court to say could exist or could have existed, that would permit the court to decide the question of factual causation.

What that means is that the wrongful conduct that the *Resurfice* version of the material-contribution test declares sufficient, or not sufficient, to establish legal factual causation is nothing more, or less, than (1) conduct which increased *(in some relevant manner and extent)* the risk of the occurrence of some injury that in fact occurred (2) in circumstances where, for some reason, the but-for test cannot be used, validly, to determine if that conduct is both a historical (scientific) factual case and a legal factual cause of the injury, so that (3) the court can continue the process of determining whether that conduct *justifies* the imposition of liability on a particular defendant for that harm (4) even though, in law, the defendant's conduct is not a factual cause of that harm.

Please note the italicized word in the preceding sentence: "justifies". "Justification" refers to what is right or wrong by reference to standards of behaviour that are based on criteria which are not measurable, physical-world, attributes such as mass or chemical composition. These standards are, instead, rules of morality or, using a word that has the same meaning for some judges or lawyers, in this context, metaphysical.

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[138] In addition to the cases mentioned earlier, see *Ghani v. Umran*, 2008 BCSC 585 at para 36 where the trial judge wrote: "In *Resurfice Corp. v. Hanke* ... the Supreme Court of Canada made clear that the burden is usually on the plaintiff to show that the injury would not have occurred "but for" the defendant's negligence. Only in special circumstances can a plaintiff rely on the less-stringent test of whether the defendant's *negligence materially contributed to the injury*" (emphasis added, citation omitted).

Some Canadian judges have been known to assert that they do not like metaphysics in their tort law. One consequence of *Resurfice* is that some judges, even trial judges, will have to regularly deal with platefuls of indigestible metaphysics. I will recast the statement contained in proposition (3) in the preceding paragraph. The *Resurfice* material-contribution test requires that judge decide whether a bad person *ought* to be punished for sufficiently bad misconduct that might have injured somebody, even though we do not have sufficient proof to form a scientifically valid (i.e., logically valid) conclusion that it did. The limits of that inquiry – the limits of the *Hegemony* of the *Resurfice* material contribution test – are metaphysical because those limits are "ought" limits. They are moral (normative) limits ultimately imposed because the judges who have the last word (or the legislature, should the legislatures choose to intervene) decide we will go this far, but no farther, because this far is "right" or "fair and just".

Resurfice introduced its discussion of causation principles with three sentences that should go down in Canadian judicial infamy. "Much 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. It suffices at this juncture to simply assert the general principles that emerge from the cases."[139] One could take it from that assertion, and its context, that the Court thought that at least some of that ink had been spilled unnecessarily; that it was not expressing praise in an indirect manner. It is not my purpose, in this article, to *directly* contest the Supreme Court's views of the importance of the "debates".[140] The content and reason for those debates is sufficient proof of their importance. The content of Professors Black's and Brown's articles are sufficient proof. The morass in the jurisprudence is sufficient proof. A passage in Professor Brown's *Hegemony* continues and emphasizes the thesis in Professor Black's *Policyization*. Brown, in the Conclusion to *Hegemony*, opens with: "the conflation of creation of risk with contribution to injury, and of risky conduct with harmful conduct, represents on its own a fundamental event in the evolution of Canadian negligence law."[141] He added:

> In discussing developments in causation law at the Supreme Court of Canada after *Athey* and Walker, Professor Black observed that the court has not Instead, the court has generally proceeded as if it were affirming orthodox doctrinal bedrock. After *Hanke*, this remains a valid observation. The juxtaposition of the almost casual note struck by the court with the quality of this shift, however, makes it

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[139] *Resurfice*, at para. 20. I have not been bashful about stating my view that the Supreme Court's rationale for these sentences seems to include an unwillingness to confront the already existing inconsistencies and contradictions in its own jurisprudence and to address the additional inconsistency and contradiction that it was introducing through the *Resurfice* material-contribution declarations. "Looking Glass" states, 45 Alta. L. Rev at 242, note 11, that it seems that the Court's decision to mention only its own cases was "[m]ainly … to give the impression that its own decisions in the area were clear and consistent." As others have shown in numerous articles in law reviews and in Canada's leading tort texts, as I have shown in *Snark*, and I will recapitulate in this article as needed, the jurisprudence was too often neither clear nor consistent.

[140] Other people with more letters behind their surnames (if not more in their surnames) can, have, and will do that. Obviously, the Court has the last word. As Humpty Dumpty is reported to have said, the issue, at its root, is about power.

[141] Brown, *Hegemony*, at 455

> difficult to avoiding wondering whether the court appreciates the significance of its statement or, alternatively, even whether the court is being candid about its profound transformation of the law of negligence.[142]

The on-going results of *Resurfice* prove that the Supreme Court's view that it "suffices at this juncture to simply assert the general principles that emerge from the cases" was and is wrong.

Professor Richard Wright recently wrote in "Acts and Omissions as Positive and Negative Causes":

> Debates over the meaning and role of causation in attributions of legal responsibility are hardly new. However, the debates have been much more widespread and urgent in recent years, as advances in science combined with mass production and distribution of products have created an expanding number of risks and harms, which, however, are often difficult to attribute to specific actors. In the current debates, as in past debates, considerable confusion—and sometimes bad legal results—have been generated by the failure of many courts, lawyers, and theorists to clearly distinguish the issue of factual causation from the issue of legal responsibility, for which a finding of factual causation (or at least the possibility of factual causation) remains a necessary but not sufficient prerequisite. Difficult normative issues of proper legal responsibility have gone unrecognised or been ignored by, on the one hand, judicial findings of 'no causation' (and thus no liability) when factual causation clearly existed in the particular situation and, on the other hand, judicial findings of 'causation' (and thus full liability) when only the probability or even mere possibility of factual causation could be established. *The necessary first step in clear thinking about legal responsibility is to isolate and clarify the concept of factual causation and the requirements for establishing factual causation in particular situations.* This chapter is an attempt to contribute to that understanding.[143]

Borrowing and paraphrasing Wright's last sentences, this on-going article is also an attempt to contribute to that necessary understanding, aimed primarily at the part of the profession which has to apply that understanding in the trenches.[144]

If you really believe that we practitioners can now give our clients reliable, cost-effective, advice, no matter what side of the plaintiff or defence side you usually inhabit (or inhibit), then you are far more optimistic than I am. Professor Brown succinctly describes the situation in "Material Contribution's Expanding Hegemony". In the but-for test and the *Resurfice* version of material-contribution test,

> we have two approaches with vastly differing ramifications for the parties *inter se*, and with no objective measure for predicting the circumstances in which one will be preferred to the other. On the first approach – the but-for test – the plaintiff's chance of success depends on objectively demonstrating the necessary factual link between the defendant's negligence and harm. Applying this test, some plaintiffs will succeed while some will

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[142] Brown, *Hegemony*, at 455-56. An internal footnote referencing *Policyization* at 188 has been omitted. For those who care, it appears at the end of the sentence that ends with "doctrinal bedrock".

[143] In Emerging Issues In Tort Law, Jason Neyers, Erika Chamberlain and Stephen Pitel, eds. (Hart Publishing, London, 2007), at 307. (emphasis added) [Wright, *Acts and Omissions*].

[144] If a few judges are listening, too, so much the better. The Cassandra-role tends to be self-limiting.

> not, but the result will always be explicable by verifiable reference points. The second approach, however – the material-contribution test – guarantees the plaintiff success, but is applied only on a purely intuitive basis. Or as McLachlin J. put it, it is applied where "it would offend basic notions of fairness and justice to deny liability by applying a 'but for' approach."[145]

I, for one, would certainly like to know what the words bracketing "and" in the phrase "basic notions of fairness and justice" mean to the judges using the terms and what, if any, difference there is in the meaning of each of the two words. But, perhaps I am being a bit too demanding. Perhaps the meaning should be clear enough to anyone who has and uses ordinary, common sense; that it is discernable through the exercise of a robust, pragmatic approach to the elucidation of the non-metaphysical significance of these two historically ancient English words. In other words, it should be as obvious as the nose on my face. Or may be not.

In any event, it seems that the only accurate summary practitioners can give their clients is: "you pays your money (to us: your lawyers), you takes your chances". Why should we (the lawyers getting paid) complain?

A Canadian Causation Conundrum: How Many Tests?

Canadian tort jurisprudence now has the traditional but-for test for factual causation and the *Resurfice* material-contribution test for legal causation. Are there more tests for factual or legal causation? Another way to ask this question is: does the *Athey* material-contribution test for factual causation still exist? [146]

Resurfice is remarkably opaque. The penultimate paragraph states: "In this case, the Court of Appeal erred in failing to recognize that the basic test for causation remains the "but for" test. It further erred in applying the material contribution test in circumstances where its use was neither necessary nor justified."[147] This passage does not state or imply that the version of the material-contribution test that the Alberta Court of Appeal applied – the *Athey* version of material-contribution to injury – has been abolished. The paragraph states only that the Alberta Court of Appeal erred in applying the *Athey* version as it did and the Supreme Court provides an explanation for why the Court of Appeal was wrong.

The rest of *Resurfice* does not provide an answer, either, to the question: does the *Athey* material-contribution test still exist? The Supreme Court could have, but did not, provide an explicit answer. *Resurfice* states that the but-for test is the default test. It creates a new risk-based test called the material-contribution test. The *Athey* passage setting out the *Athey* version of the material-contribution-to-injury test[148] is not cited,

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[145] Brown, *Hegemony*, 45 Can. Bus. L. J. at 446.

[146] Or, in effect, is *Walker Estate* still good law? What is the test for factual causation in cases of negligent screening of blood donors?

[147] *Resurfice*, para 29.

[148] *Athey*, para. 15

quoted, or referred to, except in the three paragraphs of *Resurfice*[149] in which the Supreme Court recounts why the Alberta Court of Appeal erred and in which Supreme Court lists the decisions which it states are authority for the proposition that the but-for test is the default test rather than the material-contribution test. The version of the material-contribution test referred to in these paragraphs is the *Athey* version. That is all that these paragraphs say about the status of that version. They say nothing on the issue of whether the *Athey* material-contribution-to-injury test continues to exist. *Athey* is not mentioned, again, after paragraph 22 in which *Resurfice* quotes from para. 14 of *Athey*: "As stated in ***Athey v. Leonati***, at para. 14, … [t]he 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." [150]

I return to the Supreme Court's summary of its reasons for why the Alberta Court of Appeal erred: "In this case, the Court of Appeal erred in failing to recognize that the basic test for causation remains the "but for" test. It further erred in applying the material contribution test in circumstances where its use was neither necessary nor justified."[151] As mentioned, the reference to "the material contribution test" is to the *Athey* version. The passage provides two reasons for why the Alberta Court of Appeal erred. The first sentence summarizes the exposition of law in paragraphs 18-23 of *Resurfice*. The second sentence could be seen to be nothing more than an affirmation of the first, but said in different words. The use of the *Athey* version was "neither necessary nor justified", if its use was wrong. The use of the *Athey* material-contribution test was neither "necessary nor justified" if the but-for test was validly applicable, regardless of the answer provided by its application. Put that way, the second sentence is a restatement of the first.

However, it could be argued that that analysis of the second sentence ignores the first three words in the sentence – "it [the Alberta Court of Appeal] further erred". It could be argued that these words should be understood to indicate that the balance of the sentence will outline at least one more, different – different from the first sentence – reason why the Alberta Court of Appeal erred. What other error(s) could that be? The discussion of law in *Resurfice* does not provide any clues. Did the Supreme Court means something more by the use of "justified"? The scope of "necessary" seems exhausted by identifying it as a summary of the proposition "used improperly because but-for was applicable". What, then, does "neither justified" mean? There should be no doubt as to why the Alberta Court of Appeal asserted that the *Athey* version of the material-contribution test was the applicable test. It was to avoid the application of the but-for test. It was to increase the possibility that both Hanke and the defendants could be held at fault and liable, so as to permit the Hanke to recover some damages for his serious injuries.[152]

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[149] *Resurfice*, paras. 18-19, 22

[150] *Resurfice*, at para. 22 (internal quotation marks omitted).

[151] *Resurfice*, para. 29

[152] This is explicit in the Alberta Court of Appeal's assertion that the trial judge erred by adopting an approach which, according to that court, meant that the trial judge focussed too much on Hanke's conduct and failed to consider whether the incident could have been caused by, and be the fault of, both Hanke and the defendants: see Cheifetz & Black, *Quantum Uncertainty*, at 157.

Was the Supreme Court attempting to tell the profession that there are still some instances where the Athey *material-contribution-to-injury*[153] test, whatever it means – whatever that is will still be some version of a causation of injury test – or some other test, is still capable of applying, and is to be applied, in the plaintiff's favour even though the but-for test validly applies to those facts and produces a "No, there is not factual causation" answer? Or, as in *Walker Estate*, produces a "yes, there is factual causation" answer? This has to be the *Athey* material-contribution test, or some other version of a factual causation test, because the *Resurface* version of the *material-contribution-to risk* test does not apply if the but-for test applies.[154] Recall that, whatever else it means, *Walker Estate* held that *Athey* version of the material-contribution was to be applied to facts to which the but-for test also applied, even though, in *Walker Estate*, the application of the but-for test produced a plaintiff-favouring "yes, there is factual causation" answer.[155]

We do not find the answer to this riddle in *Resurface*. As I wrote earlier in this section, another way to ask the question is: does the *Athey* material-contribution test for factual causation still exist? An answer is provided by looking at cases decided before *Resurface* and asking how they would be decided, now. The process is as follows.

> 1. Can we identify cases decided *in favour of the plaintiff* on an *Athey* material-contribution basis that would not be decided in favour of the plaintiff now? We are not concerned with "why", yet, just the result. We remove from the set of cases all of the cases, if any, which we now believe would be decided against the plaintiff. Call the larger set of cases that remains "Set A".
>
> 2. We examine Set A (cases in which the plaintiff succeeded) for any cases that would now be decided in favour of the plaintiff by applying the *Resurface* material-contribution contribution test. They are supposed to be "exceptional cases" so there should not be that many. We remove those cases. Call what is left "Set B".
>
> 3. We examine Set B. On what basis would the finding of cause-in-fact be made in favour of the plaintiff, now, in each of those cases? If the answer is the but-for test, then the rhetorical question is: "what changed about the facts that makes the but-for test validly applicable, now, when it was not validly applicable before February 8, 2007?" [remember: basis was Athey mc before]

If there are no cases left, the *Athey* version of the material-contribution-to-injury-test no longer exists. Knowing whether *Walker Estate* is still good law would not help. In *Walker*

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[153] I have borrowed the terminology from Brown, *Hegemony.*

[154] *Resurfice*, para. 25.

[155] What is clear is that, in *Walker Estate*, the Supreme Court made a normative decision (a policy decision) that causation issues in future cases of "negligent blood-donor screening" should be handled using the "relaxed", assumed to be (in practice) easier to satisfy, *Athey* material-contribution-to-injury test rather than the but-for test. What is the status of *Walker Estate* after *Resurfice*? What is the status of the ratio at para. 88: "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."

Estate, the Supreme Court held that that the *Athey* material-contribution test and the but-for test were both applicable to the same set of facts and both produced a "yes, there is factual causation" answer.[156] However, if there is at least one case where there is a finding that cause-in-fact exists, which is a finding that is not valid under but-for as it is presently understood, then there has to be another meaning for the but-for test, or another test for the existence of cause-in-fact, if it is your view that the issue was correctly decided in the plaintiff's favour.[157] That other meaning or test might be the *Athey* material-contribution-to-injury test, whatever that now means, or something completely different.[158] *Resurfice* provides no clues.[159]

Tracing A Resurfice Rationale

The explicitly-stated rationale for the *Resurfice* material-contribution version of legal causation – fault plus risk plus injury within ambit of risk may be sufficient for legal causation" – is "fairness and justice". "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 notions of fairness and justice to deny liability by applying a 'but for' approach."[160] *Resurfice* does not explain why "it would offend basic notions of fairness and justice to deny liability" where the *only* evidence that is legally relevant evidence shows that it is more likely than not that the conduct of particular defendant *did not cause* the plaintiff's injury or, at best, the evidence is equally balanced as between caused and did not cause. After all, the but-for doctrine and its underpinning of individual responsibility for wrongdoing is more than four centuries-old, traditional, tort doctrine.[161]

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[156] *Walker Estate*, at para. 88.

[157] The assumption, here, is that you have also determined that these problematic cases were *not* missed as *Resurfice* material-contribution-to risk cases.

[158] I, and others, have argued that it the *Athey* either meant nothing more than "*a* cause-in-fact" or it meant nothing at all, because a cause is a cause is a cause. I suggest that good proof of that is a recent British Columbia trial decision: *Dewitt v. Takacs*, 2008 BCSC 314. The findings of factual causation were made using the but-for test and but-for wording of "cause", "caused" and "a cause". The result seems correct on the facts outlined in the reasons. It also seems undeniable that, before *Resurfice*, we would have had the same result using versions of "materially contributed". The Nova Scotia Supreme Court trial decision in Miller v. Royal Bank of Canada, 2008 NSSC 32 is equally explicit proof. *Randhawa v. Hwang*, 2008 BCSC 435 is even better proof of this, of the fact that the message is not getting through to some members of the bar and the judiciary. In *Randhawa*, the plaintiff had pre-existing problems. The trial judge found that the plaintiff's problems after the accident were different from those before the accident. The trial judge held that accident probably caused the new problems. The trial judge accepted the plaintiff's expert medical evidence that her new complaints were probably caused by the accident and rejected the defence evidence that there was no difference or that the complaints were a continuation of the prior condition. The trial judge held that "on the balance of probabilities" the accident "materially contributed" to the injuries. Yet, despite all that, the trial judge held that she was deciding causation based on *Resurfice* material contribution because it was impossible for the plaintiff to establish factual causation on a but-for basis.

[159] It is at least plausible that the judges on the panel in *Moore v Wienecke* 2008 ONCA 162 saw this problem and that that is part of the reason why they avoided any discussion of what the new law means.

[160] *Resurfice*, at para. 25.

[161] *Policyization*, at 187; see, also, J. G. Fleming, *The Law of Torts*, 8th ed. (Syndey, Butterworths, 1992) at 143, cited with approval by Sopinka J. and McLachlin J. in their dissent in *Hollis* at para. 74. Fleming wrote: "If such a causal relation does not exist, that puts an end to the plaintiff's case: to impose liability for

In *Resurfice*, the Supreme Court adopted a pro-plaintiff normative position without any explanation why, unless we conclude that the explanation is sufficiently contained in the mere facts that (1) the defendant was negligent and (2) that negligence could be a cause; that is, the harm that occurred was a risk created by the negligence. Indeed, that is seemingly exactly what *Resurfice* asserts is the "central" basis. After offering examples based on *Cook v. Lewis* and *Walker Estate* as cases to which the new material-contribution test applies,[162] the Court wrote (in explaining why the new test applied to the example drawn from Walker Estate): "Once again, the impossibility of establishing causation and the element of injury-related risk created by the defendant are central."[163]

However, *Resurfice* does not explain what it is about the so-called "exceptional" cases that makes those factors "central"; that is, sufficient in these "exceptional" cases but not other cases. "Fairness" and "justice are labels describing conclusions. What *Resurfice* does not adequately do is set out the facts that lead to those conclusions. *Resurfice* does not explain why the "impossibility of establishing causation" coupled with "the element of injury-related risk created by the defendant" lead to the conclusion that it is fair and just in a particular type of case, described as the exceptional case, to allow the plaintiff to succeed against a defendant without establishing on a probability basis that that defendant's tortious conduct is probably a factual cause of that plaintiff's injury. The Court could have explained why it was that the fact it is impossible for the plaintiff to prove that the defendant's negligence caused the plaintiff's injury using the but-for test, where]the impossibility is due to factors that are outside of the plaintiff's control is, in some cases, relevant. The Court did not.

Is it significant that the Court offered *Cook v. Lewis* as one of the two examples of fact-patterns triggering the risk-based material-contribution test *without* referring to one of the alternative justifications stated in *Cook v. Lewis*, itself, for the result?[164] This is the fact that the negligence of each of the defendants could be said to have destroyed the plaintiff's ability to prove factual causation, under the but-for test, against either or both of the defendants. The same negligence that injured the plaintiff also destroyed the plaintiff's ability to lawfully obtain the remedy provided for injury caused by negligence.[165] It may be that the Court saw that this problem, in some way, is probably common enough in cases of harm caused by negligence, even if it need not necessarily exist. Having just criticized the Alberta Court of Appeal for asserting a version of the material-contribution test which was a *de facto* replacement for the but-for test, the Supreme Court was likely very leery about falling into the same error. In addition, it is

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loss to which the defendant's conduct has not in fact contributed would be incompatible with the principle of individual responsibility on which the law of torts has been traditionally based. (Emphasis in original.)

[162] *Resurfice*, paras. 27, 28.

[163] *Resurfice*, at para. 28.

[164] A justification which the Supreme Court had relied on in *Hollis v. Dow Corning*.

[165] *Cook v Lewis*, *supra*. See, particularly, the reasons of Rand, J. This rationale for *Cook v. Lewis* is discussed in some detail in Brown, *Hegemony*, and Beever "Cause In Fact". This aspect of *Cook v. Lewis,* and the case, itself, form part of the majority's rationale in *Hollis v. Dow Corning Corp*. See [19995] 4 S.C.R. 634 at paras. 56-57. The Court asserted that "a close analogy" could be drawn between the facts of the two cases.

unlikely, if only for reasons of taxonomic impracticability [impracticability/difficulty in making valid distinctions] in practice,[166] that the difference is in some way related to the quality or the extent of the increased risk in the particular activity. The difference, cannot, obviously, be the mere fact that the but-for test does not provide a plaintiff-favouring answer. That approach would presume that any pro-defendant answer is probably wrong.

As such, the missing factor must either be in some other aspect of the conduct, or something imposed on the relationship between the parties, such as liability imposed by statute. We can ignore explanations of the last type. That sends us back to either fault, risk, or something else about the conduct. It cannot be fault; or risk, alone or in conjunction. Fault, alone, is not sufficient for liability in tort. Relevant risk is an aspect of fault. All conduct (misfeasance or nonfeasance) creates risks. Negligence requires unreasonable increase in risk. "A defendant's conduct is negligent if it creates an unreasonable risk of harm".[167] All we have left is something else: some other aspect of the defendant's activity, or the activity as a whole. What, then, might be the difference in defendant's conduct in "exceptional cases" that makes fault and risk sufficient for legal causation under the *Resurfice* material-contribution test?

Resurfice does not say, but it is possible to make an educated guess as to what the *Resurfice* panel might have had in mind, based on two prior Supreme Court of Canada judgments: *Hollis v. Dow Corning Corp*.[168] and *Bazley v. Curry*.[169] It is, essentially, that the activity, or some aspect of the way that the activity is performed, is such that, as between injured person and actor, the actor *ought* to pay for injury which the actor's tortious conduct might have caused, unless the actor can show that its conduct was probably not a cause. *Resurfice* did not suggest that some analogue to the *Hollis* rule applies against the defendant in material-contribution cases so we should assume that, for the moment, it does not. The *Hollis* rule produces an irrebutable presumption of factual causation. Where it applies, the *Hollis* rule, prevents a defendant from establishing, either probably or certainly, that the defendant's conduct would not have made a difference.[170] The Supreme Court's decision *Walker Estate* limiting the *Hollis* rule to failure to warn cases involving "learned intermediaries", and that *Hollis* is not mentioned in *Resurfice* although *Walker Estate* is, is a reason to assume the Court did not intend to deny defendants the ability to defend on the basis that their conduct, in fact, could not be a factual cause at all, and to lead evidence to establish this.

More importantly, though, is that it is intrinsic to the material-contribution-as-risk fact-pattern that the trial court will be hearing evidence that the defendant's conduct was not a cause. The inquiry the trial court is undertaking is to decide whether there is a possibility, which is less than a probability, that the defendant's conduct caused the harm.

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[166] After all, practicising lawyers and inferior court judges will have to use the test.

[167] Mustapha v. Culligan of Canada Ltd., 2008 SCC 27 at para. 7; Klar, *Tort Law* (3d), at 581, n. 203; Allen. M. Linden and Bruce Feldthusen, *Canadian Tort Law*, 8th ed. (Markham: Butterworths, 2006) at 130.

[168] *Hollis*, *supra*

[169] *Bazley v Curry*, [1999] 2 S.C.R. 534, 174 D.L.R. (4th) 45, 1999 CanLII 692**.**

[170] See *infra* – **But-for Variations: Hollis**

That possibility is what increased risk means. In order to make any sense at all, the process by which that decision is made requires the trial court hear evidence adduced either to show that the defendant's conduct was not a cause at all or to minimize the possibility that it was a cause.

In *Hollis*, the Supreme Court gave three reasons and what amounts to a rationale in summary for denying Dow Corning the right to establish, on the balance of probability (or even to a certainty if that were that possible), that the doctor would not have passed on the proper information even if he had had it – in other words, that Dow's negligence in fact made no difference. First, this would have required the plaintiff "to prove a hypothetical situation relating to her doctor's conduct … brought about by Dow's failure to perform its duty. While the legal and persuasive onus in a negligence case generally falls on the plaintiff, I do not see how this can require the plaintiff to prove a hypothetical situation of this kind."[171] The majority's explanation of why the plaintiff should be relieved of the orthodox counterfactual requirement" seems to have been to ensure that all plaintiffs in circumstances similar to that of *Hollis* would have a cause of action against somebody. That is explicit in the second reason. The proposed defence could produce a situation where the plaintiff would fail against both the doctor and the manufacturer, even though the manufacturer was at fault, and would be remediless.

> Adopting such a rule [that the defendant would not be liable if it could show that the intermediary would not have passed on the correct information, even if given it] would, in some cases, run the risk of leaving the plaintiff with no compensation for her injuries. She would not be able to recover against a doctor who had not been negligent with respect to the information that he or she <u>did</u> have; yet she also would not be able to recover against a manufacturer who, despite having failed in its duty to warn, could escape liability on the basis that, had the doctor been appropriately warned, he or she still would not have passed the information on to the plaintiff. Our tort law should not be held to contemplate such an anomalous result.[172]

The third reason is also somewhat of a rationale: "The learned intermediary rule provides a means by which the manufacturer can discharge its duty to give adequate information of the risks to the plaintiff by informing the intermediary, but if it fails to do so it cannot raise as a defence that the intermediary could have ignored this information."[173] The stated rationale appears earlier in the reasons: justice. The plaintiff "who was in a position of great informational inequality with respect to both the manufacturer and the doctor, played no part in creating the set of causal conditions leading to her injury. *Justice dictates* that she should not be penalized for the fact that had the manufacturer actually met its duty to warn, the doctor still might have been at fault."[174]

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[171] *Hollis*, at para. 60.

[172] *Hollis*, at para. 60 (emphasis in original, words in brackets added). The dissent's response was succinct: "Liability cannot be based on failure to take measures which would have no effect and be pointless": *Hollis*, para. 75

[173] *Hollis*, at para. 61.

[174] *Hollis*, at para 57 (emphasis added)

The dissent might be seen as ironic, in hindsight, given that it was written by Sopinka J. and concurred in by McLachlin, J., as she then was. The substance of the dissent was that there was no valid reason for departing from orthodox principles that required the plaintiff to establish, on the balance of probability, that the conduct of the defendant sought to be held liable was a cause of the injury.[175] The crux of the dissent is captured in one sentence: "Liability cannot be based on failure to take measures which would have no effect and be pointless."[176]

About three years later, McLachlin C.J. gave a speech, in Sydney, Australia, I which she intimated that the "all or nothing" aspects of the but-for test were problematic[177] and, about four years later, in *Bazley v. Curry*,[178] McLachlin C.J. stated "it is fair that the person who or organization that creates the enterprise and hence the risk should bear the loss. This accords with the notion that it is right and just that the person who creates a risk bear the loss when the risk ripens into harm. … [T]he fairness of this proposition is capable of standing alone".[179] I have quoted from the Supreme Court's rationale for the "enterprise liability" basis of vicarious liability. The complete passage from which I extracted the quoted words is:

> "However, effective compensation must also be fair, in the sense that it must seem just to place liability for the wrong on the employer. Vicarious liability is arguably fair in this sense. The employer puts in the community an enterprise which carries with it certain risks. When those risks materialize and cause injury to a member of the public despite the employer's reasonable efforts, it is fair that the person or organization that creates the enterprise and hence the risk should bear the loss. This accords with the notion that it is right and just that the person who creates a risk bear the loss when the risk ripens into harm. While the fairness of this proposition is capable of standing alone, it is buttressed by the fact that the employer is often in the best position to spread the losses through mechanisms like insurance and higher prices, thus minimizing the dislocative effect of the tort within society."[180]

As we see, *Bazley* asserts that the increased-risk-as-causation principle is self-sufficient. *Bazley* did not tie it to tortious conduct by somebody in an employment or analogous relationship. The "risk ripens into harm" when the harm occurs.

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[175] *Hollis*, especially paras.. 72-77. In para. 77, Sopinka J. specifically referred to and rejected the majority's use of *Cook v. Lewis* and *Snell*. He wrote that the "requirement that causation be established is fundamental to tort law" and that "none of the foregoing cases … suggested that the problem could be avoided by treating the issue of causation as irrelevant."

[176] *Hollis*, at para 75, per Sopinka J.

[177] Hon. B. McLachlin, "Negligence Law - Proving the Connection" in Mullany and Linden eds., *Torts Tomorrow, A Tribute to John Fleming* (Sydney, LBC, 1998) at 16.

[178] [1999] 2 S.C.R. 534 at para. 31.

[179] *Bazley*, at para. 31.

[180] *Bazley*, at para. 31.

Bazley states: "First and foremost is the concern to provide *a just* and practical remedy to people who suffer as a consequence of wrongs perpetrated by an employee. … [A] person who … advance[s] his own economic interest should in fairness be placed under a corresponding liability for losses incurred in the course of the enterprise. The idea that the person who introduces a risk incurs a duty to those who may be injured lies at the heart of tort law. … This *principle of fairness* applies to the employment enterprise and hence to the issue of vicarious liability"[181] *Bazely* also asserts: "Policy considerations relating to the fair allocation of loss to risk-creating enterprises and the deterrence of harms tend to support the imposition of vicarious liability on employers."[182] There is at least an echo of these words in the "fairness and justice" rationale in *Resurfice*: "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 notions of fairness and justice to deny liability by applying a "but for" approach."[183]

The "second major policy consideration" – fairness and justice being the first – given by *Bazley* as a rationale for vicarious liability is "deterrence of future harm".[184] *Bazley* argues that imposing liability based on risk increases the likelihood that the defendant will take steps to minimize the manifestation of the harm.[185] *Bazley* asserts that "The introduction of the enterprise into the community with its attendant risk, in turn, implies the possibility of managing the risk to minimize the costs of the harm that may flow from it."[186]

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[181] *Bazley*, at para. 30 (emphasis added, brackets added).
[182] *Bazley*, at para. 35.
[183] *Resurfice*, at para. 25.
[184] *Bazely*, at para. 32-33.
[185] *Bazely*, at para. 32-34
[186] *Bazley*, at para. 34.

II. But-For: Not Completely Dead But Not At All Well[187]

> The fundamental rule which has never been displaced is that but-for test is the basic, primary test for determining causation in negligence actions.[188]
>
> "Causality is usually tested by the short-form question whether the same event would have occurred "but for" the defendant's negligence. Inevitably, the answer is conjectural, since we can never be certain that it would have happened otherwise." J.G. Fleming, "Probabilistic Causation In Tort Law: A Postscript" (1991), 70 Can. Bar. Rev. 136 at 140. (internal footnote omitted).

Overview

In the Western conception of reality, all events (putting aside the Big Bang and religion) have more than one historical (scientific) cause; that is, more than one factual cause.[189] This must be true inside the court room, too. Any other suggestion would fail even a semblance of a reality test. There might only be one *relevant*, *legal*, factual cause; however, that is a policy-driven conclusion – a normative decision made by the law of the particular legal system for its particular reasons. For law, legal factual causation refers to "the need to establish a causal connection or link between events of *legal significance*, namely the wrong in question and any detrimental effect on the plaintiff alleged to the be the result of that wrong."[190] It not a decision based on any valid principle of science. In the same sense, there is always more than one factual, historical, scientific, cause of some injured person's harm (injury). Or, there may be more than one, relevant, legal, factual cause but still fewer legal causes than number of historical, scientific, factual causes. That, too, is a legal decision not a scientific decision. As Glanville Williams wrote, more than 50 years ago, law does not require us to go back to the "primeval slime" to find a relevant, legal, factual cause.[191]

It was always the law that the but-for test applied even if there was more than one potential cause of the harm. That was the law long before *Resurfice*, *Athey v Leonati*, and *Snell v Farrell*. *Resurfice* affirms that principle but adds nothing to our understanding of the principle. If something in *Resurfice* does help to eliminate some misunderstanding on the part of some, then so much the better. However, that misunderstanding should not have existed. The mere fact that there might be more than one cause for some injury was

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[187] See, Monty Python's Flying Circus, Episode 3,"The Larch". Defence counsel attempts to introduce evidence through a witness who is inside a coffin. The explanation, according to the lawyer, is that the witness is virtually, not completely, dead and that he is in the coffin purely as a precaution. The lawyer's attempts end when the witness stops answering, apparently having died. This part of the sketch ends with this exchange between judge and counsel. Judge: What do you mean, no further questions? You can't just dump a dead body in my court and say 'no further questions'. I demand an explanation." Counsel: "There are no easy answers in this case m'lud."

[188] *Resurfice*, at paras. 21, 22.

[189] This is true even about the Toronto Maple Leafs.

[190] Ken Cooper-Stephenson, *Personal Injury Damages in Canada* (1996, Thomson, Canada), at 747. (emphasis added). *Snell v. Farrell*, at 327, describes this as a "substantial connection". *Resurfice* borrowed the description: see, para. 23.

[191] Glanville Williams, "Causation in the Law, [1961] Cambridge L.J. 62 at 64: "What is the use of defining cause so widely that it goes back to the primeval slime?"

never sufficient to make a case one to which the but-for test did not apply.[192] Anybody who suggests that *Snell* or *Athey* or any other Supreme Court case before *Resurfice* intended to change that basic law has not been paying proper attention. The cases where there were, in fact, two or more independently (of each other) sufficient causes for harm could always be (and seemingly were, at least in Canada) handled as special applications of the but-for test.[193]

Some consequences may have only "a single *legal* cause", but that is an entirely separate issue. "Legal cause" is an artefact of lawyers. It is a concept unknown to science. I repeat the definition from *Snell*. Legal "[c]ausation 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."[194] A consequence of the principles defining the meaning of "legal cause" is that there are some scientific causes which are not legal causes. Another consequence is that there may be legal causes which are not scientific causes.

It is true that the Alberta Court of Appeal *Resurfice* accurately referred to a statement in *Walker Estate v York-Finch General Hospital*,[195] that read literally supports the Court of Appeal's decision. The statement is:

> 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.[196]

The *Walker Estate* statement could not have been meant to mean what the Alberta Court of Appeal took it to mean: see D. Cheifetz & V. Black, "Material Contribution and Quantum Uncertainty: *Hanke v Resurfice Corp.*";[197] V. Black, "A Farewell To Cause – *Canadian Red Cross Society v. Walker Estate*";[198] V. Black, "The Transformation of Causation in the Supreme Court: Dilution and 'Policyization'".[199]

The first sentence is a problem because, as mentioned, all events (in our known physical and scientific realities – putting aside the Big Bang and religion) always have more than "a single cause". I have quoted Glanville Williams' almost 50 year-old admonition. Professor Lewis Klar has provided a more recent reminder. His language is always elegant in its clarity. He reminds us in *Tort Law* (3d) that

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[192] *Resurfice*, paras. 18-23. See, also, Klar, *Tort Law*; at 391; Linden & Feldthusen, Canadian Tort Law (8th) at 120-23; Vaughan Black, "A Farewell To Cause – *Canadian Red Cross Society v. Walker Estate* (2001), 24 Adv. Q. 478.

[193] Cook v. Lewis, [1951] S.C.R. 830. See the discussion of Bow Valley Husky v. Saint John Shipbuilding in this article at_____. See also Cheifez, *Snark* at p. 12, note 36.

[194] *Snell v Farrell*, [1990] 2 S.C.R. 311 at 326, 72 D.L.R. (4th) 289.

[195] [2001] 1 S.C.R. 647, 2001 SCC 23

[196] *Walker*, para. 87.

[197] (2006), 43 Can. Bus. L. J. 155, for example, at pp. 164-167.

[198] (2001), 24 Adv. Q. 478 at 486-91.

[199] In T. Archibald and M. Cochrane, eds., *Annual Review of Civil Litigation* 2002 (Toronto: Carswell, 2003), 187 at 204

> [t]here are literally countless causes or events which must have occurred in order for the plaintiff's injury to have happened and it would be preposterous to suggest that each ought to be investigated as a source of responsibility and compensation for the victim. . . .
>
> [A] two car collision occurs. There are thousands of causal factors which could be considered — the fact that the cars were built, that they were sold, that the drivers were born, that they were licensed to drive, that roads were built, and so on.[200]

John Fleming wrote in *The Law of Torts*:

> *[e]very* event or occurrence is the result of many conditions that are jointly sufficient to produce it. This complex set of conditions includes all antecedents, active or passive, creative or receptive, which were factors actually involved in producing the consequence. In particular, it embraces both "causes" and what are commonly called mere causal "conditions"; for that distinction, whatever its value in the context of the later inquiry into "proximate" cause, does not correspond to any functional difference as regards the *de facto* relation between antecedents and their consequents.[201] (emphasis added)

Anglo-Canadian judges profess to dislike metaphysics, even more so if the metaphysics are perceived to be "scholastic".[202] Borrowing from *Snark*:

> Disparaging "academic" causation analyses is not a new judicial sport; see, for example, *Clover, Clayton & Co. Ltd v. Hughes,* [1910] A.C. 242 at p. 245: "I will not pursue scholastic theories of causation." In *Overseas Tankship (UK) Ltd v. Morts Dock & Engineering Co Ltd (The Wagon Mound) (No 1)*, [1961] A.C. 388 at 419 (H.L.) Viscount Simond referred to the "grave danger of being led astray by scholastic theories of causation and their ugly and barely intelligible jargon". … In *School Division of Assiniboine South No. 3 v. Hoffer*, [1971] 4 W.W.R. 746, 21 D.L.R. (3d) 608 at para. 19, 1 N.R. 34 (Man. C.A.), leave to appeal to S.C.C. refused 40 D.L.R. (3d) 480n Dickson J.A. (as he then was) wrote: "Since *The Wagon Mound (No. 1)* the 'scholastic theories of

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[200] *Tort Law* (3d) at 391, note 18

[201] *The Law of Torts*, 8th ed. (Sydney, LBC, 1992), p. 193 (emphasis added)

[202] This is a scholastic article about causation in the primary and proper meaning of "scholastic": informed. It is not a scholastic article in the pejorative sense that some judges have used "scholastic". "Scholastic," apparently, is a word that, for some judges, means overly-academic, pedantic, divorced from reality. Some judges, apparently, do not like the sort of scholasticism encompassed by that judicial meaning. Curiously enough, the judicial gloss on "scholastic" is not the primary meaning of "scholastic", as a quick look in any reputable dictionary shows. That meaning refers to schooling and education. "Scholastic" is derived from the Greek word meaning "studious, learned". The online *Compact Oxford English Dictionary of Current English*, reminds us, at http://www.askoxford.com/concise_oed/cardinalvirtue?view=uk, in its definition of "cardinal virtue", that the "the chief moral attributes of scholastic philosophy [are] justice, prudence, temperance, and fortitude." I assume that the disparaging judicial gloss is also not the primary meaning of "scholastic" in disreputable dictionaries, but I have not looked in any so I do not know. I assume and hope that all judges will like a scholastic article which is scholastic in the proper meaning of that term: informed. I am prepared to concede that the article (given its length) might seem overly pedantic, to some. However, whatever else this article is, it is not "overly academic or divorced from reality. And, as I have said, elsewhere, my articles might be long but the individual sections tend not to be.

> causation and their ugly and barely intelligent jargon', have taken a back place to foreseeability."[203]

More recently, we have the Canadian classic in *Snell v. Farrell*, where Sopinka J. wrote that "[c]ausation ... is ... essentially a practical question of fact which can best be answered by ordinary common sense rather than abstract metaphysical theory."[204] This mantra was borrowed from the House of Lords' *Alphacell Ltd. v. Woodward*.[205] In the same vein, McLachlin J. (as she then was) wrote in *CCR Fishing Ltd. v. British Reserve Insurance Co*.:

> The question of whether insurance applies to a loss should not depend on metaphysical debates as to which of various causes contributing to the accident was proximate. Apart from the apparent injustice of making indemnity dependent on such fine and contestable reasoning, such a test is calculated to produce disputed claims and litigation.[206]

Derksen v. 539938 Ontario Ltd.[207] is in the same vein.

The definition of "metaphysical" in the Oxford Encyclopaedic English Dictionary includes "excessively subtle or theoretical". I can assure you that nothing I say in this article is intended to be excessively subtle or excessively theoretical.[208] I leave it to each reader to decide how subtle I have been although I suggest the better answer is "not very". I believe that there is very little in this piece that is theoretical in the sense meant by any common usage of "metaphysics." What "theorizing" there is deals with problems in what was said in the decisions or which seem likely to result from what the cases have said or not said.

One problem with the "common sense, not metaphysics" mantra is that it too often amounts to "I know what I know, don't confuse me with theory or facts." Unfortunately for this trend in judicial (or trier of fact) thinking, there is as at least a touch of metaphysics in the concept of cause. So, I will take a brief look at the basic component of the concept of factual cause: the concept of the "*causa sine qua non*," the "that without which" the consequence (the injury, the harm) harm could not have happened.[209]

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[203] *Snark* at 50, note 211. *Snark* appeared in the Advocates' Quarterly in 2005. It has, to my knowledge, but one judicial reference since then. I suppose that is a hint. In *Whey v. Halifax* (Regional Municipality), 2005 NSSC 348 at para. 12, 239 N.S.R. (2d) 239, the trial judge referred to *Snark* as "a complete, if not overly analytical, attempt to reconcile the traditional "but-for" approach, with the newer (and some say alternative) "material contribution" approach, applied in the rare circumstances when the "but-for" analysis is not "workable". Am I accused of an analysis which *was* overly analytical or something which was *not* overly analytical, that is, not analytical enough?

[204] Snell at 328

[205] [1972] A.C. 824 at 874, [1972] 2 All E.R. 475 (H.L.).

[206] [1990] 1 S.C.R. 814 at 823, 69 D.L.R. (4th) 112, [1990] 3 W.W.R. 505.

[207] [2001] 3 S.C.R. 398 at para. 36, 205 D.L.R. (4th) 1.

[208] (N.Y., Oxford University Press, 1991) at 912.

[209] Law's use of the "that without which" counterfactual does not imply that the consequence could never have come into existence without the existence of the putative cause. It implies only that the putative cause

There is extensive literature on the meaning of factual causation generally and factual causation in law. As mentioned, *the* seminal legal text is H.L.A. Hart and T. Honoré, *Causation in the Law.*[210] Hart and Honoré explain what it means to say that event is a cause of injury: "when each factor is sufficient, with other normal conditions, to bring about the harm as and when it occurs, each is properly described as a cause of the harm."[211] Whether any one item of evidence is capable, in any real sense, of being any proof of any possibility of actual causal connection is a question of science, not law. However, *Snell v. Farrell* reminds us explicitly that the manner in which the findings of science are used by law is not a question of science but of law. Whether law is prepared to accept science's standards, and conclusion, or chooses different standards which could lead to a different conclusion is a matter of law, not science. Law countenances fiction. Science does not. Science calls fictions science fiction or fantasy.[212] Mr. Justice Sopinka wrote in *Snell*: "Experts ordinarily determine causation in terms of certainties whereas a lesser standard is demanded by the law."[213] The result may be that law's use is different from, indeed at odds with, how science would permit those findings to be used.

Professor Tony Honoré wrote in "Causation in the Law", in *The Stanford Encyclopaedia of Philosophy*:[214]

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is sufficient for the consequence to have come into existence. See above ____. The reason for the distinction is important outside of law. In law, it might not be because law is not concerned with absolute certainty; but only probability. So law's "certainty" accepts the possibility that, in the actual world, a set of circumstances exist under which the consequence came into existence even without the existence of the antecedent factor that law has identified as the cause. Consider a too-heavy truck approaching a bridge. (Too heavy for the bridge capacity as is, without regard to whether bridge would have had more capacity if not defective.) We know that the truck will cause the bridge to collapse if it drives over the bridge. We come back and find the bridge collapsed and the truck at the bottom of the ravine. The truck is resting on top of bridge debris. Is that sufficient proof that the bridge collapsed due to the truck on it. Do we ignore the car beside the truck? Do we not need to find out whether the truck was unloaded in part before it drove onto the bridge? Or, the truck might have driven onto the bridge just as it was hit by a flash flood, which knocked out the underpinnings, and before the truck's weight brought the bridge down. How do we know that the bridge did not collapse for some other reason just before the truck got there, and the driver did not have time to stop?

[210] 2d ed. (Oxford: Oxford University Press, 1985)

[211] *Causation in the Law* , at pp. 228-229. The use of "sufficient", here is important. It does not mean "necessary". See above at note _____

[212] The assumptions of Quantum Mechanics and the Standard Model of particle physics are beyond the scope of this article and this writer. Some physicists are currently hoping to find the Higgs Bosun, sometimes called "the God Particle," as a result of tests scheduled to be done in Europe within the next few years, unless it has already been found: see, Slate.com, "Quantum Scoop: The Holy Grail Of Particle Physics May Already Have Been Found", http://www.slate.com/id/2167563/ (accessed November 17, 2007). If not, it may well still be that those physicists will achieve satisfaction before lawyers get a definitive explanation to the meaning of factual causation which is not, in some sense, circular; or, if not circular, then not arbitrary: see the text associated with footnotes 50 and 51. [R. Fumerton & K. Kress, "Causation And The Law:Preemption, Lawful Sufficiency, And Causal Sufficiency" (2001), 64 Law and Contemporary Problems 83 at 105.]

[213] *Snell v. Farrell*, at S.C.R. p. 330.

[214] http://plato.stanford.edu/entries/causation-law/ accessed January 28, 2008, last paragraph before the Bibliography.

> *There is no reason to suppose that the law, when it engages in explanatory inquiries, adopts different criteria of causation from those employed outside the law in the physical and social sciences and in everyday life.* However, even here, requirements of proof may lead to a divergence, for example, between what would medically be treated as the cause of a disease and what counts in law as its cause. As regards attributive uses of cause, the fact that the law has to attend simultaneously both to the meaning of terms importing causal criteria and to the purpose of legal rules and their moral status makes the theory of causation a terrain of debate which does not at present command general agreement and is likely to remain controversial . . . (emphasis added, references to sources omitted).

An essential article dealing with the meaning of factual causation both outside of and within law is R. Fumerton and K. Kress, "Causation And The Law: Preemption, Lawful Sufficiency And Causal Sufficiency".[215] The authors end their analyses of what they see as inadequacies in the current theories of causal connection in law with this admonition.

> An increasing number of philosophers seem to be willing to take the concept of causal connection as a primitive (unanalyzable) concept – one of the conceptual atoms out of which we build more complex concepts or ideas. But one does not need to be overly cynical to wonder whether this embrace is not born out of sheer frustration with the inability to say something interesting yet true about what constitutes the essence of causation. In any event, if the law is waiting for philosophers to offer something better than a prephilosophical grasp of what is involved in one thing causing another, the law had better be very patient indeed.[216]

The Meaning of Factual Cause

What, then, is the essential content of this elusive concept called "factual cause"?[217] *The* seminal legal text in the Anglo-Canadian (maybe even American) canon

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[215] (2001), 64 Law and Contemporary Problems 83. (Online, here)

[216] (2001), 64 Law and Contemporary Problems 83 at 105.

[217] I have, elsewhere, described the attempt to provide this answer as the process of hunting for a causative *Snark*. An equally apt description is that it is a search for the "f" in actual cause. A less irrevent philosophical starting point was provided by John Stuart Mill in John Stuart Mill, A System of Logic: Ratiocinative and Inductive, 8th edn (London, Longmans, Green & Co, 1872) bk III, ch V, s 3:

> The cause, then, philosophically speaking, is the sum total of the conditions positive and negative taken together; the whole of the contingencies of every description, which being realised, the consequent invariably follows. The negative conditions, however, of any phenomenon, a special enumeration of which would generally be very prolix, may be all summed up under one head, namely, the absence of preventing or countervailing causes.

The Mill definition is a quoted from form Wright, *Acts and Omissions*, at 290.

The recommended definition of "factual cause" in the pending *Restatement (Third) of Torts: Liability for Physical Harm* is: "Conduct is a factual cause of harm when the harm would not have occurred absent the conduct. Tortious conduct may also be a factual cause of harm under §27." (*Restatement (Third) Torts: Liability for Physical Harm* (Proposed Final Draft No. 1), (American Law Institute, 2005), c. 5, § 26, c. 5, at 417) The first sentence of the definition is: Tortious conduct must be factual cause of physical harm for liability to be imposed." That sentence should not be read literally. American jurisprudence has means of imposing liability even in the absence of adequate evidence that tortious conduct of a particular defendant is a cause of a the harm sustained by a particular plaintiff. Most Canadian lawyers will be

puts it this way. In the traditional understanding of causation, the condition *sine qua non*, also called "cause in fact" is "what causation means apart from the law": Hart and Honoré, *Causation In The Law*[218] Indeed, it is the "the sole point of contact" that law has with the meaning of causation outside of law: *Causation In The Law*.[219] Central to the concept of *sine qua non* is the notion of necessity. Some prior event or condition which is a *sine qua non* of a subsequent event is a necessary part of a *relevant to law* set of prior conditions or events. There may be more than one such set. See, Hart and Honoré, *Causation In The Law*, c. 5, "Causation and *Sine Qua Non*"; Richard W. Wright, "Causation In Tort Law"[220] and Wright, "Once More Into the Bramble Bush: Duty, Causal Contribution, and the Extent of Legal Responsibility".[221]

Why did I write "a *relevant to law* set of prior conditions or events"? Because it is **not** the case that an antecedent factor's ability to satisfy the condition *sine qua non*

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familiar with at least one of these methods: the "market-share" liability theory created in the DES case: *Sindell v Abbott Laboratories*, 26 Cal. 3d 588 (1980). The American jurisprudence is canvassed in *Fairchild*. It is not necessarily true that about 97 years of fumbling by far more academic lawyers, practising lawyers, and judges than we have ever had in Canada, or the rest of the Commonwealth, necessarily means that the Americans are closer to the truth. The numbers do increase the likelihood that any one person will stumble on the truth. All they do is increase the likelihood that the truth will be discovered, if it is discoverable, sooner. However, numbers and time mean that there is a body of knowledge that the Canadian profession should pay attention to and should have paid attention to.

Since I am attempting to keep this paper as "unmetaphysical" as possible, I add this, from a source thoroughly grounded in law, the proposed Restatement (Third) of Torts, § 28, *Comment b. Reasonable inference and speculation in proving causation*, at 479-80:

> As philosophers have taught, factual cause is not a phenomenon that can be seen or perceived; instead, it is an inference drawn from prior experience and some, often limited, understanding of the other causal factors – the causal mechanism – required for the outcome. Thus, all causal determinations require inferential reasoning. In some cases, the inference is quite powerful … In other cases, the inference may be quite weak … When the inferential leap from the evidence to the conclusion is too great, courts intervene to declare that … [factfinders] may not speculate, and the matter is removed from the province of the … [factfinder].
>
> The difficulty that courts confront is that the line between reasonable inference and prohibited speculation is one of the more indistinct lines that exists in law, and also is one on which reasonable minds can and do differ. Different courts draw those lines at different points at different times; comparison of cases is very difficult because modest differences in the evidence can substantially affect the power of an inference. Thus, it is not possible to state specific rules that locate the line between permissible inference and prohibited speculations.

Tony Honoré has written a very useful summary of causation in the law which is freely accessible: Honoré, "Causation in the Law", *The Stanford Encyclopedia of Philosophy*, *(Winter 2005 Edition),* Edward N. Zalta (ed.), URL = http://plato.stanford.edu/archives/win2005/entries/causation-law/ (accessed January 28, 2008). The Stanford Encyclopedia of Philosophy has articles which provide excellent overviews on various aspects of causation. This query < http://plato.stanford.edu/search/searcher.py?query=causation > produces a list of relevant articles. Lawyers interested in more will find much useful reading in articles by Professors Jane Stapleton and Richard Wright, many of which are now available on the Internet. Another excellent article based on Canadian content is Allen Beever, "Cause-In-Fact: Two Steps out of the Mire" (2001), 51 U.T.L.J. 32.

[218] Causation In the Law (2d) at 90.

[219] Causation In the Law (2d) at 90.

[220] Wright, (1985), 73 Cal. L. Rev. 1735.

[221] Wright, (2001), 54 Vanderbilt Law Review 1071 (Symposium, the John W. Wade Conference on the Third Restatement of Torts).

requirement on scientific grounds – on grounds outside of the law – means the factor is a relevant legal factual cause. The point is that it is **not** the case that every antecedent factor (event, condition) that is a scientific, historical, causally relevant factor is a condition *sine qua non* for law. I will not repeat the passages quoted above from Williams, Klar and Fleming. There are some prior factors (conditions or events) which are, by the very fact of human existence in this reality, necessary to all subsequent event; however, these prior conditions or events will never be considered as potential legal causes.

I mentioned the Big Bang. I could add the existence of this planet and all of the chemical processes necessary for life on Earth as life now exists. The point is that law has a cut-off point back beyond which law will not go. The reason for this can be called policy. I quote, again, from *Snark*.

> Normative considerations define the limits of the empirical factual causation inquiry. There may be an extremely large number of historical factors that satisfy the scientific inquiry. … Law does not consider every historical factual cause relevant. A relevant legal factual cause is a cause falling within the scope of liability limitations. The scope of liability stage involves choosing, based on policy reasons that limit the choices, which among the one or more available events that accepted scientific knowledge defines as factual causes, the legal factual cause(s) that may validly be used as part of the rationale for imposing liability on a defendant for injury found to result from the cause. The scope of liability analysis is used to set the limits within which the law will look for factual causes. The entire universe of events that occurred before the incident is not part of the matrix of legally relevant causative events. The law arbitrarily decides "that is far enough", we need go no further. Policy reasons tell us how to make a choice. Policy reasons include notions of foreseeability, proximity, remoteness and any other matter that involves the interests of tort law or law generally, and the public good, that the court may consider relevant as a reason for excluding any of the events that satisfy the criteria of science or philosophy for factual cause.[222]

Hart and Honoré summarize the situation neatly in *Causation In The Law* (2d): "not every causally relevant factor is a condition *sine qua non*" because "the ideas of [legal] causal relevance and condition *sine qua non* are not the same: and the law is in general only concerned with the latter so far as it is an indication of the former."[223] "Former", in this sentence, refers back to "legal causal relevance", not just "causal relevance".

The second sentence of the quotation from *Walker Estate* – "However, the but-for test is unworkable in some situations, particularly where multiple independent causes may bring about a single harm."[224] – does assert the but-for test is unworkable where multiple independent causes exist. The assertion that the existence of multiple, independently of each other sufficient, causes – this sufficiency requirement is implicit in the concept of multiple independent causes – makes the but-for test unworkable is wrong. What the existence of multiple independent causes means is that the but-for test will

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[222] Cheifetz, *Snark*, at 16 (internal footnotes 54-59 omitted).
[223] *Causation In the Law* (2d) at 113-114. Word in brackets added.
[224] *Walker Estate*, at para 87.

produce answers which are capable of being misunderstood as negatives. This is because the application of the but-for test will produce more than one *sine qua non*. Each of the independent causes will produce a "no" to the counterfactual *sine qua non* question: would the harm have occurred in the absence of the misconduct? The argument then is that there cannot, logically, be more than one independently sufficient causal candidate, as each necessarily eliminates the other, therefore the problem must be the use of the but-for test. The reason why this too-simplistic conclusion is wrong is the subject of extensive scholarship, examining what it means to say that we have "multiple independent causes" or "multiple independently sufficient causes" or "multiple sufficient causes". For Canadian practitioners, good places to start are Klar, *Tort Law* (3d)[225] and Ken Cooper-Stephenson, *Personal Injury Damages In Canada*.[226] The more academically inclined may go, from there, to Hart and Honoré, *Causation In The Law*, (first or second editions), a number of articles by Richard Wright including the two that I listed earlier, and a number of articles by Professor Jane. Stapleton.[227] Finally, another, perhaps clearer, more descriptive, so more useful, phrase to describe what we have when there are "multiple sufficient independent causes" is "duplicative causation".[228]

So much for metaphysics. Now let us get back to "the law". There should be, by now, no uncertainty as to the *basic* meaning of but-for conduct in the but-for test. It means that without the impugned conduct, the injury complained of would not have occurred.[229] "The standard for factual causation is that of *sine qua non*, commonly known as the but-for test. The meaning of the but-for test is settled. The test calls for an inquiry in ... some form of the question, would the injury have occurred in the absence of the misconduct of the defendant? While applying the but-for test sometimes presents difficulties, that does not mean that there is uncertainty about its meaning."[230] A British Columbia trial judge recently stated the rule very succinctly. "[T]he question in this case is whether [the plaintiff] would have suffered the injuries she complains of but for the negligence of the defendants. She is not entitled to recover damages for those injuries that she would have suffered regardless of the defendants' negligence."[231] *Athey* states: the "essential purpose of tort law … is to restore the plaintiff to the position he or she would have enjoyed but for the negligence of the defendant."[232] *Athey* continues in the seminal "original position" passage.

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[225] *Tort Law*, (3d) ed., at pp. 405-417 where Professor Klar discusses far more than just multiple independently sufficient cause scenarios.

[226] Cooper-Stephenson, Personal Injury Damages in Canada, 2d ed., c. 13, (Toronto, Carswell, 1996), where Professor Cooper-Stephenson discusses more than just multiple independently sufficient cause scenarios.

[227] Including Jane Stapleton, "Cause-in-Fact and the Scope of Liability for Consequences"(2003), 119 L.Q.R. 388 and Jane Stapleton, "Legal Cause-in-Fact and the Scope of Liability for Consequences" (2001), 54 Vand. L.J. 941;

[228] See the articles of Professors Richard Wright, Jane Stapleton, and others, including Allen Beever, "Cause-In-Fact: Two Steps out of the Mire" (2001), 51 U.T.L.J. 327.

[229] *Resurfice*, paras. 21, 22.

[230] Cheifetz & Black, "Material Contribution and Quantum Uncertainty: *Hanke v Resurfice Corp*." at 158; see also Klar, *Tort Law* (3d) at pp. 389-92.

[231] *Duley v. Friesen*, 2007 BCSC 1723 at para. 41.

[232] *Athey*, at para. 20.

> The essential purpose and most basic principle of tort law is that the plaintiff must be placed in the position he or she would have been in absent the defendant's negligence (the "original position"). However, the plaintiff is not to be placed in a position better than his or her original one. It is therefore necessary not only to determine the plaintiff's position after the tort but also to assess what the "original position" would have been. It is the difference between these positions, the "original position" and the "injured position", which is the plaintiff's loss.[233]

The use of but-for in duplicative-causation cases presents an apparent *definitional* contradiction in terms.[234] In duplicative causation cases, we have at least two events (or sets of events) each of which is not (or does not include) the other, each of which is a but-for cause for law's purpose, as explained in *Snell*, for the existence of the causation requirement.[235] That purpose is to express 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."[236]

An explanation of what *law* is doing (or perhaps, why the law is doing what it is doing) in the use of but-for in duplicative causation cases is contained in this explanation. *As a general rule, law will not permit a defendant to escape liability merely by showing that some other person's or persons' wrongful conduct may also be a legal cause – that that conduct will also satisfies the requirements for legal causation – if we pretend that the conduct of the former did not occur. The defendant will not be permitted to assert that, logically, it cannot be proven that that defendant's conduct made a difference. Therefore, it does not matter to legal factual causation that some other person is or may also be at fault,* ***so long as that other person's faulty conduct is not pre-emptive***

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[233] *Athey*, at para. 31.

[234] The defintional solution in the proposed *Restatement (Third) of Torts: Liability for Physical Harm* (Proposed Final Draft No. 1), (American Law Institute, 2005), c. 5 "Factual Cause", §27 "Multiple Sufficient Causes", at 452 is: "If multiple acts exist, each of which alone would have been a factual cause under §26 of the physical harm at the same time, each act is regarded as factual cause." The "at the same time" phrase is essential. It is intended to ensure that pre-empted causes are not caught in §26. A "pre-empted" cause of harm is exactly what it sounds like: an event that would have been a cause of the harm but-for the fact that the harm had already occurred *before* the pre-empted cause had any effect. Whether the causes are operating at the same time is a question of fact to which the answer will not always be clear. *Cook v. Lewis* would be an example of a pre-empted cause if there had been two bird shot pelllets entering the eye at separate times. The first pellet destroyed the eye. There would be nothing left for the second pellet to destroy. There could still be the problem of determining who shot the pre-empting pellet if the pellets were identical and there was insufficient other evidence from which to validly draw an inference identifying the gun from which the pellet came. *Fairchild* was, in fact, an example of pre-empted causation, with the twist that the evidence did not exist to allow the courts to validly decide which of the exposures to asbestos was the pre-empting exposure.

[235] It is the apparent contradiction (or paradox) caused by duplicative-causation instances – that contradiction being that each of the causes seemingly prevents any of the other causes from being a but-for cause, hence, logically, there are no but-for causes and, thus, no causes at all – that is one of the two categories of examples of the situation where the but-for test is said to be unworkable. That situation has what seems to be too many choices. Duplicative-causation instances also called overdetermined events. The other category has too little evidence to validly support any decision.

[236] *Snell v. Farrell*, at 326.

conduct.[237] The more the merrier, for some, is a crude, but accurate, summary. In any event, the apparent *definitional* contradiction vanishes when we appreciate that "but-for", as used in the non-duplicative cases, is an application of a more general principle.[238]

I suggest there is Supreme Court of Canada authority for this understanding of the meaning of but-for in duplicative-causation cases. The case is *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd*.[239] In *Bow Valley*, the Supreme Court held the loss was caused by the conduct of all of the plaintiff and two defendants, Saint John Shipping (SJSL) and Raychem. The conduct of at least each of SJSL and Raychem has to be considered as independently sufficient to have caused the loss. One could meaningfully argue that BVHB's conduct was cumulative with the conduct of the defendants. The negligent conduct of each of SJSL and Raychem was the same conduct: failing to warn BHVB about the flammability of a product that Raychem had supplied to SJSL for use by SJSL in the construction of the drilling rig. The contributory fault of BHVB could not have been independently sufficient. A missing electrical safeguard – which BHVB had failed to install – and other aspects of the electrical system for which BHVB was at fault, and the manner in which it operated the rig, were the reason why the fire started, but the fire would not have spread had the product supplied by SJSL not been so flammable.

The paragraphs containing the causation discussion are in the dissenting reasons of McLachin J. (as she then was), but this portion of her reasons was accepted by the majority. McLachlin J. wrote, in part:

> [38] SJSL submits that if BVHB's knowledge did not negate SJSL's duty to warn, it establishes that the failure to warn did not cause the loss. BVHB, it argues, did not prove that it would have acted differently had it been aware of Thermaclad's true characteristics. BVHB continued to operate the rig without a functioning GFCB system,

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[237] An alternative version reverses the sentence order: As a general rule, it does not matter to legal factual causation that some other person's conduct may also amount to legal causation, so long as that other person's conduct is not pre-emptive conduct. The defendant will not be permitted to assert that, logically, it is necessary to conclude that that defendant's conduct "did not make a difference" because of the conduct of another. Therefore, law will not permit a defendant to escape liability merely by showing that some other person's or persons' wrongful conduct may also be a legal cause – that the conduct satisfies the requirements for legal causation – if we pretend that the conduct of the former did not occur. Understand, too, that what conduct is or is not called pre-emptive may be a decision that is normative (so arbitrary) in the sense that a different policy rationale could include that conduct.

[238] I will not discuss what those principle might be this article. I refer readers to Professors Richard Wright's and Jane Stapleton's extensive scholarship on factual causation. Wright is the leading advocate of of a test for the existence of a factual cause called NESS. NESS is an acronym for the phrase "Necessary Element of a Sufficient Set". Wright's description of the NESS test is: "a particular condition was a cause of (condition contributing to) a specific consequence if and only if it was a necessary element of a set of antecedent actual conditions that was sufficient for the occurrence of the consequence." (Wright, *Causation*, at 1777). See, Wright, *Causation*, *Bramble Bush I*, *Bramble Bush II*. Professor Stapleton has developed and described a test that she has called "targeted but-for": Jane Stapleton, "Cause-in-Fact and The Sope of Liability for Consequences" (2003) 119 L.Q.R. 388 and Stapleton, "Legal Cause-in-Fact and The Sope of Liability for Consequences" (2001) 54 Vand. L. J. 975. The targeted but-for test" seems to operate in fashion similar to a NESS test.

[239] [1997] 3 S.C.R. 1210.

> knowing that the Thermaclad could burn and that there was risk of explosion from arcing. In response, BVHB argues, first, that it is not required to prove that it would have behaved differently had it been warned, and second, that the evidence supports its claim that it would have taken steps to address the risk had it been properly warned.
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> [39] I am satisfied that causation is established, on either a subjective or an objective standard. There is evidence that had BVHB been aware of Thermaclad's specific inflammability characteristics, it would not have been used, or alternatively, that BVHB would have taken additional steps to compensate for its inflammability. BVHB, in accordance with applicable standards, would not have permitted inflammable materials to be used without careful consideration and investigation into the availability of nonflammable alternatives. I conclude that a reasonable plaintiff or BVHB itself would have either declined to use Thermaclad or taken steps to deal with its inflammability had it been warned. This suffices to meet the argument that the loss was not caused by the defendants' breach of their duty to warn.
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> [71] The Court of Appeal upheld the trial judge's finding that BVHB was contributorily negligent in failing to have an operable GFCB system …
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> [76] … The trial judge found that the fire started because the rig was being operated without a GFCB system. The fire would not have occurred "but for" the negligence of BVHB: *Snell v. Farrell*, [1990] 2 S.C.R. 311.
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> [78] I agree with the courts below that BVHB was contributorily negligent. …[240]

In the duplicative-causation paradox, each of SJSL and Raychem would argue that their conduct could not be but-for conduct because it was not necessary to produce the consequences of the failure to warn. The conduct of the other was sufficient because it was the same failure in relation to the same product. That proper conduct by one would have negated the failure to warn of the other shows that the conduct of each was independently (of each other) sufficient. I suggest that *Bow Valley* should be understood this way even though the Supreme Court did not address this point. An alternative would be that we are obliged to conclude that the Supreme Court has an understanding of the meaning of but-for in duplicative causation cases, or an understanding of duplicative causation, which no-one else understands.

The other alternative is to argue that the causation test that the Supreme Court used as between SJSL and Raychem, although seemingly but-for, was a nascent form of what was ultimately the *Walker Estate* use of [a form of] material contribution, even though material contribution and *Athey* are not mentioned anywhere in the case.[241] *Athey* was argued a year before *Bow Valley*. The *Athey* reasons were released a bit more than a year before the release of the *Bow Valley* reasons. *Walker Estate*, of course, could not

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[240] [1997] 3 S.C.R. 1210, paras. 38, 39, 71, 76, 78

[241] Failure to warn conduct, in some cases, could be described as amounting to nothing more than conduct which increases the risk of the harm that ultimately materializes. This is because the factual scenario sometimes requires additional conduct of some sort by somebody – it might be the injured person but need not be – to trigger the occurrence of harm. However, in some cases it does not. *Walker Estate* is an example of the former. Other cases require only additional conduct by the injured person. An example would be where the failure to warn is of a quagmire that the injured person is about to fall into.

have been mentioned because it did not yet exist. It was not argued until November 2000, with reasons released in April 2001.

When Does But-For Apply?

> The but-for test applies when the but-for test applies. The but-for test does not apply when it is impossible to apply it.[242]
>
> The material-contribution test applies when the but-for test does not. When does the but-for test apply? When the material-contribution test does not. When does the material contribution test not apply? When the but-for test applies. Accordingly, the but-for test applies when the but-for test applies.[243]

Resurfice confirms *Snell* on the purpose of the but-for test. Again, purpose is a legal construction. Science does not consider "purpose" in its process of deciding whether X is a cause of Y. *Resurfice*, quoting *Snell*, tells us that the but-for test

> recognizes that compensation for negligent conduct should only be made 'where a substantial connection between the injury and 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. (para. 23, internal quotation marks omitted)

Assuming that we know what the criteria are that determine when the but-for test applies, knowing what the purpose of the but-for test is may help us decide whether the criteria have been satisfied where there is some issue. It will also help us define the criteria. Or, we might say that satisfying the purpose (whatever the purpose is) is also one of the criteria that have to be met. But, none of these statements tell us what the other criteria are.

Has *Resurfice* clarified the question of when but-for is applicable? It has, but only in a very broad sense. In substance, *all* that *Resurfice* tells us on this question is that the but-for test applies when the material-contribution test does not apply. It tell us that the but-for test is the basic test but does not tell us the elements are that trigger the application of the but-for test, so that the judge or jury does not have to consider any other test. There is nothing in *Resurfice* that amounts to a proposition in the form of: if the situation meets at least these criteria, the but-for test applies. There is nothing in *Resurfice* that amounts to a statement in the form of: "at least these criteria must exist for the but-for test to apply." Instead, *Resurfice* amounts to this statement: "the but-for test does not apply where the material-contribution test applies."

In substance, *all* that *Resurfice* tells us on this issue of how we are to recognize when the but-for test applies is the but-for test is the "basic test" and that it does not apply when it is "impossible" to apply it. What is the *Resurfice* answer to the question: when is it impossible to apply the but-for test? The *Resurfice* answer is: "when it is impossible to apply it." In effect, if we ask, "how do we know when it is impossible to apply but-for?" all that *Resurfice* tell us is that we will know it when we see it, because factual causation

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[242] My two-sentence summary of *Resurfice*.
[243] My six-sentence summary of *Resurfice*.

is a matter of common sense and not metaphysics. We will know it because we will find that the but-for test is impossible to apply.

Does *Resurfice* provide a definition of "impossible to apply"? In effect, it does. It is the circular definition that "impossible to apply" will exist when the criteria that define when the material-contribution test applies are satisfied. The *Resurfice* answer is that it is impossible apply the but-for test in "special circumstances" and that those "special circumstances" are the circumstances when it is "impossible" to apply it.

Resurfice states that but-for is the "*basic test*" for determining causation;[244] that but-for "remains the *primary test* for causation *in negligence actions*";[245] and, that it is "the general, but not conclusive, test for causation"; but that it does not apply "in special circumstances" – defined as those which satisfy the requirements of something called the "material-contribution test".[246] What, then, are those special circumstances in Canadian jurisprudence? That is, what does it mean to say that the situation is which be correctly described as being one where it is legally " *inherently* impossible … for the plaintiff to prove that the defendant's tortious conduct actually contributed to the injury."[247] *Resurfice* has told us the general requirements for Canadian tort jurisprudence. The first is an "impossibility" requirement. "[I]t must be impossible for the plaintiff [due to factors that are outside of the plaintiff's control] to prove that the defendant's negligence caused the plaintiff's injury using the "but for" test."[248] The second is that the harm (injury) sustained by the injured person "injury must fall within the ambit of the risk created by" the wrongdoers' misconduct.[249]

Merely telling us that the but-for test does not apply when the material-contribution test applies is not enough. We have to assume that the Supreme Court was *not* suggesting that the correct procedure now requires judges to first determine whether the material contribution-test applies and then, only if that test does not apply, apply the but-for test. That would be contrary to the Court's use of "basic test," "primary test", and "general test".[250] Advice that but-for is the basic, default, primary test is also not enough of an answer. Again, the explanation of the but-for test's purpose may help to determine if one has identified *law's* factors which determine when but-for applies, but the purpose

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[244] *Resurfice*, para 21, emphasis added.
[245] *Resurfice*, para 22, emphasis added.
[246] *Resurfice*, para 24.
[247] See, Richard Wright, "Liability For Possible Wrongs: Causation, Statistical Probability; And The Burden Of Proof" [*Possible Wrongs*] (emphasis added; forthcoming, 2008 or 2009, used with permission). In our context, "inherent impossibility" should be understood to mean by reference to valid, known, science; i.e., the current limits of science.
[248] *Resurfice*, para 25.
[249] *Resurfice*, para 25.
[250] Whether *Resurfice* unintentionally produces that consequence is a separate question. Consider the implications of the use of *Hegemony* in Russ Brown's "Material Contribution's Expanding Hegemony". This negative advice may be more helpful than concluding that human beings are not Martians; if so, not much more. See, *Joly v. Pelletier*, [1999] O.J. No. 1728 [QL], 1999 CarswellOnt 1587 (Ont. S.C.J.): person claiming to be non-human clone, in this case a Marsian or Martian, being neither a human being nor a corporation, does not qualify as a "person" under Ontario Rules of Civil procedure defining what persons have standing to sue in Ontario civil courts.

is not the one of factors; or, even if purpose is, it is not a factor which is sufficient of itself. Is there a non-self-referential way to state the question except in the negative: but-for applies except in cases where there is some reason valid to the particular system to not apply the counter-factual analysis which the but-for label summarizes – what would have happened if certain conduct had not occurred; more broadly, if certain conditions had not existed? That is a philosophical question for another day.

We can duck the philosophical question because it is clear, in most cases, that the but-for counter-factual analysis is applicable once the trier-of-fact (judge or jury) decides what the relevant facts are. The policy (normative) question then becomes: are we prepared to accept the conclusion the application of but-for produces? I will duck that question, too, in this article because that is also metaphysics and policy. Or it is part of the duty question (maybe foreseeability, maybe proximity) at the first stage of the *Cooper v Hobart*[251] duty-analysis? Or, it is part of the second-stage *Cooper* limitations on the *prima facie* "yes, there is a duty" answer.

The key, then, is implicit in the first requirement of the material-contribution test. In light of *Resurfice*, Canada's version of but-for applies (absent some overriding *policy* reason) *in all cases where it could have been possible for the plaintiff to prove, on the balance of probability, that the defendant's negligence caused the plaintiff's injury using the but-for test.* It is not "impossible" if the problem is that the plaintiff did not adduce evidence which could exist. It is not "impossible" if the evidence exists or could exist which the plaintiff could have adduced.

Accepting the necessary premise that Resurfice "impossibility" does not exist if the necessary evidence exists or could exist is the way out of the circle caused by *Resurfice*'s statements that, in effect, define but-for and material contribution in terms of each other – that tell us that the material contribution test applies when the but-for test does not but tell us nothing about when the but-for test applies.

The way out was recognized by the Ontario Court of Appeal about 5 years ago, now, in *Cottrelle v. Gerrard*.[252] The way is implicit in the explanation of the meaning the Court gave to Athey's "unworkable". The Court wrote that the but-for test "has been relaxed as 'unworkable' in cases where, practically speaking, it is impossible to determine the precise cause of the injury."[253] That statement necessarily means that the orthodox but-for test applies where, practically speaking, it is possible to determine the precise cause of the injury. I suggest that most cases that judges see are exactly that: cases were, practically speaking, it is possible to determine the precise cause of the injury. It may be difficult because of the amount of the evidence to be analyzed, or because the evidence is complicated, but it is still, practically speaking, possible.[254] It is, practically speaking, possible, because there is absolutely nothing inherent in the

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[251] 2001 SCC 79, [2001] 3 S.C.R. 537.
[252] (2003), 67 O.R. (3d) 737, (2003), 233 D.L.R. (4th) 45, 2003 CanLII 50091 (C.A.)
[253] *Cottrelle*, 67 OR. (3d) 737 at para. 30.
[254] See, for example, *Adams v. Borrel*, 2007 NBQB 102 and *Berendsen v. Ontario*, 2008 CanLII 1416 (Ont. S.C.J.)

circumstances that produced the action that makes it "*inherently* impossible … for the plaintiff to prove that the defendant's tortious conduct actually contributed to the injury."[255] It cannot be inherently impossible if the appropriate evidence could once have existed. It cannot be inherently impossible if accepted methods for the logical analysis of data permit the drawing of deductions or inferences which are legally sufficient to support the conclusion that a defendant's tortious conduct is or is not a probable cause of the injury. It may be a difficult decision, but that the decision is difficult to make is not reason enough to declare the situation one of inherent impossibility. The decision may might also be one that results in the injured person's claim being dismissed. That, too, is not reason enough to declare the situation one of inherent impossibility.[256]

Whether there is sufficient admissible evidence to allow the fact finder to make a valid conclusion that the conduct is or is not a probable cause is entirely a separate question. Similarly, whether a plaintiff should be granted some sort of indulgence where the evidence did or at least could have once existed but the plaintiff is unable to adduce it (not failed to adduce it even though practically, speaking able to) because of some reason relevant to the legal system is also a separate question. The opposite poles of the "evidence existed or could have existed but has not been introduced" situation are (1) where the plaintiff has failed to introduce, and failed to adequately explain the failure to introduce, evidence that exists or could exist and (2) where the proper conclusion is that the evidence once existed or could have existed but relevant conduct on the part of the defendant has destroyed the evidence or made it impossible to now obtain.

Somewhere in the middle lies the situation where the evidence is missing that would allow the fact finder to decide if the necessary evidence existed or could have existed. However, this situation is not a problem so long as we recall who has the onus of proof; that is, the risk of non-persuasion. That person is usually the plaintiff. Assuming, this is the case for this discussion, then the situation where there is no evidence to explain the why the required evidence is not before the court becomes an example of the first situation: one where the plaintiff failed to explain, adequately why evidence that could have existed is not in court. All readers should know the necessary result of that situation without the need for citation: the dismissal of the action because the plaintiff has failed to meet the burden of proof.

How will this play out in practice? I have used the "you will know it when you see it" refrain. The British Columbia trial decision in *B.(P.) v. V.E.(R.)*[257] is a good example. The trial judge quoted paragraphs 19, 21-23 of *Resurfice*, quoted from the then recent British Columbia Court of Appeal decision in *Hutchings v. Dow*[258] and summarized the situation by stating that the but-for test applied without explaining why.

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[255] The quotation is from Richard Wright, "Liability For Possible Wrongs: Causation, Statistical Probability; And The Burden Of Proof" (emphasis added; forthcoming, 2008 or 2009, used with permission). In our context, "inherent impossibility" should be understood to mean by reference to valid, known, science; i.e., the current limits of science.

[256] *Jackson v. Kelowna Hospital, B.S.A. Investors v. DSB*, *Bohun v. Segal*.

[257] 2007 BCSC 1568 at paras. 264-269.

[258] 2007 BCCA 148, 66 B.C.L.R. (4th) 78.

> [269] The defendant must establish that but for P.B.'s abuse, she would not have suffered the psychological disorders or injuries of which she complains, or suffered them to the extent that she has them.

Another good example, in a case with extensive, detailed, complex, scientific evidence, is the Ontario trial decision in *Berendsen v. Ontario*.[259] A review of the evidence set out in the reasons makes it abundantly clear "why". The trial judges had more than enough evidence required to decide who did what to whom and how the what happened, if it happened at all. For example, in *Berendsen*, the trial judge wrote "[n]ot only is there evidence of a substantial connection between the buried roadbed materials and the contaminates in the farm wellwater, but the evidence also persuasively eliminates other potential causes of the contaminates"[260] and "[o]n the evidence therefore there is no other probable source for the trace amounts of contaminates found in the Berendsen farm water by the Eco Logic testing and investigation."[261]

So, it is and should be true that, in most cases, it will be obvious enough that the evidence required to apply the but-for test could exist and that the but-for test is the applicable test, even if it is not dead-fish obvious. It will be obvious enough that the court will not need to embark onto any form of extended analysis. It will be palpably clear. In *Housen v. Nikolaisen*,[262], the Supreme Court of Canada, accepted definitions of "palpable" which were "clear to the mind or plain to see", "so obvious that it can easily be seen or known", and "readily or plainly seen". A declarative sentence such as "The but-for test is the applicable test" will suffice, with only minimal explanation why.[263] The only question on factual causation will be whether sufficient evidence to satisfy the requirements of the but-for test has been introduced by the person with the onus to adduce it. According to *Resurfice*, that onus is *generally* with the plaintiff.[264] In addition, the level of certainty required was always the balance of probability.[265] Whether this is still always the case may be in doubt: see item 4 in the section, in this part, titled "More Unanswered Questions".

What Is A Substantial Connection?

The purpose of the but-for test is to test whether a defendant's conduct probably made a difference. How much evidence is enough for the judge or jury to properly conclude that the conduct of a particular defendant probably made a difference to the existence of the injury? How much evidence is enough to support a valid conclusion that

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[259] 2008 CanLII 1416 (Ont. S.C. J.).
[260] 2008 CanLII 1416 at para. 284.
[261] 2008 CanLII 1416 at para. 285.
[262] 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 5.
[263] The problem, because of *Resurfice*, is now those cases where it is not, in fact, obvious enough on the facts for the particular judge to use any form of the declarative statement I mentioned; or, the plaintiff insists on arguing that it is not obvious enough, even if it is, so that the judge embarks on the inquiry. The problem is the content of that inquiry: what is the test that the judge is to use to decide which test (currently either but-for or material contribution) is to be used to decide whether factual causation exists?
[264] *Resurfice*, para. 22.
[265] *Resurfice*, para. 22.

the required connection exists between conduct and harm, so as to permit the conclusion, on a but-for basis, that the conduct is a cause of the harm? In *Resurfice*, McLachlin CJ. wrote:

> 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": *Snell v. Farrell*, at p. 327, per Sopinka J.[266]

Resurfice, therefore, establishes that a substantial connection is sufficient; that the but-for test is satisfied in respect of a particular defendant, where the evidence shows a substantial connection between the harm suffered by the plaintiff and the conduct of that defendant. However, neither *Snell* nor *Resurfice*, nor any case in between that referred to *Snell's* use of "substantial connection," attempted to explain what "substantial connection" means, in the sense of attempting to provide a generally applicable statement of what we should look for to tell us whether this much evidence is enough. That, of course, makes sense because how much is enough will vary from case to case and there probably are no common markers.

Rather, what *Snell and Resurfice*, and the cases in between, seemed to tell us is what is **not** enough for a "substantial connection". There is not enough evidence to establish a substantial connection – to establish causation on a but-for basis, with respect to the conduct of a particular defendant – if the proper conclusion from the evidence is

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[266] *Resurfice*, para. 23. Sopinka J. had written in *Snell*:

> Two theories of causation emerge from an analysis of the speeches of the Lords in this case [McGhee]. The first, firmly espoused by Lord Wilberforce, is that the plaintiff need only prove that the defendant created a risk of harm and that the injury occurred within the area of the risk. The second is that in these circumstances, an inference of causation was warranted in that there is no practical difference between materially contributing to the risk of harm and materially contributing to the harm itself. (*Snell*, at p. 326)
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> . . . .
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> 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? I have examined the alternatives arising out of the McGhee case. They were that the plaintiff simply prove that the defendant created a risk that the injury which occurred would occur. Or, what amounts to the same thing, that the defendant has the burden of disproving causation. 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. (*Snell*, at p. 327)

that the injury "may very well be due to factors unconnected to the defendant." Does this help? What does that "may very well be due to factors unconnected" mean? It must mean "probably not connected" because probability is "either-or". Some conduct is either a probable cause of some harm or it is not. There is no third alternative. *Resurfice* and *Snell*, therefore, tell us that "substantial" means "probable". We do not have a substantial connection where it is probable that the conduct of the defendant is *not* a cause of the injury.

In *Sam v. Wilson*,[267] the British Columbia Court of Appeal attempted to provide a positive statement on the meaning of "substantial connection". Remarkably, the Court did that by defining "substantial connection" to mean "material contribution" as used in *Athey*.[268] In effect, *Sam* defines "substantial connection" to mean more than *de minimis* because *Athey* held that "[a] contributing factor is material if it falls outside the *de minimis* range".[269] Citing *Athey*, *Sam* asserts: "Where indivisible damage would not have occurred but for the combination of multiple tortious causes each tortfeasor is jointly and severally liable with the others for the whole of the damage so long as his acts or omissions made a material contribution – beyond *de minimis* – to the damage".[270] The Court then explained: "'Material contribution', as that phrase was used in *Athey v. Leonati*, is synonymous with 'substantial connection', as that phrase was used by McLachlin C.J.C. … in *Resurfice Corp. v. Hanke*."[271]

The effect of this equation of the phrases "material contribution" and "substantial connection" is to set the threshold of "substantial connection" as anything more than trivial or minor. In *Mizzi v. Hopkins*, the Ontario Court of Appeal wrote: "[t]he ordinary meaning and usage of 'material' connotes something in excess of trivial or minor."[272] While it might, at first blush, seem odd to equate substantial with *anything* more than trivial or minor, the equation is necessary to avoid introducing normative considerations into the factual cause inquiry if the jurisprudence continues to use the "substantial connection" concept. The equation is needed to prevent this possibility: conduct being

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[267] *Sam v. Wilson*, 2007 BCCA 622. Sam contracted tuberculosis. He was being treated with a drug whose side effects can include permanent liver damage. As a result, there is a monitoring protocol of blood tests to detect the level of liver enzymes in the patient's blood. The level indicates whether the patient is at risk of liver damage from the medication. He was not monitored properly. Sam sustained irreversible liver damage and needed a liver transplant. (*Sam*, paras. 3-13.)

[268] On the other hand, it may not be so remarkable if we remember that this, in effect, is what Smith JA had done in *Mooney v. British Columbia (Attorney-General)* 2004 BCCA 402. However, there, Smith JA had stated, at para. 191, the evidence was not strong enough: "Further, I agree with Mr. Justice Hall's comments, at para. 144 above, that the trial judge's findings were soundly based in the evidence. In my view, the trial judge did not err in concluding that a causal contribution 'of little if any significance' did not meet the *de minimis* material contribution test of causation."

[269] *Athey*, at para. 15.

[270] *Sam v. Wilson*, at para. 108.

[271] *Sam v. Wilson*, 2007 BCCA 622 at para 109. (By a 2-1 majority. The dissenting judge did not deal with this issue.) The majority also explicitly recognizes that the *Resurfice* material-contribution test is not the *Athey* material-contribution test and that the *Resurfice* version is not a test for the existence of actual factual causation: "it is not a test of causation at all: rather, it is a rule of law based on policy." (See para. 109.)

[272] *Mizzi v. Hopkins* (2003), 64 O.R. (3d) 365 at para. 38.

declared *not* to be a factual cause, even though the conduct is more than trivial, because the judge or jury concludes the conduct is *not* significant enough to substantial.[273]

It tell us nothing useful to be told that "substantial" means "more than trivial or minor". The Supreme Court of Canada has conceded, albeit in a different context, that the "*de minimis*" phrase has no useful content.[274] I suggest that that concession is applicable here. The problem is that the "substantial connection" definition is ultimately useless, just as the *de minimis* definition was useless,[275] even without defining "substantial connection" to mean "outside the *de minimis* range. To state that there is a "substantial connection" been negligent conduct and harm is to state that that conduct is a "substantial factor" in the circumstances that resulted in the occurrence of the harm. Hart and Honore wrote, in *Causation in the Law* (2d): "Little, however, seems to be gained by describing, even to a jury, such cases in terms of the admittedly indefinable idea of a 'substantial factor'".[276]

In summary, "substantial connection" does not provide a judge or jury with any help in determining whether factual causation exists. I wrote in *Snark* that "substantial connection" is a reference to the quality of the evidence, not the quantity of the evidence. I suggested that Sopinka J. had used "substantial connection" to make it clear that that robust, pragmatic inference had to something more than mere speculation, or conjecture,

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[273] This is not a hypothetical problem. It is an existing problem in the use of "substantial" to identify factual causative conduct. It was identified decades ago in American jurisprudence. The proposed *Restatement (Third) of Torts: Liability for Physical Harm* (Proposed Final Draft No. 1), (American Law Institute, 2005), § 26 , "*Comment j. Substantial factor"*, at 427-29, and Reporters' Note, Comment j., at 442-47, have an exhaustive enough discussion, for present purposes, of the problems, with citations to American case law examples and judicial acknowledgment of the issue. The text states, at 428:

> "The 'substantial factor' rubric is employed alternatively to impose a more rigorous standard for factual cause or to provide a more lenient standard. Thus, for example, comparative-responsibility jurisdictions improperly employ the substantial-factor test to suggest to a jury that it should find the plaintiff's 'substantial' contributory negligence, rather than the defendant's tortious conduct, to the 'the' cause of the harm. Conversely, some courts have accepted the proposition that, although the plaintiff cannot show the defendant's tortious conduct was a but-for cause by a preponderance of the evidence, the plaintiff may still prevail by showing that the tortious conduct was a substantial factor in causing the harm. … To be sure, courts may decide, based … on policy grounds to modify or shift the burden of proof for factual cause … Courts may, for similar reasons, decide to permit recovery for unconventional types of harm, such as a lost opportunity to avoid an adverse outcome. Nevertheless, the substantial-factor rubric tents to obscure, rather than to assist, explanation and clarification of the basis of these decisions."

The Reporters' Note states, at 443, that the use of

> "substantial factor" "may lure the factfinder into thinking that a substantial factor means something less than a but-for cause, or, conversely, may suggest that the factfinder distinguish among factual causes, determining that some are and some are not 'substantial factors'. Thus, the use of substantial factor may permit proof of causation on less than a showing that the tortious conduct was a but-for cause of harm or may unfairly require some proof grater than the existence of but-for causation."

The resonances with Canadian jurisprudence are clear enough.

[274] *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] 1 S.C.R. 76 at para 44, 2004 SCC 4, per McLachlin C.J. See, also, *Snark*, at pp. 17-18, note 65.

[275] *Snark* at 85-87.

[276] Causation in the Law (2d) at _____.

or guesswork.[277] Ultimately, I wrote in *Snark* that "substantial" is an adjective of no greater use than "material".[278] What it does is describe a quality of the evidence once we are satisfied we have enough. It is a conclusion about the quality of the evidence that we have, once we have decided that the evidence is adequate for the purpose, not a marker that assists us in determining whether the evidence is adequate. If offered as a marker, it was and remains mumbo-jumbo: another of law's equivalents of "abracadabra".[279]

More Unanswered Questions

Resurfice has left us with at least these questions, applicable to cases where it would **not** be impossible to apply the but-for test had the required evidence been adduced in court – evidence that is necessarily presumed to exist or to have once existed because otherwise but-for would not be applicable.

1. What did the Supreme Court mean by "basic test"?

2. What did the Supreme Court mean by 'primary test"? "Primary" implies the existence of more than one test. Did the Supreme Court mean that there is a secondary test, also applicable to facts to which the "primary" but-for test applies? If there isn't another test that may *also* apply, why didn't the Supreme Court say, explicitly, that but-for is the only test that applies to facts to which the test applies?

3. What did the Supreme Court mean by "general" in "the general, but not conclusive, test for causation"?

4. What did the Supreme Court mean by the statement: "[t]he rules of causation consider generally whether "but for" the defendant's acts, the plaintiff's damages would have been incurred on a balance of probabilities." Was this meant to tell us: (1) that there are now some cases to which the but-for test applies for which the balance of probabilities will not be the standard of proof or (2) merely as a reminder that that there is

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[277] *Snark* at pp. 46-49

[278] *Snark*, at 101.

[279] "Substantial factor" is a well-known term in American causation jurisprudence because it identifies the American test that is the functional equivalent of the *Athey* material-contribution test: see *Snark*, at 98-100. American causation jurisprudence has had a substantial-factor test for proof of factual causation for almost a century. The academic consensus on that test is nicely summarized in two sentences from a recent article. "The test offers no real guidance for determining when a factor is substantial or even a 'factor.' Courts and juries must rely on intuition to decide the issue." See David A. Fischer, "Insufficient Causes" 94 Kentuckey L. J. 277 at 280-81 (2005-2006). The subtstantial-factor test is abandoned in the forthcoming *Restatement of the Law (Third) Torts: Liability for Physical Harm* (Proposed Final Draft No. 1). For example, the *Restatemen*t states, in c. 5, §26, at 443: "With the sole exception of multiple sufficient causes, 'substantial factor' provides nothing of use in determining whether factual cause exists". The "substantial factor" test is not being replaced with another test which will also identify causes capable of being identified on the proper application of but for. However, to supplement the but-for test for test for those instances of multiple (independently of each other) sufficient causes, the *Restatement* recommends the adoption of a version of the NESS (Necessary Element of a Sufficient Set) test. (*Restatement* (Third), c. 5, § 26 comment c. and §27 comments f. and i. See, also, Snark, at 98-100.

another test for causation other than but-for and a reminder that the standard of proof there might not be the balance of probability? The first meaning probably was not intended, not the least because it would be contrary to *Snell* and *Athey*. The second meaning situates the sentence as a lead-in to the discussion of material contribution.

The sentence is a quotation from the Supreme Court's decision in *Blackwater v Plint.*[280] However, the context in *Blackwater* was different. The issue, there, was not how one determines if an event is a factual cause. It was whether an event can have more than one legal factual cause. The statement quoted was made to remind us that harm can have more than one legal factual cause. *Blackwater* states:

> It is important to distinguish between causation as the source of the loss and the rules of damage assessment in tort. The rules of causation consider generally whether "but for" the defendant's acts, the plaintiff's damages would have been incurred on a balance of probabilities. Even though there may be several tortious and non-tortious causes of injury, so long as the defendant's act is a cause of the plaintiff's damage, the defendant is fully liable for that damage. The rules of damages then consider what the original position of the plaintiff would have been. The governing principle is that the defendant need not put the plaintiff in a better position than his original position and should not compensate the plaintiff for any damages he would have suffered anyway: *Athey*.[281]

5. What did the Supreme Court mean by "not conclusive" in "the general, but not conclusive, test"? Given what the Court said is the purpose of the but-for test, does the use of "not conclusive" mean there are circumstances in which the answer provided by the but-for test will not be the conclusive answer, because the judge concludes that "it would offend basic notions of fairness and justice to deny liability (or find liability) by applying a "but for" approach"? Does this mean we have yet another test for causation in facts to which the "basic" but-for test could apply but does not apply? What are the defining factors of such circumstances? What is the applicable test, given that the facts will not, by definition, satisfy the "impossibility" requirement of the *Resurfice* material-contribution test?

6. Does the use of "basic", "general", and "primary" as adjectives describing the but-for test mean that there is another test capable of applying to facts to which but for-is capable of applying? If so, what is it and when does this other test apply? What if the other test produces a different answer?

7. What is the status of the *Athey* version of the material-contribution test which was, just as but-for always was and still is, *only* a test for determining if conduct would be held to be a factual cause of harm

[280] [2005] 3 S.C.R. 3 at para. 78, 2005 SCC
[281] [2005] 3 S.C.R. 3 at para. 78.

(injury)? Does that version of a test still exist after *Resurfice*, since *Resurfice's* version of material-contribution test applies only where the evidence is not sufficient to support a valid conclusion that the conduct is a cause of the injury? See *Greenall v. MacDougall and HMTQ*. (BCSC)[282]

8. What is the status of the variations to the but-for created in *Cook v. Lewis*[283] (reverse-onus) and *Hollis v. Dow Corning Corp*.[284] (the learned intermediary)?

In *Cook*, the case was sent back for a new trial so that each of the hunters would have the opportunity to show that his conduct was not a but-for cause. Contrary to what *Resurfice* suggests, there was no finding of impossibility in *Cook.* The judges concurring in the decision may not have all agreed on the rationale for their decision to send the case back for a new trial, but they all agreed that it had to go back. It is wrong to assume that the judges decided to send the case back for a new trial even though they were satisfied that it would be impossible for either hunter to discharge the onus. In addition, the Supreme Court's use of *Cook v Lewis* is inconsistent with what it said about the meaning and purpose of *Cook* in *St.-Jean v Mercier*.[285]. I will return to this point later.

In *Hollis*, the Supreme Court decided, for "policy" reasons, that the manufacturer would not be permitted to adduce evidence showing that the doctor would not have passed on the correct information, even if it had been given to him. In other words, the Supreme Court held that the manufacturer would not be permitted to prove that its conduct would not have made a difference.

9. What did the Supreme Court mean by stating that but-for is the "primary test for causation in *negligence* actions"? (my emphasis) Are the rules different for causes of action not based on negligence? If so, what are the rules for these other causes of action?

10. Are cases where the fault is a failure to do what was supposed to be to be analyzed in the same way as cases where cases where the fault is doing something that should not have been done. As indicated, it is (at least) logical to characterize some instances of failure to act conduct as conduct which did nothing more than increase the risk of the materialization (occurrence) of the harm.

11. The first threshold in the *Resurfice* material-contribution test is the requirement that the evidence required to establish causation on a but-for

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[282] 2007 BCSC 339.
[283] [1951] S.C.R. 830. There is an extended discussion of *Cook* at current pages 296-302 (fns 845-868) as an example of material-contribution impossibility.
[284] [1995] 4 S.C.R. 634. See infra Variations: *Hollis v. Dow Corning* (in this part)
[285] 2002 SCC 15 at para. 118, [2002] 1 S.C.R 491.

basis not exist due to factors outside of the plaintiff's control? Does that mean that a case where the evidence could have existed, but if so it was destroyed by others will not be a but-for case? What are the parameters of "the impossibility must be due to factors that are outside of the plaintiff's control" requirement?[286]

12. Can the traditional probability-based but-for test apply to one aspect of the causation inquiry – for example, which defendant? – and the new possibility-based material contribution test to the other aspect – what cause? Or the reverse situation? Or does the same test have to used for the entire inquiry?

There is quite a bit, here, that needs to be clarified. I suspect that anybody taking a few moments can probably come up with more.

The recent Ontario trial decision in *McKinnon v. Grand River Hospital*[287] is a prime example of the problem. It is abundantly, indisputably, clear from the trial judge's recitation of the facts and conclusions of fact that the trial judge found that the physician's negligent conduct was the probable cause of the injury, and that without that conduct the injury probably would not have occurred. It is also abundantly, indisputably, clear that on those findings of fact, the trial judge could and should have decided the causation question applying the but-for test as explained in *Snell v Farrell*. However, there is no reference to any case on the issue of whether the negligent conduct caused the injury. Instead, we have one paragraph summarizing the law of causation, under the heading "Causation".

> [160] The general test for causation I accept is that the plaintiff must establish on a balance of probabilities that the defendant caused or materially contributed to the plaintiff's injury and the onus can be met on the basis of all the evidence, including circumstantial evidence showing that the negligence caused the injury suffered by the plaintiff or materially contributed to it. I now turn to analyses of these three issues based on the facts as I find them.[288]

That paragraph is, ultimately, followed by the judge's conclusion.

> [187] Accordingly, I find that the plaintiff has proven that the injuries suffered by Cheryl McKinnon were caused by or materially contributed to by the negligent actions of Dr. Sharkey.[289]

Which test – but-for or material contribution – did the trial judge apply? Compare this to the even more recent Alberta trial decision, *Zazelenchuk v. Kumleben*[290] which purports to be an application of the *Resurfice* material contribution test but cannot be anything

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[286] I discuss this question in more detail in Part III, That Smell, Again, below.
[287] 2007 CanLII 23492 (Ont. S.C.J.).
[288] *McKinnon*, 2007 CanLII 23492, para. 160 (Ont. S.C.J.)
[289] *McKinnon*, 2007 CanLII 23492, para. 187 (Ont. S.C.J.
[290] 2007 ABQB 650.

more (or less) than a decision on a but-for basis that the negligence was the factual, probable, cause of the injury.

If we needed more evidence that the state of current Canadian jurisprudence is capable of confusing judges even on the meaning of but-for, we now have it courtesy of the recent British Columbia trial decision in Lyon v. Ridge Meadows Hospital.[291] *Lyon*, though apparently correct in result (that the facts did not establish causation on a but-for basis) seems to conflate (combine and confuse) the statement of the but-for test as set out in *Snell v. Farrell* with the statement of the material-contribution test as set out in *Athey v Leonati*. The result is this.

> [23] In establishing causation in medical malpractice cases, the burden of proof lies with the plaintiff. The plaintiff must prove that the defendant's breach of duty of care caused the injury. The plaintiff has the ultimate burden; however, where the defendant has failed to put forward evidence to the contrary, *the courts may draw a "robust and pragmatic" inference of causation, based on the facts, that the defendant's negligence materially contributed to the plaintiff's injury*, even though positive or scientific proof of causation has not been submitted: *Snell v. Farrell* 1990 CanLII 70 (S.C.C.), (1990), 72 D.L.R. (4th) 289, [1990] 2 S.C.R. 311. The burden of proof does not shift to the defendant *and the plaintiff remains fixed with the burden of proving causation on a balance of probabilities*.[292]

I suppose I should not say "I told you so", but I will. I warned of the prospect of this very conflation in *Snark*. [293]

There are a host of problems with this passage in *Lyons*, unless the judge meant nothing more than "caused" when using "materially contributed", in which case the italicized portions become an orthodox statement of *Snell*: the courts may draw a robust and pragmatic inference of causation, based on the facts, that the defendant's negligence was a cause of the plaintiff's injury. Otherwise, the problems include the small conundrum that results from "equating" the *Athey* material-contribution causal connection with the *Snell* but-for causal connection. An *Athey* material-contribution connection *need not be more than a de minimis connection*. However, *Snell* held (as *Lyon* correctly notes) that the but-for connection has to be a "substantial connection".[294] Does *Lyon* assert that *more than de minimis* means whatever "substantial" means but nothing more? If so, that is an unusual stretch in logic, even for law, even in the realm of "legal fiction".[295] (Recall that *Sam v. Wilson* has now told us that "substantial connection"

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[291] 2007 BCSC 1000. A judge of the Ontario Court of Appeal has explicitly said that it was the confusion in the jurisprudence before *Resurfice* that explains why the judges of the Alberta Queens Bench and Court of Appeal had different views on which of the but-for or material contribution tests applied: see *Rizzi v. Marcos* which I discuss in the Ontario section of this paper.

[292] *Lyon*, 2007 BCSC 1000, para. 23 (emphasis added).

[293] The trial decision in the *Aristorenas v. Comcare Health Services*, 2004 CanLII 22088 (Ont. S.C.J.) is another example of this conflation.

[294] Lyon, 2007 BCSC 1000 at para. 24.

[295] I have argued in *Snark* that *Athey*'s "greater than *de minimis*" definition of a materially contributing cause had to mean probable cause in pre-*Resurfice* Canadian causation jurisprudence. If it does not, then we are deciding on a more likely than not basis that some event has a less than probable connection – a not

means more than *de minimis*.) It was, without doubt, the impression of most members of the legal profession, who thought about the problem before *Resurfice*, that the *Athey* connection between cause and consequence was somehow less stringent than the *Snell* connection. Does any variation of "relaxed standard of proof" ring a bell?[296]

Lyon also contains the other puzzling statements. The trial judge wrote:

> An inference of causation cannot be drawn without evidence that negligence caused the injury. ... In other words, in order to draw an inference of causation there must be evidence that the negligence caused, or could have caused, the injury.[297]

If there is no evidence at all, how could any *inference* be drawn under but-for, let alone any other basis? And, if there is evidence that has been accepted that the negligence caused the injury, then the court does not need to infer anything. It has positive evidence. In addition, paragraph 23 of *Lyon* goes far beyond *Snell* by implying that a defendant always has some sort of evidentiary obligation to adduce evidence contradicting causation so that if the defendant does not, the defendant is at risk of a finding of causation. *Snell* outlines specific parameters as to when a defendant's failure to adduce evidence, that the defendant should have, may form part of the process of analyzing the facts that results in the decision on causation. There are other problems with Lyon's statements on but-for jurisprudence. *Lyon* also comments on the pronouncements in *Resurfice* on the material-contribution test. I will deal with that aspect of *Lyon* in the next part of this article.

Variations: Hollis v. Dow Corning

Hollis v. Dow Corning Corp.[298] where it applies, creates an irrebutable presumption that the conduct of the defendant (a product supplier who provided

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likely connection - to a result, but nonetheless declaring that factor to be a cause of that result. It is open to the legal system to do that; however, we should accept that conclusion for what it is: the possible imposition of liability on a statistical basis for normative reasons even though the evidence that we have, properly analyzed with the tools we have, requires the conclusion that, for any particular case, it is more likely than not that the event was NOT an actual cause of THAT harm.

[296] See, for example, the discussion in *Aristorenas v. Comcare Health Services*, 2006 CanLII 33850, 274 D.L.R. (4th) 304 at paras. 26, 60-64 (Ont. C.A.). Paragraph 60 is: "In *Athey*, Major J. speaks of avoiding a rigid application of the test or requiring scientific precision. He also says that common sense can aid in the determination of causation. Further, an inference may be drawn without scientific proof. While this language does evoke a more 'relaxed' standard to proving causation, it does not alter the requirement that the plaintiff must establish causation on a balance of probabilities. In my view the 'robust and pragmatic' approach modifies the type of evidence as well as the factors that the court may consider. It does not modify the amount of proof required to establish causation." See, also, *Stewart v. Pettie*, [1995] 1 S.C.R. 131 at paras. 65-66, 121 D.L.R. (4th) 222, 1995 CanLII 147 (S.C.C.). Para. 65 is: "There has progressively been developments in tort law which lessen the burden facing a plaintiff in trying to prove that the defendant's actions actually caused the loss complained of. See *Snell v. Farrell*, [1990] 2 S.C.R. 311. This makes the plaintiff's task less onerous where there is some inherent difficulty in proving causation with scientific accuracy, or where the facts surrounding causation lie uniquely within the knowledge of the defendant."

[297] *Lyon*, 2007 BCSC 1000, para. 24.

[298] [1995] 4 S.C.R. 634, 1995 CanLII 55

inadequate information to an intermediary upon whom the P relied for advice regarding the use of the product) is a legal factual cause of the harm. *Hollis* bars the product supplier from adducing evidence the supplier's conduct probably would not have made a difference in the conduct of the intermediary or plaintiff; that is, that the intermediary probably would not have provided the correct information or that the plaintiff probably would not have followed the correct advice even if it had been given.[299] The Court stated: "The learned intermediary rule provides a means by which the manufacturer can discharge its duty to give adequate information of the risks to the plaintiff by informing the intermediary, but if it fails to do so it cannot raise as a defence that the intermediary could have ignored this information."[300]

The material-contribution test, if applied as between the plaintiff and the intermediary, produces an imposed conclusion of legal causation on the presumed basis of the possibility that the intermediary's conduct was causative. Assuming that the product supplier has been sued (by the plaintiff for damages or by the intermediary for contribution), then we have the issue of the significance of the inadequate information as between the plaintiff and the product supplier only because of the conclusion that the intermediary's conduct possibility made a difference to what the plaintiff did based on the information. If we conclude that it did not, then it does not matter that the information provided to the intermediary by the product supplier was inadequate. *Hollis* creates the irrebutable presumption that the product supplier's conduct was causative. *Hollis* does this by preventing the product supplier from adducing evidence that even that possibility could not exist, because the intermediary would not have passed on the correct information to the plaintiff or that the plaintiff would have ignored that information if given it.

Hollis is a majority decision. It is undeniable the that the rationale for the decision was the *risk* created by the manufacturer/distributor who failed to provide essential information about the product to the very person who was supposed to disseminate that information to the end user: the "learned intermediary rule provides a means by which the manufacturer can discharge its duty to give adequate information of the risks to the plaintiff by informing the intermediary".[301]

The dissenting position was, seemingly, an orthodox call to an orthodox, application of but-for: a "manufacturer should be able to escape liability for failing to give a warning it was under a duty to give, by simply presenting evidence tending to establish that even if the doctor had been given the warning, he or she would not have passed it on."[302] The majority's rationale for rejecting the orthodox application of but-for – if conduct did not, in fact, made a difference then it cannot be a but-for cause as but-for is defined – was that

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[299] *Hollis*, at para. 61.
[300] *Hollis*, at para.61.
[301] *Hollis*, at para. 61.
[302] *Hollis*, at para. 60, quoting La Forest J.'s accurate summary of the dissent. La Forest J. wrote the majority reasons.

> [a]dopting such a rule would, in some cases, run the risk of leaving the plaintiff with no compensation for her injuries. She would not be able to recover against a doctor who had not been negligent with respect to the information that he or she did have; yet she also would not be able to recover against a manufacturer who, despite having failed in its duty to warn, could escape liability on the basis that, had the doctor been appropriately warned, he or she still would not have passed the information on to the plaintiff. Our tort law should not be held to contemplate such an anomalous result.[303]

The anomalous result that the majority warns against is the injured plaintiff having no remedy. P would have no remedy because the doctor who was not negligent could not be held liable and the manufacture/distributer, though negligent, could not be held liable if its conduct was not causative.

The basis of the dissent was, of course, that the manufacturer/distributor should not and could not be held liable under Canadian negligence law because its fault was not causative and causation is a prerequisite for liability in negligence. The dissenting judges held that "in order to establish liability, the plaintiff must show not only a breach of duty by the defendant, but also that the breach in question was the cause of the plaintiff's injury."[304] They also stated:

> Ms. Hollis must show that her doctor would have warned her of any dangers that had been brought to his attention and that if warned she would have refused the operation. Absent this form of proof, it cannot be said with any degree of certainty that the failure of Dow to warn physicians was the cause of the unfortunate injuries suffered by Ms. Hollis.[305]

The dissent relied on Professor John Fleming for an explanation of why basis tort contains "the necessity of a factual finding of a cause and effect relationship *between* the defendant's breach of duty and the plaintiff's injury".[306] "If such a causal relation does not exist, that puts an end to the plaintiff's case: to impose liability for loss to which the defendant's conduct has not *in fact* contributed would be incompatible with the principle of individual responsibility on which the law of torts has been traditionally based."[307]

There is, in light of *Resurfice*, some irony in some passages in the dissent. For example, the dissent states: the majority reasons refer to

> refers to a number of cases, such as *Cook v. Lewis* … *Snell v. Farrell* … which either reversed or relaxed the ordinary burden which rests on the plaintiff to prove causation. Those cases do not support treating causation as irrelevant. Indeed, they start with the premise that causation is a fundamental principle and address whether the plaintiff's ordinary burden should be eased. Not only is the requirement that causation be established fundamental to the law of torts … [but]

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[303] *Hollis,* at para 60 (emphasis in original).
[304] *Hollis*, at para. 72 (emphasis in original).
[305] *Hollis*, at para. 73 (emphasis in original).
[306] *Hollis,* at para. 74 (emphasis added).
[307] *Hollis,* at para. 74 quoting Fleming, *The Law of Torts*, 8th (1992), at 143 (emphasis in Fleming).

> none of the foregoing cases was it suggested that the problem could be avoided by treating the issue of causation as irrelevant.[308]

The *Resurfice* panel might respond by saying that they are being consistent with the dissent, as the material-contribution test addresses a situation where "the plaintiff's ordinary burden should be eased" and that *Resurfice* does not treat the issue of causation as irrelevant because it requires at least the possibility of factual causation. The answer to that is that *Resurfice* does not, in fact, always require the possibility of factual causation. One example, is, of course, *Cook v. Lewis* recast as an example of the material-contribution fact situation if both hunters are held liable.

It is worth considering whether the fact-pattern that resulted in *Hollis* would be held to invoke the material-contribution test if it arose now. That pattern seems to create a situation where it is "impossible for the plaintiff to prove that the defendant's negligence caused the plaintiff's injury using the "but for" test" and where the "impossibility must be due to factors that are outside of the plaintiff's control."[309] All that need happen is for the evidence to be equivocal as to what the physician would have done even if given the correct information by the manufacturer/distributor. The fact-pattern, stated this way, seems to be an example of the situation "where it is impossible to prove what a particular person in the causal chain [the physician] would have done had the defendant not committed a negligent act or omission, thus breaking the 'but for' chain of causation",[310] so creating a situation "where the impossibility of establishing causation and the element of injury-related risk created by the defendant are central."[311] While this fact-pattern does not necessarily contain a "current limits of scientific knowledge" issue, neither does the *Walker Estate* example suggested by the Court as a fact-pattern that does invoke the material-contribution test.[312]

What is clear about *Hollis* is that, for the majority, the importance of ensuring that Ms. Hollis had a remedy for the breach of her "right to informed" consent trumped doctrinal purity. "[T]he governing principle in a case of this nature is informed consent, namely, the right of the patient to be fully informed by the manufacturer of all material risks associated with the use of a medical product. It is clear from the record that Ms. Hollis' right to informed consent was not respected".[313] Also,

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[308] *Hollis,* at para. 77. Sopinka J. wrote the dissenting reasons. Some might also consider it ironic that the other dissenting judge was McLachlin J. (as she then was.).

[309] See, *Resurfice*, para. 25. I have intentionally stated the first requirement without the "for example, current limits of scientific knowledge" proviso. The status of that proviso as a necessary aspect of the first requirement is not clear. See infra.

[310] See, *Resurfice*, para. 28.

[311] See, *Resurfice*, para. 28.

[312] See, *Resurfice*, para. 28. See, also, infra. The fact that the *Walker Estate* example *does not* seem to necessarily present a "current limits of scientific knowledge" issue may be the reason for the Court's use of "for example" in the phrase "for example, current limits of scientific knowledge". This does seem to raise the question of why the Supreme Court did not use *Hollis* as an example instead of *Walker Estate* or *Cook v. Lewis* or, at least, in addition to these cases.

[313] *Hollis*, at para 57.

> I do not think a manufacturer should be able to escape liability for failing to give a warning it was under a duty to give, by simply presenting evidence tending to establish that even if the doctor had been given the warning, he or she would not have passed it on to the patient … Adopting such a rule would, in some cases, run the risk of leaving the plaintiff with no compensation for her injuries. She would not be able to recover against a doctor who had not been negligent with respect to the information that he or she did have; yet she also would not be able to recover against a manufacturer who, despite having failed in its duty to warn, could escape liability on the basis that, had the doctor been appropriately warned, he or she still would not have passed the information on to the plaintiff. Our tort law should not be held to contemplate such an anomalous result.[314]

The "anomalous result" was that Ms. Hollis would lose, completely, under but-for. However, it seems that her action against the manufacturer could succeed, under *Resurfice* material-contribution, so long as the court is prepared to find that there is a possibility that the doctor would have passed on the correct information. That possibility would exist so long as the evidence about what the doctor would have done is equivocal.[315] However, it seems the action should still fail, even under *Resurfice* material-contribution, if it is certain that the doctor would not have passed on the correct information or the information would not have got to Ms. Hollis in some other fashion. So there is still that much of a potential for an "anomalous result" in *Hollis* terms. However, how likely is it that there will ever be sufficient certainty that there is no relevant possibility, other than one so outlandish so as to require it to be ignored, that the correct information would have got to the patient? If the possibility is unlikely enough that, that might be reason enough to return to "doctrinal orthodoxy" under *Resurfice* and apply *Resurfice* material-contribution to the *Hollis* fact-pattern in lieu of the but-for test.

While *Resurfice* does not require a reconsideration of *Hollis*, it can support an argument in favour of reconsideration at least for those cases where the test for factual causation is possibilistic material-contribution rather than probabilistic but-for causation. Probabilistic but-for causation is all or nothing. Possibilistic-causation under *Resurfice* might not be. It might allow the imposition of proportional liability. To that extent, there is an argument that the *Hollis* rule is not required. However, the policy-based justifications for the *Hollis* rationale that the defendant should not be able to dispute causation, at all, could still considered to be more important. The same issue exists in relation to the *Reibl v. Hughes* modified objective test. A remedy of half (or part of) a

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[314] *Hollis*, at para. 60.

[315] An analogous situation is where the patient's subjective evidence is that the patient does not know what he or she would have done if given the correct information, not even to the extent of saying: "I would not have had the operation then, I would have waited, thought some more, maybe had a second opinion". And, the evidence is that that would have been a reasonable action by the reasonable person in the position of the patient. The point is that the *Resurfice* material-contribution rule, phrased as it is, without the "limits of scientific knowledge" as a necessary source of the gap in the evidence, puts into question the need for the "modified objective" rule created in *Reibl v. Hughes*, [1980] 2 S.C.R. 880, 1980 CanLII 23. Did the *Resurfice* panel see that?

loaf might not be considered sufficient recognition of the patient's "right to informed consent".[316]

Coda: Ooh, That Smell –*When* Does But-For Apply?[317]

Look in any leading Commonwealth torts text. Look in a leading torts text from any jurisdiction where the legal system is based on English common law. Look in any leading torts judgment from any of those jurisdictions. Look in any authoritative text or decision on obligations law[318] from any of those jurisdictions. All of these systems use versions of the but-for test, the *causa sine qua non* test, as their primary test to be used to determine whether some antecedent something is a cause of a subsequent something else. *You will not find anything that amounts to an authoritative statement whose substance is this: the but-for test applies if and only if these conditions exist*.[319] The reason for that is obvious. For most of the history of the common law, the but-for test was the only test used to determine factual causation. The plaintiff had to satisfy the requirements of that test or the action failed at that stage.

Where the litigation involves a disputed allegation that harm resulted from wrongful conduct, the court will have to decide whether the conduct caused (whatever "caused" means in that jurisdiction) the harm. In many cases, it will be (or is) obvious why some event occurred. The correct answer to the question "is the defendant's conduct a cause of the plaintiff's injury?" will be as overwhelming as the smell of a weeks-old, rotting, unrefrigerated, dead fish. It will be so overwhelmingly obvious that we *will* know it when we see it. Or, even if that answer is not obvious, what is obvious is that the test we will use to determine the answer is the but-for test.[320] However, in other cases the answer, or the answer to the question as to which test to use, will not be that obvious, or obvious at all. Eye-witness evidence is not always reliable.[321] Magic is even less so. Arthur C. Clarke wrote that "any sufficiently advanced technology is indistinguishable from magic". Science which is sufficiently advanced beyond the comprehension level of

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[316] This form of justification for the *Hollis* learned-intermediary rule analysis might require the Supreme Court to consider the validity of the "rights-balancing" rationale used by the majority of the House of Lords in *Chester v. Afshar*, [2004] UKHL 41, [2005] 1 A.C. 134.

[317] "Ooh, ooh that smell, can't you smell that smell? / Ooh, ooh that smell, can't you smell that smell": Lynyrd Skynyrd, "That Smell" (date, copyright). This section contains discussion specific to the but-for test and excerpts borrowed from the more extensive discussion on the material-contribution test in Part III.

[318] By obligations law, I mean any aspect of the non-criminal law dealing with the private-law rights and duties of a member of a state.

[319] The situation is the same in Quebec and European legal systems equivalents for contractual and non-contractual obligations.

[320] See, *Richards v. McDonalds Restaurants of Canada*, 2007 SKQB 460 at para. 10: "There is no dispute between the parties with respect to the appropriate test for causation. It is found at *Resurfice Corp. v. Hanke*, [2007] 1 S.C.R. 333. It is the but for test." The issue in *Richards* was whether the plaintiff's gastroenteritis (food poisoning) was caused by the consumption of a bad Big Mac.

[321] Studies show that eye-witness evidence is remarkably frail, even where the witnesses are lawyers.

a particular culture is indistinguishable from magic.[322] Magic, however, is not yet a valid explanation in Canadian law: common, civil, or statute.[323]

Resurfice does not tell us anything useful about when either of the but-for or material contribution tests applies, because what it tells us is that each test applies when the other does not. In "Looking Glass," Vaughan Black and I explained, in broad terms, why the *Resurfice* criteria for the application of the material contribution test – "the ambit of the risk" and "impossibility" requirements – either have no useful meaning or are so broad as to include practically every case, in which case there is again no useful meaning.[324]

Ask yourself this question. Does *Resurfice* tell us when the but-for test applies? *Resurfice* tells us the but-for test applies where the material contribution test does not apply. Ask yourself the next question. Does *Resurfice* tell us when the material-contribution test does not apply? *Resurfice* tell us that the material-contribution test does not apply where the but-for test applies. That might be helpful if we had a definite positive statement of when the but-for test applies or the material-contribution test applies. We do not. We have a statement that the but-for test is the basic, default, primary, test which applies in all but exceptional circumstances. We do not have a taxonomy of those special circumstances. Rather, we have two general requirements which, we are told, must exist before any circumstance producing harm can qualify as an exceptional circumstance. Remarkably, the first of them is defined in terms of he but-for test: when the but-for test is not applicable. That is, the material-contribution test is applicable only when it is impossible for the plaintiff to adduce sufficient evidence to prove, on the balance of probability, that the defendant's misconduct is a factual cause of the injury and this impossibility is due to factors outside of the plaintiff's control.[325] But, we also do not have a taxonomy (or check list of factors that must exist) for the but-for test to apply. We have a general rule that it always applies unless it does not. When does it not? In effect, in all cases, except where the material-contribution test applies. The Supreme Court certainly did not intend to set up this circularity. However, it is the necessary meaning of what they wrote in *Resurfice*. There is no other valid interpretation if one gives to what they wrote the meaning that English words are supposed to have if one refers to standard dictionaries and applies known rules of English grammar. If the Court meant to say something else in *Resurfice*, it ought to have been clearer.

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[322] For present purposes, magic and junk science are synonymous.

[323] We will leave, for another day, the question of whether "abracadabra" is, at least in some cases, an accurate description of the process involved in applying the *Snell* robust and pragmatic, common-sense, inference approach to the determination of the factual causation question. Or, you can read my *Snark* and draw your own conclusions. Divine *fiat*, or "the Devil made me do it" may be acceptable in canon law, in the ecclesiastical courts. It is not in any other Canadian court.

[324] "Looking Glass", pp. 246-49. I expand on this analysis in Part III.

[325] *Resurfice*, para. 25. The Court did not explain the meaning of "factors outside of the plaintiff's control". The sentence stating the requirement has a subordinate clause "for example, the current limits of science." There is nothing in the reasons to indicate whether "the current limits of science" is a necessary part of the requirement or merely an example of the type of problem to which the test is intended to apply.

As I said, there will be some situations where the answer to the causation question, or the choice of the test, will be as obvious as the smell of bad fish, so incontestable that the court does not have to do anything but state the obvious. There will be others in which the smell is not that clear.

In Part III, I look at how we identify the smell, and why the smell exists. I explain why *Resurfice* forces lawyers, judges and juries, to answer this question, except where it is obvious that the but-for test is the applicable test:

> *Could evidence now exist, or ever have existed, that would be sufficient to establish, in law, that the impugned conduct – the conduct of the defendant or of someone else for whom the defendant may be vicariously liable – is at least a cause of the plaintiff's injury.*

The combination of both the answer to that question and the reason for that answer will determine whether the but-for test or the material contribution test is to be used. As indicated, this discussion continues in the context of the material-contribution test in Part III of this article.

Conclusion (For Now)

The crux of the reason given by judges and others who argued for an alternative to the but-for test is that too mechanistic applications of but-for reasoning were depriving "deserving victims" of compensation that they were entitled to. Putting this more bluntly: too complicated rules for proof of factual causation were preventing plaintiffs who should win from winning. I do not know of any empirical studies that show this. I am sure that many of us have anecdotal evidence going both ways.

Professor Klar wrote in *Tort Law* (3d) that "judges "will not allow wronged plaintiffs to fall between the cracks due to the formal requirements of proving cause".[326] They will create what they believe to be "a just solution" that allow the plaintiff to succeed. I repeat, somewhat rewritten, portions of passage that I wrote for *Snark.*[327]. John Fleming wrote in *The Law of Torts*: "Whatever the technical allocation of proof, in practice any doubt as to causal relevancy is usually resolved by the strong sympathetic bias in favour of the victim of a proven wrongdoer."[328] The comment, with slight modifications, appears in subsequent editions. I did not check to see whether variations of the comment appear even earlier. The first edition was published in 1957. In short, it is at least plausible that the complaints about the but-for test are overstated.

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[326] Klar, *Tort Law* (3d) at 400.
[327] *Snark*, footnote 72, pp. 18-19.
[328] J. Fleming, The Law of Torts (4th ed., 1971) at 171

If you want more about but-for, read my article, "The Snell Inference And Material Contribution: Defining The Indefinable And Hunting The Causative Snark".[329]. It might be long but there is a brief enough list of all of the applicable principles, as they existed as of publication, at the beginning of the article, and scads of explanatory subheadings in the rest of the piece. The summary appears at the end of this article.

[329] D. Cheifetz, "The Snell Inference And Material Contribution: Defining The Indefinable And Hunting The Causative *Snark*" (2005), 30 Adv. Q. 1

III. Material Contribution: Nothing *Is* Now Enough

> "Ordinarily, exposure to risk goes to duty of care and its breach, but not to cause. Contribution to any injury goes to cause." *Nowsco Well Service Ltd. v. Canadian Propane Gas & Oil Ltd.* (1981), 122 D.L.R. (3d) 228 at 245, 16 C.C.L.T. 23 (Sask. C.A.).[330]

> "It might be argued as a matter of strict logic, that the fact that given precautions would substantially diminish the risk, does not prove that failure to take those precautions materially contributed to the appellant's infection unless it can be established how that infection occurred. But the law's view of causation is less concerned with logical and philosophical considerations than with the need to produce a just result to the parties involved." *Birkholz v. RJ Gilbertson Pty Ltd*. (1985), 38 SASR 121 at 130 (South Australia S.C.).

> "The traditional approach to causation has come under attack in a number of cases in which there is concern that due to the complexities of proof, the probable victim of tortious conduct will be deprived of relief." ... "I have examined the alternatives arising out of the *McGhee* case. … 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." *Snell v. Farrell*, [1990] 2 S.C.R. 311 at 320, at 326-27.

> "[P]ast events must be proven, and once proven they are treated as certainties. In a negligence action, the court must declare whether the defendant was negligent, and that conclusion cannot be couched in terms of probabilities. Likewise, the negligent conduct either was or was not a cause of the injury. The court must decide on the available evidence, whether the thing alleged has been proven; if it has, it is accepted as a certainty." *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para. 28

> Some people "perceive" that the current principles of factual causation are depriving injured people of compensation they ought to obtain: "I would suggest that it is because too often the traditional 'but-for', all-or-nothing, test denies recovery where our instinctive sense of justice — of what is the right result for the situation — tells us the victim should obtain some compensation." Hon. B. McLachlin, "Negligence Law — Proving the Connection" in Mullany and Linden, eds., *Torts Tomorrow, A Tribute to John Fleming* (Sydney, LBC Information Services, 1998), at 16

> "In those exceptional cases where these two requirements [for the material contribution test] are satisfied, liability may be imposed, even though 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." *Resurfice Corp. v. Hanke*, 2007 SCC 7 at para. 25.

> "Sometimes the act cannot be shown to have been even a necessary condition but only to have added substantially to the probability that the

[330] I thank Ken Cooper-Stephenson for reminding me of this passage from *Nowsco* in his recent article "Justice in Saskatchewan Robes: The Bayda Tort Legacy" (2007), 70 Sask. L. Rev 269, at 289-90.

> damage would be suffered. But in some situations even this limited causal connection will suffice". *Kuwait Airways Corp v Iraqi Airways Co*, [2002] UKHL 19 at para. 127.
>
> The *Resurfice* material-contribution "principle … is not a test of causation at all; rather, it is a rule of law based on policy." *Sam v. Wilson*, 2007 BCCA 622 at para. 109.
>
> A consequence of *Resurfice* is that "if the plaintiff's only obstacle to recovery is causation, then causation is no obstacle". R. Brown, "Material Contribution's Expanding Hegemony: Factual Causation after *Resurfice Corp. v. Hanke*" (2008), 45 Can. Bus. L. J. 432 at 445.

Prologue – The Law Before *Resurfice*

This is thoroughly detailed elsewhere in any of the leading Canadian tort texts, including Lewis Klar's *Tort Law* (3d) and Allen Linden's *Canadian Tort Law* (7th). Recent articles reviewing primarily the Supreme Court's jurisprudence in include Vaughan Black's "Transformation of Causation in the Supreme Court": Dilution and 'Policyzation', Russell Brown's "Material Contribution's Expanding Hegemony", and my articles "The Snell Inference and Material Contribution: Defining the Indefinable And Hunting The Causative Snark" and "Materially Increasing the Risk of Injury as Factual Cause of Injury: *Fairchild v. Glenhaven Funeral Services Ltd.* in Canada".[331] In light of that, I will deal briefly only with the Supreme Court's statements of what the law of causation was. This prologue is, for the most part, a summary of what appears in "The Snell Inference", "Materially Increasing the Risk" and "Transformation of Causation".

In brief, the Supreme Court said, any number of times in a series of cases, both common law and civil law, that causation required proof on the balance of probability that the impugned conduct was an factual cause of the harm complained of by the injured person. ("Factual" subsumes "actual" for the reasons given. That allows one to describe the status of the causation jurisprudence as a search for the "f" in actual cause.)

There is this much that is clear about *Snell*, regardless of the fact that it has been applied, since, in a 'Monty Pythonish' "nudge nudge, wink wink" fashion to produce conclusions of factual causation which are, at the least, logically suspect. That is, the evidence to support any valid series logically connected propositions leading from premise to conclusion simply does not exist. Somewhere along the line, the judge or jury (only judge or jury because we no longer have Lords, in Canada) leaped a logical chasm. Perhaps as good an answer, as any, to the suggestion that the but-for test, even when applied as required by *Snell*, was sending "deserving" plaintiffs home uncompensated appears in this passage in Klar, *Tort Law* (3d) at pp. 403-04:

> The effect of *Snell v. Farrell* on proving causation in cases where the scientific and expert evidence cannot establish a probable connection between a defendant's negligence and a plaintiff's injury has been significant. To allow an inference of cause to be drawn

[331] In 2002 Annual Review of Civil Litigation, ed. T. Archibald, Carswell, (2005) 30 Adv. Q. 1 and (2004) 29 Adv. Q. 253, respectively. The subtitle to "The Snell Inference" is "A Not Excessively Subtle and Theoretical Examination of Proof of Factual Causation in Canadian Tort Law". My preferred shorthand is *Snark*.

> even where there is no scientific evidence of a probable connection between negligence and injury is in effect to accept the essential principle of *McGhee*. While this approach may produce a pragmatic solution to a plaintiff's dilemma in difficult causation cases, it does depart from the traditional "but-for" test, and the balance of probability standard. (internal footnotes omitted)

Statisticians remind students that "correlation is not causation". Roman philosophers described a fallacy in logic which has come down to us as "after this therefore because of this."[332] A very crude example of the mistake is this. Most of us will concede that, at least in the Northern Hemisphere, tomorrow follows today as night follows day. None of us, I assume, would argue that today causes tomorrow or that day causes night.

In *Snell v. Farrell*, *Athey v. Leonati*, *Laferrière v. Lawson*, and *St-Jean v. Mercier*, the Supreme Court specifically rejected any suggestion that possibility was enough to establish factual causation.[333] However it was that the court arrived at its final conclusion, that conclusion had to be that the evidence established that it was more likely than not – that it was probable – that the impugned conduct was a factual cause of the harm. Anything less meant that the plaintiff failed to establish factual causation. The *Cook v. Lewis* exception dealt only with onus and inference. It did not alter the rule that the evidence had to be held to establish factual causation on the balance of probability. *Walker Estate v. York Finch*, whatever else it might mean, cannot be seen as an exception, not the least because it nowhere actually suggests that mere possibility was enough to establish factual causation.

Now let us move to the Supreme Court's last statements on the meaning of factual causation after *Walker Estate* and before *Resurfice*. These appeared in two 2005 decisions.[334] The first of the 2005 decisions is *H.L. v. Canada (Attorney General)*.[335] This is what the Court wrote about causation.

> [28] Klebuc J. recognized that H.L. had a dysfunctional home life. He found, however, that no divisible injury could be attributed to it; nor was it a "necessary cause" of H.L.'s injuries. There was no evidence that H.L. suffered from a "crumbling skull", or pre-existing condition that would have led to his losses regardless of the sexual battery (see *Athey v. Leonati*, 1996 CanLII 183 (S.C.C.), [1996] 3 S.C.R. 458, at paras. 34-36). Rather, if H.L. was particularly vulnerable, this amounted to a "thin skull", within the meaning of *Athey*, exonerating neither Canada nor Mr. Starr from their liability for the consequences.

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[332] *Post hoc ergo propter hoc* for those who still remember some Latin.

[333] The citations for the passages in the cases are elsewhere in this article. If they are not, they are easily found in "The Snell Inference" (aka *Snark*) and "Materially Increasing".

[334] I am restricting my comments to civil law as opposed to criminal law. The Supreme Court might have, in this millennium, said something necessarily relevant to causation in the civil law context in a criminal law case. I am inclined to conclude that the discussion in *R. v. Nette*, 2001 SCC 78, [2001] 3 S.C.R. 488, 205 D.L.R. (4th) 613, even though *Athey* is mentioned at para. 79 in relation to the "crumbling skull" doctrine, is not. If there is such a case, I do not know about it, have not read about it, and have not heard about it. If somebody does know, please let me know.

[335] 2005 SCC 25, [2005] 1 S.C.R. 401, 251 D.L.R. (4th) 604.

> [123] … This Court explained the test for causation in *Athey* … It is sufficient if the defendant's negligence was a cause of the harm. . . . [Emphasis in original.]

The second is *Blackwater v. Plint*.[336] In *Resurfice* the Supreme Court referred to *Blackwater* as a case confirming the primacy of the but-for test. I will now set out what the Supreme Court wrote about causation in *Blackwater*.

> [74] The calculation of damages for sexual assault to Mr. Barney is complicated by two other sources of trauma: (1) trauma suffered in his home before he came to AIRS; and (2) trauma for non-sexual abuse and deprivation at AIRS that was statute barred. In reality, all these sources of trauma fused with subsequent experiences to create the problems that have beset Mr. Barney all his life. Untangling the different sources of damage and loss may be nigh impossible. Yet the law requires that it be done, since at law a plaintiff is entitled only to be compensated for loss *caused by the actionable wrong*. It is the "essential purpose and most basic principle of tort law" that the plaintiff be placed in the position he or she would have been in had the tort not been committed: *Athey v. Leonati*, 1996 CanLII 183 (S.C.C.), [1996] 3 S.C.R. 458, at para. 32. [underlining added, italics in original]
>
> [78] It is important to distinguish between causation as the source of the loss and the rules of damage assessment in tort. The rules of causation consider generally whether "but for" the defendant's acts, the plaintiff's damages would have been incurred on a balance of probabilities. Even though there may be several tortious and non-tortious causes of injury, so long as the defendant's act is a cause of the plaintiff's damage, the defendant is fully liable for that damage. The rules of damages then consider what the original position of the plaintiff would have been. The governing principle is that the defendant need not put the plaintiff in a better position than his original position and should not compensate the plaintiff for any damages he would have suffered anyway: *Athey*. …[337]
>
> [80] … The defendant must compensate for the damages it actually caused but need not compensate for the debilitating effects of the other wrongful act that would have occurred anyway. …
>
> [81] All these scenarios flow from the basic principle that damages must seek to put the plaintiff in the position he or she would have been in but for the tort for which the defendant is liable.

Blackwater is referred to twice in *Resurfice*, so it is worth looking at more closely, even if the citations are in the but-for context.[338] Let us look first at the underlined

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[336] 2005 SCC 58, [2005] 3 S.C.R. 3,258 D.L.R. (4th) 275.

[337] The last sentence in paragraph 78 sets out the argument that the Court rejected: "Mr. Barney's submissions that injury from traumas other than the sexual assault should not be excluded amount to the contention that once a tortious act has been found to be a material cause of injury, the defendant becomes liable for all damages complained of after, whether or not the defendant was responsible for those damages."

[338] At paras. 19 and 22 of *Resurfice*. The reference is to paragraph 78 of *Blackwater*. Paras. 19 and 22 of *Resurfice* form part of the Court's explanation of why the Alberta Court of Appeal was wrong in asserting that the material-contribution test (as explained by *Athey*) was the causation test applicable to the facts merely because there could be more than one cause of the accident.

passage in paragraph 74: "Untangling the different sources of damage and loss may be nigh impossible. Yet the law requires that it be done, since at law a plaintiff is entitled only to be compensated for loss *caused by the actionable wrong*." That passage would be problematic if the Court meant it to be a statement about the requirements for factual causation. If so, the statement would inconsistent with the material-contribution test as explained by *Resurfice*, since *Resurfice* material-contribution applies only where it is impossible for the plaintiff to prove that the loss was caused by the defendant's fault. However, it is not a statement about the content of the principles of legal causation. The statement could not have been intended to say anything about the requirements for proof of factual causation. The key is the context of the statement and the use of "*actionable wrong*". The Court was doing no more than emphasizing that damage is compensable if an only if it is caused by an actionable wrong, even if the actionable wrong is only one of the causes. If it is not, the damage is not compensable.[339] The prior sentence – the use of "untangling"- as well as the remainder of paragraph 74 and the content of paragraph 75 makes that clear. The reference is to the necessity of "untangling" damage which was found to have been caused by *actionable wrong*, even if that actionable wrong was only a cause, from damage which was found to have been caused by something but not the actionable wrong.

The Supreme Court, in paragraph 74 of *Blackwater*, was not addressing the "content" of the meaning of causation. It is true that one cannot attempt to "untangle" divisible from indivisible injury without first looking at how the injury was caused; however, this small conundrum should not lead us to conclude that *Blackwater* should be understood to say something about the content of the principles of causation in paragraph 74. If there is anything in *Blackwater* on the content of the principles of causation, it is in paragraph 78 which contains the statement quoted in *Resurfic*e, at paragraph 22: "[t]he rules of causation consider *generally* whether 'but for' the defendant's acts, the plaintiff's damages would have been incurred on a balance of probabilities." (emphasis added). There is no doubt that the use of "generally" was intentional. It certainly has to be understood as reference to the *Athey* material-contribution doctrine, whatever that doctrine meant. However, it is a bit much to suggest that the statement in paragraph 78 should be understood to contain the seeds of the *Resurfice* material-contribution doctrine. The Supreme Court, itself, did not cite the statement in the context of its material-contribution discussion. Rather, it was cited as part of the Court's reminder, at paragraph 22 of *Resurfice*, that the but-for test is the "primary test for causation in negligence actions."

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[339] Ontario lawyers will recognize this as the principle the Ontario Court of Appeal attempted to make clear in *Alderson v. Callaghan*, (1998), 40 O.R. (3d) 136 at paras. 9-10, 1998 CanLII 895 (C.A.). *Alderson* holds that the plaintiff can be compensated (awarded damages) only for damage which is shown to have been caused by the defendant's actionable fault. *Alderson* holds that the plaintiff has to establish, on the balance of probability, that the defendant's negligence was a cause of all of the damage for which the plaintiff seeks compensation. The plaintiff is not entitled to compensation for all of the damage the plaintiff has, merely by establishing that the defendant has caused some of it.

There are also two 2003 decisions delivered concurrently: *E.D.G. v. Hammer*,[340] and *K.L.B. v. British Columbia*.[341] *KLB* is unusual. The material-contribution test is not mentioned at all. The phrase is not used. It is as if the Court forgot to mention that the *Athey* material-contribution test existed. The only mention of *Athey* is in the "crumbling skull" context.[342] The reasons do not use the phrase "but for". Instead, we see a statement of the law and the approach that the Court said was to be applied to determine factual causation: the Snell "robust and pragmatic, common sense" approach. The Court wrote:

> [12] This ground of liability requires a finding that the government itself was negligent. Direct negligence, when applied to legal persons such as bodies created by statute, turns on the wrongful actions of those who can be treated as the principal organs of that legal person. Both courts below held that the government had a duty under the *Protection of Children Act*, R.S.B.C. 1960, c. 303, to place children in adequate foster homes and to supervise their stay, and that this duty had been breached.
>
> [13] These unchallenged findings are fully supported on the record. Before turning to this, however, it is worth noting that the private nature of the abuse may heighten the difficulty of proving the abuse and its connection to the government's conduct in placement and supervision. As in other areas of negligence law, judges should assess causation using what Sopinka J., citing Lord Bridge in *Wilsher v. Essex Area Health Authority*, [1988] 2 W.L.R. 557 (H.L.), at p. 569, referred to as a "robust and pragmatic approach" (*Snell v. Farrell*, 1990 CanLII 70 (S.C.C.), [1990] 2 S.C.R. 311, at p. 330). As Sopinka J. emphasized, "[c]ausation need not be determined [with] scientific precision" (*Snell*, at p. 328). A common sense approach sensitive to the realities of the situation suffices.

However, the decision is clearly a use of a but-for analysis. The Court affirmed the decision that the British Columbia government was negligent and liable. *KLB* states:

> She [the trial judge] found that the government negligently failed to meet this standard (para. 74), and that this negligence was causally linked to the physical and sexual abuse suffered by the children and their later difficulties (para. 143). It is clear from these conclusions that the government failed to put in place proper placement and supervision procedures, as required by the Act. The system of placement and supervision was faulty, permitting the abuse that contributed to the children's subsequent problems.[343]

It is worth repeating the obvious. Absent legal fiction, something can only contribute to the occurrence of something else if the former is a cause of the latter.

Hammer is even less helpful. It cites *Athey* for the principle that it is sufficient that the impugned conduct be a cause and that it need not be the only cause.[344]. There is no discussion of causation beyond that. No version of "but-for" or "material contribution" appears in the reasons. The tests for proof of factual causation are not discussed.

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[340] 2003 SCC 52, [2003] 2 S.C.R. 459 (2003), 230 D.L.R. (4th) 554.
[341] 2003 SCC 51, [2003] 2 S.C.R. 403, 230 D.L.R. (4th) 513.
[342] *KLB*, 2003 SCC 51, para. 60.
[343] *KLB*, 2003 SCC 51, para. 16.
[344] *Hammer*, 2003 SCC 52, paras. 28-31.

Professor Ken Cooper-Stephenson recently wrote about the *Athey* material-contribution test that "there is nowhere – and I mean nowhere – any sensible description of what is meant by 'material contribution,' aside from its minimum requirement that the contribution not be *de minimis*. The meaning of the test is in fact hidden inside the word 'contribution,' because the word 'contribution' itself implies the notion of cause, and the test therefore begs the very question it attempts to answer."[345] Where does that leave Canadian jurisprudence, immediately before *Resurfice*? I suggest it leaves it at the stage I suggested in *Snark* and "Materially Increasing Risk". Whatever *Athey*'s material-contribution test meant, if it meant anything at all, the valid meaning had to be that it was nothing more than another process for determining whether impugned conduct was a probable cause of the alleged harm.

Principles: Impossibility and Ambit of Risk

> "Hypothetical events (such as how the plaintiff's life would have proceeded without the tortious injury) or future events need not be proven on a balance of probabilities. Instead, they are simply given weight according to their relative likelihood": *Athey v. Leonati,* [1996] 3 S.C.R. 458 at para. 27
>
> "By contrast, past events must be proven, and once proven they are treated as certainties. In a negligence action, the court must declare whether the defendant was negligent, and that conclusion cannot be couched in terms of probabilities. Likewise, the negligent conduct either was or was not a cause of the injury. The court must decide on the available evidence, whether the thing alleged has been proven; if it has, it is accepted as a certainty." *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para. 28

We now move to the meaning of the material-contribution test for proof of factual causation (at least in negligence-based actions in tort) as a result of *Resurfice Corp. v Hanke*. I will discuss the central and problematic cases. I will not deal with all of the cases listed in the case summary at the end of this article. I set out, again, the prime paragraphs in *Resurfice* setting out this new material-contribution test.

> [24] However, in special circumstances, the law has recognized exceptions to the basic "but for" test, and applied a "material contribution" test. Broadly speaking, the cases in which the "material contribution" test is properly applied involve two requirements.
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> [25] 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,

[345] K. Cooper-Stephenson, "Justice in Saskatchewan Robes: The Bayda Tort Legacy" (2007), 70 Sask. L. Rev. 269 at 293.

> even though 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.[346]

I want to repeat emphasize, before moving on to the discussion, what this test is. It is "not a test of causation at all; rather, it is a rule of law based on policy."[347]

Imagine a court somewhere in Canada. For convenience, I will assume it is in an English-speaking part of Canada. There is a civil trial (without a jury) in progress. The evidence is over. Argument has begun. A defendant's lawyer is setting out that defendant's case. One of the defence positions is, of course, that the plaintiff has not proven factual causation. The lawyer tells the judge that the plaintiff's evidence is not sufficient. It is not even close no matter what test is used. The judge responds:[348]

> Close doesn't count? Close-enough doesn't count? Close doesn't count in hockey. This is law, Mr. Cheifetz, not hockey.[349] There's close and there's close and then there's close-enough. Close may count in law. Close-enough counts in law. Close-enough counts in horseshoes, hand grenades, nuclear explosions, and the material-contribution test.[350]

I am going to borrow, but rephrased and updated, a passage from *Quantum Uncertainty*. In its 2007 judgment in *Resurfice*, the Supreme Court of Canada again played roulette with insurers, manufacturers, distributors, vendors – generally the Canadian business sector – with stakes again potentially exceeding those in *Fairchild*.

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[346] *Resurfice*, paras. 24-25.

[347] *Sam v. Wilson*, 2007 BCCA 622, at para. 109.

[348] Those so inclined can picture John Cleese playing the judge, using his "Basil Fawlty" persona.

[349] In *Bouncing Off the Moon* (N.Y., Tor Books, 2001), Hugo and Nebula award-winning writer David Gerrold wrote, about a character named David Cheifetz who (coincidentally, no doubt) was a lawyer, that "he looked like a hockey player".

[350] The problem is that, even though judges may want to fashion remedies to protect those perceived as injured victims who should not be sent home uncompensated, "close-enough" is, in principle and logic, in many cases not "close-enough" to be "good enough". That is, "close-enough" does not leave small-enough gap in the evidence that it can be stepped over, or leaped over. In other words, there is no valid way of drawing the inference of factual causation that would have to bee drawn to have a valid syllogism – a valid argument in logic – that the defendant's negligence is a factual cause of the plaintiff's harm. The *Restatement (Third) of Torts: Liability for Physical Harm* (Proposed Final Draft No. 1), c. 5, §28, Comment b., at 481, states:

> In some cases the specific facgts of the defendant's tortious conduct and its relationship to the harm to the plaintiff may be sufficient to justify a reasonable inference of causation. Yet it is clear that the fact of the defenant's tortious conduct and harm to a plaintiff within the scope the risk created by that conduct cannot alone be sufficient in all cases to permit an inference of causation. As a matter of scope of liability, the defendant's tortious conduct must increase the risk of harm to the plaintiff. See §29. If nothing further were required, other than adequate evidence of tortious conduct, plaintiff's burden of production on causation would always be satisfied. Thus, only when the tortious conduct reasonably could be found, after the fact, to have increased the risk of harm to a grater extent than the risk posed by all other potential causes would an inference from tortious conduct alone be permissible.

The difficulty in proving that the defendant's tortious conduct in fact "increased the risk of harm to a grater extent than the risk posed by *all* other potential causes" is obvious.

The first time around – *Bazley v. Curry*[351] – the business sector lost both battle and war. The business sector lost both battle and war, again. Or, at best, the individual defendants in *Resurfice* won the battle but they and business sector lost the war.[352] If *Resurfice* is applied for what it explicitly says about proof of factual causation, specifically the material-contribution test, Canadian business is about to enter into a treacherous world where, judicial denials notwithstanding, the business sector, or at least manufacturers, distributors and vendors, will become de facto insurers of end-users.[353] One construction union representative estimated that *Fairchild* would cost the United Kingdom insurance industry £6 to £8 billion.[354] *Resurfice* stands to cost the Canadian business sector even more. The *Resurfice* version of the increased-risk-based material-contribution test, at least in the version sketched in *Resurfice*, has very few if any of the extensive limits that the House of Lords put on the scope of the *Fairchild* version.

Remember that, before *Resurfice*, the *Athey* material-contribution test was a test by which the court determined if conduct *did* cause injury; if the impugned conduct was at least a cause – a factual cause, even if only one of the factual causes: there could be more than one – of the injury. What we are looking into, now, is the question of whether the *Resurfice* version is the same test stated differently or a different test. What I will explain is that *Resurfice* material-contribution is a different test: one that looks *at the risk* created by the faulty conduct and not whether the conduct *did* cause the injury. The reason for this is that the *Resurfice* version of material contribution is based on the premise that, for some reason or reasons which are NOT to be attributed to (not to be blamed on) the plaintiff in any way, evidence does not exist which would allow a valid conclusion that the conduct did, in fact, cause the injury. It is a requirement that it be impossible for the plaintiff to establish factual causation on the but-for basis. This is because the evidence does not permit anything more than the conclusion that there is a possibility (less than a probability) that the conduct *did cause* the injury and also the conclusion, seemingly made on a more likely than not (probability) basis, that the conduct *increased the risk* of the injury occurring.

The *Athey* explanation of the material-contribution test is: "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."[355] Regardless of what you may read or hear elsewhere, this is NOT the *Resurfice* version. There is a difference in content, not just manner of expression. The *Athey* version, as I and others have explained, repeatedly, purported to be a test by which the court determined if faulty conduct was a factual cause. The use of "material

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[351] [1999] 2 S.C. R. 534.

[352] The defendants were successful on appeal. They succeeded in having the trial judgment dismissing the action restored and the case dismissed. So, in that sense, they won battle and war. However, the manner of the victory may well be pyrrhic. It all depends on what the scope of the material-contribution test, as restated in *Resurfice*.

[353] D. Cheifetz and V. Black, "Material Contribution And Quantum Uncertainty: *Hanke v. Resurfice Corp*" (2006), 43 Can. Bus.L. J. 155 at 155 (internal quotation marks omitted).

[354] Joshua Rozenburg, "Legal Victory for Asbestos Victims", The [London] Daily Telegraph, May 17, 2002, at 8, cited in "Quantum Uncertainty" at 155, note 3.

[355] *Athey*, [1996] 3 S.C.R. 458, para 15.

contribution" or "materially contributed" to mean "a factual cause", in cases where there was or could be more than one factual cause, did not start with *Athey* (in Canada) or, earlier, in *Bonnington*[356] in the United Kingdom. That usage was already current by 1900 in common law Canada, and appeared in judgments of the Supreme Court of Canada through 1989.[357] *Snell*, you will recall, was decided in 1990.

The British Columbia Court of Appeal recently acknowledged, expressly, in *Sam v. Wilson*,[358] that the *Resurfice* material-contribution test is not "material contribution" as that phrase is used in *Athey*. The Court held that the *Resurfice* material-contribution test "is not a test of causation at all: rather, it is a rule of law based on policy."[359] The majority reasons state:

> Material contribution", as that phrase was used in *Athey v. Leonati*, is synonymous with "substantial connection", as that phrase was used by McLachlin C.J.C. above in *Resurfice Corp. v. Hanke*. **This causal yardstick should not be confused with the "material contribution test**". As McLachlin C.J.C. explained in *Resurfice Corp. v. Hanke*, at [paras.] 24-29, the "material contribution test" applies as an exception to the "but for" test of causation when it is impossible for the plaintiff to prove that the defendant's negligent conduct caused the plaintiff's injury using the "but for" test, where

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[356] *Bonnington Castings, Ltd. v. Wardlaw*, [1956] 1 All E.R. 615 (H.L.),

[357] Grand Trunk Railway Co. of Canada v. Rainville, (1898), 29 S.C.R. 201 at 203, 1898 CanLII 15: "The principles of law governing cases of this kind are well known. A railway company, like an individual, is liable for the consequences of its negligence only when that negligence is the cause of the damage, or at least has materially contributed to it. That is the general rule." See, also, Algoma Steel Corp. v. Dubé, (1916), 53 S.C.R. 481 at 500, 1916 CanLII 10; Nixon v. Ottawa Electric Ry. Co., [1933] S.C.R. 154 at pp. 157, 160, 1933 CanLII 3; Koeppel v. Colonial Coach Lines Ltd., [1933] S.C.R. 529 at pp. 544, 1933 CanLII 11 – Koeppel and Nixon are also examples how the concept of a "material contribution" was used as a synonym for "proximate cause" and how the judges used "material contribution" to apply or avoid, as they saw fit, the common law consequences of contributory fault (contributory negligence)on the part of the injured person which was the complete dismissal of the action;. *Ottawa Brick & Terra Cotta Co. Ltd. v. Marsh*, [1940] S.C.R. 392 at395, 1940 CanLII 4, Landreville v. Brown, [1941] S.C.R. 473 at 477-78, 1941 CanLII 11; *Myers v. Peel County Board of Education*; [1981] 2 S.C.R. 21 at 53, 1981 CanLII 27 (S.C.C) – using "contributed" to refer to a factual cause: "The plaintiff is bound to prove, according to a balance of probabilities, that the failure of the school authorities to provide more adequate matting and insist upon its use contributed to the accident."; and, Vorvis v. Insurance Corporation of British Columbia, [1989] 1 S.C.R. 1085 at 1106, 1989 CanLII 93. It is, no doubt, ironic that when the older cases use the concept of "material contribution", it was usually used as to restrict the field to one necessary antecedent legal cause, even though there is (admittedly) more than necessary antecedent event making the totality of the circumstances required to cause the injury. The doctrine was usually applied as between plaintiff and defendant to allow the court to pinpoint the "proximate" cause so that court could apply or not apply last clear chance or ultimate negligence or some other doctrine designed to avoid the consequences of, or permit the consequences of the common law "contributory negligence" defence. That fact is most obvious in Koeppel, where the passage at pp. 533-34 has the propositon that a mere but-for factual cause – a mere *sine qua non* – is is not enough to make the factually-necessary-to-the-occurrence-of-the-harm conduct of both plaintiff and defendant legal causes. Rather, said the Court, the search is for conduct which is the *causa efficiens*. Only *Algoma Steel* used material contribution to describe the causal conduct of more than one defendant in circumstances where the conduct of both was considered causative and sufficient to hold both liable. *Algoma* Steel should be considered an example of the cumulative causal situation, not independently sufficient causes situation.

[358] 2007 BCCA 622. By a 2-1 majority. The dissenting judge did not comment on or deal with this issue.

[359] *Sam v. Wilson*, 2007 BCCA 622 at para. 109.

> it is clear that the defendant breached a duty of care owed the plaintiff thereby exposing the plaintiff to an unreasonable risk of injury, and where the plaintiff's injury falls within the ambit of the risk. In my reasons for judgment in *B.M. v. British Columbia (Attorney General)*, 2004 BCCA 402, 31 B.C.L.R. (4th) 61 at [paras.]153-166, I traced the development of this principle from its genesis in *McGhee v. National Coal Board*, [1972] 3 All E.R. 1008 (H.L.) through to *Fairchild v. Glenhaven Funeral Services Ltd.*, [2002] UKHL 22, [2002] 3 All E.R. 305 and noted that **it is not a test of causation at all: rather, it is a rule of law based on policy**.[360]

The new explanation of the material-contribution test is set out in paragraphs 23-28 of *Resurfice*.[361]

> [23] The "but for" test recognizes that compensation for negligent conduct should only be made "where a substantial connection between the injury and 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": *Snell v. Farrell*, at p. 327, *per* Sopinka J.
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> [24] However, in special circumstances, the law has recognized exceptions to the basic "but for" test, and applied a "material contribution" test. Broadly speaking, the cases in which the "material contribution" test is properly applied involve two requirements.
>
> [25] 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 notions of fairness and justice to deny liability by applying a "but for" approach.
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> [26] These two requirements are helpful in defining the situations in which an exception to the "but for" approach ought to be permitted. Without dealing exhaustively

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[360] *Sam v. Wilson*, 2007 BCCA 622 at para. 109. (bold emphasis added). The majority, at para. 110 adopted the explanation for this test as summarized in *Barker v. Corus (UK) Ltd*., [2006] UKHL 20 at para. 17: "The purpose of the *Fairchild* exception is to provide a cause of action against a defendant who has materially increased the risk that the claimant will suffer damage and may have caused that damage, but cannot be proved to have done so because it is impossible to show, on a balance of probability, that some other exposure to the same risk may not have caused it instead." The disagreement between the British Columbia and Ontario Courts of Appeal is now explicit. The Ontario Court of Appeal has asserted that *Resurfice* did not change the law at all, only clarified it. See the discussion of Ontario law later in this article and, particularly, *Barker v Montfort Hospital*, 2007 ONCA 282, leave to appeal refused, 2007 CanLII 41867 (S.C.C.) and *Rizzi v. Mavros*, 2007 ONCA 350. *Barker v. Montfort Hospital* asserts about *Resurfice*, at para. 51: "It did not alter the state of the law on causation. Rather it confirmed that the basic test for determining causation remains the 'but for' test." (internal quotation marks omitted)

[361] 2007 SCC 7.

with the jurisprudence, a few examples may assist in demonstrating the twin principles just asserted.

> [27] One situation requiring an exception to the "but for" test is the situation where it is impossible to say which of two tortious sources caused the injury, as where two shots are carelessly fired at the victim, but it is impossible to say which shot injured him: *Cook v. Lewis*, [1951] S.C.R. 830. Provided that it is established that each of the defendants carelessly or negligently created an unreasonable risk of that type of injury that the plaintiff in fact suffered (i.e. carelessly or negligently fired a shot that could have caused the injury), a material contribution test may be appropriately applied.
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> [28] A second situation requiring an exception to the "but for" test may be 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. For example, although there was no need to rely on the "material contribution" test in *Walker Estate v. York Finch Hospital*, this Court indicated that it could be used 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. Once again, the impossibility of establishing causation and the element of injury-related risk created by the defendant are central.[362]

We should stop, here, briefly, and take a closer look at what actually happened in *Cook v. Lewis.*[363] What we find is that the Supreme Court's characterization is of a hypothetical version of the *Cook* facts, not the version of the facts that the *Cook* court found to be the case. That is because the majority of the Supreme Court held that the jury's findings did not necessarily mean that both Akenhead and Cook had shot in Lewis's direction.[364] The "impossibility" characterization is instead, a description of the facts as found in the California case of *Summers v. Tice*.[365] The majority reasons in *Cook v. Lewis*, written by Cartwright J. state that the *Summers* reverse-onus principle would apply if the facts were as described.

> I do not think it necessary to decide whether all that was said in *Summers v. Tice* should be accepted as stating the law of British Columbia, but I am of opinion, for the reasons

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[362] It is worth asking why the panel did not attempt a revisionist identification of the duplicative-causation facts of *Bow Valley Husky v Saint John Shipbuilding Ltd*. as an example of material contribution of either the *Walker Estate* or the *Cook v. Lewis* types. The presence of the separately sufficient (duplicative causation) failures to warn of each of SJSL and Raychem makes *Bow Valley Husky* an iteration of the classic example of the traditional duplicative-causation (overdetermined) case which traditional scholarship, including Canadian scholarship, identified as an example of material-contribution causation to elide the definitional problems encountered when attempting to apply but-for. By themselves, the failures to warn only materially increased the risk of the occurrence of the fire and not just in the way that it occurred. In addition, it is impossible to make a valid argument that one of the two failures to warn was the "key" failure. The effect of either failure would have been pre-empted had the other wrongdoer given the warning, but there is no principled basis for blaming one defendant and absolving the other.

[363] *Cook v. Lewis*, [1951] S.C.R. 830 affirming [1950] 4 D.L.R. 136 (B.C.C.A.). I examine the case in more detail below in the That Smell, Again subsection.

[364] [1951] S.C.R. 830 at 842.

[365] 199 P.2d 1 (Cal. 1948). This oddity is not directly germane to the *Resurfice* use of the hypothetical version of *Cook*. However, it is one more reason to conclude that that the Supreme Court's approach to the jurisprudence was more casual than it should have been.

> given in that case, that if under the circumstances of the case at bar the jury, having decided that the plaintiff was shot by either Cook or Akenhead, found themselves unable to decide which of the two shot him because in their opinion both shot negligently in his direction, both defend-ants should have been found liable. I think that the learned trial judge should have sent the jury back to consider the matter further with a direction to the above effect, in view of their answer to question 3.[366]

The "a direction to the above effect" refers to the onus-reversal principle in *Summers*, from which Cartwright J. had just quoted.[367] Cartwright J. had written, earlier in the reasons that *Summer* was distinguishable. "The decisive finding of fact in that case was that both of the defendants had shot in the direction of the plaintiff when they knew his location. There is no such finding in the case at bar. It is not, I think, necessarily implicit in the jury's findings that one of the two defendants shot the plaintiff but that they can not decide which."[368] The last sentence, though convoluted, refers back to the issue of the direction in which each of Akenhead and Cook would have shot. The meaning of the sentence is that the jury's finding cannot be understood to necessarily mean that both Akenhead and Cook shot in the same direction. The sentence does not mean that the jury's findings were ambiguous even on the issue of whether one or the other of Akenhead or Cook had shot Lewis.

In any event, returning to the point: the Supreme Court did not identify the cases from which it said these general principles for material contribution came, beyond its use of *Cook v. Lewis* and *Walker Estate* as examples. It said it was not necessary to do so.[369] "Much 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. It suffices at this juncture to simply assert the general principles that emerge from the

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[366] [1951] S.C.R. 830 at 842

[367] *Cook v. Lewis*, [1950] S.C.R. at 842. Cartwright J. wrote: "The judgment in *Summers v. Tice* reads in part as follows: 'When we consider the relative position of the parties and the results that would flow if plaintiff was required to pin the injury on one of the defendants only, a requirement that the burden of proof on that subject be shifted to defendants becomes manifest. They are both wrongdoers-both negligent toward plaintiff. They brought about a situation where the negligence of one of them injured the plaintiff, hence, it should rest with them each to absolve himself if he can. The injured party has been placed by defendants in the unfair position of pointing to which defendant caused the harm. If one can escape the other may also and plaintiff is remediless. Ordinarily defendants are in a far better position to offer evidence to determine which one caused the injury. This reasoning has recently found favour in this Court.'"

[368] [1951] S.C.R. 830 at 840.

[369] "The Supreme Court's curt reasons mention (on this issue) no cases other than its own … mainly, it seems, to give the impression that its own decisions in the area were clear and consistent." "Looking Glass" at 242 and footnote 11. *Looking Glass* also discusses why *Cook v. Lewis* and *Walker Estate* are not valid examples of the version of the material-contribution test explained in *Resurfice*. Some 3 years earlier, in *Mooney*, at paras. 176-183, Smith J.A. had rejected the view of *Walker Estat*e adopted by the Supreme Court in *Resurfice.* Smith J.A. wrote, in part, at para. 177: "I cannot accede to that submission. The but-for test of causation has traditionally been applicable even in cases where the hypothetical question requires prediction of human reaction. … Similarly, causation in cases of negligent misrepresentation turns on how the plaintiff would have acted hypothetically but for the defendant's negligent conduct." This is the decision-causation issue I discuss elsewhere in the article. Smith J.A. also referred to the this aspect of the discussion of material contribution in *Walker Estate* as "prefatory remarks", stating that, Major J., in conclusion, "expressly adopted the principles of proof of causation set out in *Snell v. Farrell*." (para. 183).

cases."[370] I suggest that one reason the Supreme Court did not identify the cases is that it is not possible to identify any Canadian authorities.[371] If you do not believe me, consider this. There is an online discussion group whose participants include many leading academics in Canada and from abroad. I offered a free dinner for two at Morton's Toronto establishment (a very expensive steak house) to anyone who could identify the cases. There was no winner. Nobody bothered to try.

Athey is certainly not the case. I repeat a passage from *Athey* that I used to introduce this section of the article.

> "By contrast, past events must be proven, and once proven they are treated as certainties. In a negligence action, the court must declare whether the defendant was negligent, and that conclusion cannot be couched in terms of probabilities. Likewise, the negligent conduct either was or was not a cause of the injury. The court must decide on the available evidence, whether the thing alleged has been proven; if it has, it is accepted as a certainty."[372]

Stewart v. Pettie,[373] is not the case. The discussion of risk in *Stewart* is in relation to the existence of a duty of care or standard of care, not on the question of causation. I mention this just in case any of you recall this statement in paragraph 49 of *Stewart*: "but the *sine qua non* of tortious liability remains the foreseeability of the risk." The statement occurs in the portion of the judgment that follows the heading "Standard of Care". It is also relevant that the "Causation" heading immediately precedes paragraph 58. There is not a whit of a suggestion that the causation could be decided on an increased risk basis. In fact, we have the exact opposite.

> [59] An equally compelling reason to allow this appeal flows from the absence of proof of causation.
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> [60] The plaintiff in a tort action has the burden of proving each of the elements of the claim on the balance of probabilities. This includes proving that the defendant's impugned conduct *actually caused the loss complained of.* (emphasis added)

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[370] *Resurfice*, para. 20.

[371] It is possible to identify a few Canadian trial decisions, even an appellate decision, where increased risk was explicitly or necessarily (if not explicitly) the basis for the finding that causation existed. The case law is collected in Lara Khoury, *Uncertain Causation In Medical Liability* (London, Hart Publishing, 2007). However, those cases were not valid authorities well before *Resurfice* even in their own jurisdictions. We should not assume that the cases from which the Supreme Court drew the "general principles" were cases which were not good Canadian law. In addition, the Supreme Court had explicitly rejected the increase in risk principle, for both common law and civil law. This is discussed in my articles in volumes 29 and 30, respectively, of the Advocates' Quarterly: "Increasing Risk of Injury as Factual Cause of Injury" and "The Snell Inference and Material Contribution: Defining The Indefinable and the Hunt for the Causative *Snark*". Finally, it is possible to identify two Supreme Court of Canada cases in which the fact that the activity created risk, rather than negligence creating additional risk, was the formal justification for the theory of liability: *Hollis v Dow Corning Corp.*, [1995] 4 S.C.R. 634 and *Bazley v. Curry*, [1999] 2 S.C.R. 534, 1999 CanLII 692 (S.C.C.). See, *supra*, A Rationale For Resurfice; See Part II: Variations: *Hollis v. Dow Corning*.

[372] *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para. 28

[373] [1995] 1 S.C.R. 131, 121 D.L.R. (4th) 222, 1995 CanLII 147.

In fact, while it is it not possible to identify any then valid Canadian authorities from which the Supreme Court drew the "general principles", it is possible to identify Canadian authorities, including Supreme Court authorities as well as provincial appellate authorities, that explicitly held that increase in risk *was not sufficient* for factual causation. One would have expected that the Court would at least acknowledge the existence of its own case law and explain why it was being overruled or, if not being overruled, qualified and limited. At the least, given that the Court was using the "material contribution" phrase which had been given a meaning in *Athey*, one might have expected to find at least some recognition of the fact that the phrase was being used differently. That did not occur.

In *St-Jean v. Mercier*,[374] the Court held, unanimously:

> [116] The [Quebec] Court of Appeal appropriately said that it is insufficient to show that the defendant created a risk of harm and that the harm subsequently occurred within the ambit of the risk created. To the extent that such a notion is a separate means of proof with a less stringent standard to satisfy, *Snell*, *supra*, and definitely *Laferrière*, *supra*, should have put an end to such attempts at circumventing the traditional rules of proof on the balance of probabilities.[375]

Laferrière is *Laferrière v. Lawson*.[376] *Mercier* and *Laferrière* are civil Quebec civil law cases. However, in *Arndt v. Smith*,[377] McLachlin C.J.C. indicated that *Laferrière* also applies to the common law on this point.[378] In *Cottrelle v. Gerrard*[379] the Ontario Court of Appeal held that Laferrière applied in Ontario. In addition, the fact that *Mercier* cited *Snell* strongly suggests *Mercier* applies to the common law.

If liability without causation – if liability based on the possibility but not the probability of causation – did not exist in Canadian tort law before *Resurfice*, then *Resurfice* marks, in judicial terms, a "sea change". It is a change which is anything but incremental. It is a development which alters the path, in Canada, of centuries of acquired and Canadian-developed common law. It is a change which has the potential to affect Quebec civil law. The adoption of a principle allowing the imposition of liability, generally in tort, or restricted to causes of action based on actionable fault of some sort, without proof of causation on a "more likely than not" (probability) basis, is as significant a change as the creation of the "neighbour principle" in *Donoghue v. Stevenson*. Yet, it is a change which the Court declared in a few, cursory, paragraphs, with no stated analysis of the consequences, with no discussion of alternatives, justifying

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[374] 2002 SCC 15, [2002] 1 S.C.R 491.
[375] 2002 SCC 15, at para. 116.
[376] [1991] 1 S.C.R. 541.
[377] [1997] 2 S.C.R. 539 at para. 43.
[378] See, also, Ellen I. Picard and Gerald R. Robertson, *Legal Liability of Doctors and Hospitals in Canada*, 4th ed. (Carswell, Toronto, 2007) at 198 at the text associated with note 512, and 287-88.
[379] (2003), 67 O.R. (3d) 737 at para. 36, 233 D.L.R. (4th) 45 (C.A.), leave to appeal to S.C.C. refused 236 D.L.R. (4th) viii.

the change with in a 19 word claim that the change was necessary "because it would offend basic notions of fairness and justice to deny liability by applying a 'but for' approach".[380]

The potential for liability without factual causation is a far more than incremental change in centuries of common law declared by the Supreme Court, without adequate reference to its prior jurisprudence on causation, without mentioning its own contrary decisions, and without mentioning its own jurisprudence dealing with when and how the Court will make radical, "sea change" cases in the common law; that is, changes that are not incremental. Going from "possibility is never enough" to "possibility may be enough" is many things. One thing it is not is an incremental change in the requirements of tort law.[381]

The Supreme Court set out the principles applicable to judicial changes to long-settled common law in *Bank of America Canada v. Mutual Trust Co*.[382] and *Friedmann Equity Developments Inc. v. Final Note Ltd*.[383] *Friedman Equity* identified five factors that are relevant when the Supreme Court considers whether to overrule or vary one of its prior decisions. (1) The existence of previous dissenting Supreme Court opinions. (2) A trend in the provincial appellate courts to depart from the principles adopted in the original decision. (3) Criticism of the case or the adoption of a contrary rule in other jurisdictions. (4) Doctrinal criticism of the case and its foundations. (5) Inconsistency of the case with other decisions.[384] After setting out these five criteria, the Court wrote:

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[380] *Resurfice*, at para. 25. This is, of course, ultimately the *Fairchild* rationale. For example, Lord Nicholls wrote, at para. 36: "Any other outcome would be deeply offensive to instinctive notions of what justice requires and fairness demands." And, at para. 56: "The concepts of fairness, justice and reason underlie the rules which state the causal requirements of liability for a particular form of conduct (or non-causal limits on that liability) just as much as they underlie the rules which determine that conduct to be tortious. And the two are inextricably linked together: the purpose of the causal requirement rules is to produce a just result by delimiting the scope of liability in a way which relates to the reasons why liability for the conduct in question exists in the first place." References to the need for "fairness" or "justice", usually linked as "fairness and justice" appear throughout the speeches in *Fairchild*. *Fairchild*, it should be recalled, quotes, at para.11, from McLachlin C.J.'s article, "Negligence Law - Proving the Connection", in Torts Tomorrow, A Tribute to John Fleming, ed Mullany and Linden, LBC Information Services 1998, at 16 where the McLachlin C.J. wrote, in part, that the courts are re-examining the rules of causation in tort "because too often the traditional 'but-for', all-or-nothing, test denies recovery where our instinctive sense of justice - of what is the right result for the situation - tells us the victim should obtain some compensation."

[381] My co-author on "Looking Glass" and "Quantum Uncertainty" and I are not the people to wonder, in print, about the cursory nature of the Court's discussion of the issues. Russ Brown wrote, in *Hegemony*, at pp. 456-57: In discussing developments in causation law at the Supreme Court of Canada after *Athey* and *Walker*, Professor Black observed [in *Policyization*] that the court has not acknowledged the profound quality of its shift in the law of causation. Instead, the court has generally proceeded as if it were affirming orthodox doctrinal bedrock. After *Hanke*, this remains a valid observation. The juxtaposition of the almost casual note struck by the court with the quality of this shift, however, makes it difficult to avoiding wondering whether the court appreciates the significance of its statement or, alternatively, even whether the court is being candid about its profound transformation of the law of negligence. (words in brackets added).

[382] [2002] 2 S.C.R. 601, 211 D.L.R. (4th) 385.

[383] [2000] 1 S.C.R. 842, 188 D.L.R. (4th) 269.

[384] [2000] 1 S.C.R. 842 at para. 43. I have made minor changes have been made to the format and grammar of the criteria without changing the meaning.

> While they are not prerequisites for a change in the common law, these factors help to identify compelling reasons for reform. On the other hand, courts will not intervene where the proposed change will have complex and far-reaching effects, setting the law on an unknown course whose ramifications cannot be accurately measured. The rationale for judicial restraint in making changes to the common law was expressed by McLachlin J. (as she then was) in *Watkins* [*Watkins v. Olafson*, [1989] 2 S.C.R. 750, 61 D.L.R. (4th) 577, [1989] 6 W.W.R. 481] . . 'The court may not be in the best position to assess the deficiencies of the existing law, much less problems which may be associated with the changes it might make. The court has before it a single case; major changes in the law should be predicated on a wider view of how the rule will operate in the broad generality of cases. Moreover, the court may not be in a position to appreciate fully the economic and policy issues underlying the choice it is asked to make.[385]

The Court summarized in *Bank of America*. "In *Friedman Equity* . . . this Court outlined the following conditions where the rules of common law may be changed if necessary: '(1) to keep the common law in step with the evolution of society, (2) to clarify a legal principle, or (3) to resolve an inconsistency.' It warned that the changes should be incremental, and their consequences capable of assessment."[386]

There is nothing in *Resurfice* to indicate that the extent to which Court considered any of the *Friedmann* factors or whether the panel thought that consideration necessary. The Court's dismissive

> Much 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. It suffices at this juncture to simply assert the general principles that emerge from the cases.

does not give me comfort. It should concern anyone concerned about the rational development of Canadian tort law.[387] This is particularly so given the inadequacy and

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[385] [2000] 1 S.C.R. 842 at para. 43.

[386] [2002] 2 S.C.R. 601 at para. 43, 211 D.L.R. (4th) 385

[387] See the comments of Professors Black in *Policyization* and Brown in *Hegemony*. I believe it accurate to say that the consensus amongst academic lawyers and practitioners is that the Supreme Court jurisprudence over the past decade in the areas of private law, including tort law, has been unsatisfactory. I adapt and paraphrase *Fairchild* at para 36. The jurisprudence has not been coherent. It has not been principled. The basis on which one case, or one type of case, is distinguished from another has not been transparent and capable of identification. When a decision departed from principles normally applied, the basis for doing was often not rational and justifiable. The jurisprudence has not avoided the reproach that hard cases make bad law. In the area of tort and contract law, generally, seven cases from the past decade are proof enough: Cooper v. Hobart, [2001] 3 S.C.R. 537, 2001 SCC 79, 206 D.L.R. (4th) 193; Whiten v. Pilot Insurance Co., [2002] 1 S.C.R. 595, 2002 SCC 18, 209 D.L.R. (4th) 257; Odhavji Estate v. Woodhouse, [2003] 3 S.C.R. 263, 2003 SCC 69, 233 D.L.R. (4th) 193; Young v. Bella, [2006] 1 S.C.R. 108, 2006 SCC 3, 261 D.L.R. (4th) 516; Childs v. Desormeaux, [2006] 1 S.C.R. 643, 2006 SCC 18, (2006), 266 D.L.R. (4th) 257; Fidler v. Sun Life Assurance Co. of Canada, [2006] 2 S.C.R. 3, 2006 SCC 30, 271 D.L.R. (4th); and, of course,

error in the Court's assertion of "general principles" said to "emerge from the cases" when, in fact, the general principles did not exist before the Court asserted they did, we are not shown how the Court derived those general principles and, indeed, we are not told (beyond the mention of two cases offered as examples – *Cook v. Lewis* and *Walker Estate*) which cases, Canadian or otherwise, the Court believes provide these general principles.

It can reasonably be said that the factors do exist. The existence of the debates the Court acknowledged, in passing, is proof enough. The existence of the extensive English and Australian jurisprudence is proof enough. The fact that Australia has formally rejected the material-increase-in-risk test is proof enough. "An unknown course whose ramifications cannot be accurately measured" undertaken without adequate discussion understates the consequences. How unknown a course have we embarked on. How radical a change is the move to possibility? If causation is no longer required as the cord that connects injured person and wrongdoer, then it may well be that, someday, we will hold a butterfly flapping its wings on Sirius responsible for yet another century of Chicago Cub and Toronto Maple Leaf failures; or, if we chose not to, we will do so admitting that "policy" requires us to ignore the possibility.

Vaughan Black and I wrote in *Looking Glass* that, "[i]n recent years, especially in the United Kingdom, judges have expended much effort wrestling with the question of when, in the interests of justice, courts may depart from the traditional but-for test for causation and employ a more easily satisfied test. The House of Lords has issued four long, complex judgments [the speeches total more than 200 pages] on the matter since 2003, each with considered references to both United Kingdom and other Commonwealth case law. *Hanke* grapples with the same difficult issues as did the House of Lords. Unlike the House of Lords decisions, *Hanke* does so in bare-bones fashion. The Supreme Court's curt reasons mention no cases other than its own and no scholarly writing on the causation issues beyond an acknowledgment that some exists."[388] It is, of course, implausible to assume that any of the members of the Court did not know that *Resurfice* is a departure from prior case law. It is certain that the members of the Court knew about the relevant, prior, Canadian decisions and the relevant Commonwealth decisions.[389] It is a bit disconcerting to have to suggest that the reason that all 9 members of the Supreme Court chose to not refer to their prior decisions is that they knew that *Resurfice* creates, in judicial terms, a "sea change" and that, for some reason all agreed to keep private, the Court decided it would be better to pretend there was no inconsistency so as to be able to duck having to deal with a difficult discussion. If we assume the members of the Court are cognizant of what they have wrought, then what could that reason be other than an

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Resurfice. The situation is worse if one ventures into the areas of the Supreme Court's unjust enrichment or insurance law jurisprudence.

[388] Looking Glass, at 242 (internal footnotes omitted). The four cases are: Fairchild v. Glenhaven Funeral Services Ltd., [2002] UKHL 22, [2003] 1 A.C. 32 [Fairchild]; Chester v. Afshar, [2004] UKHL 41, [2005] 1 A.C. 134; Gregg v. Scott, [2005] UKHL 2, [2005] 2 A.C. 176 [Gregg]; Barker v. Corus (UK Ltd.), [2006] UKHL 20, [2006] 2 A.C. 572 [Barker].

[389] Australia, for example, has rejected the "increase in risk is sufficient even though it cannot be said to amount to probable cause" approach. See *Snark*, at 97-98; cite **Australian case book**.

unwillingness to deal with their prior decisions and to explain what had happened in less than 20 years to make what had been fair and just, before, into a situation that now "would offend basic notions of fairness and justice."

In *Gregg v. Scott*,[390] one of the House of Lords cases that the Supreme Court did not mention in its reasons, but certainly knew about, Lord Hoffmann wrote:

> [89] In *Fairchild*'s case [2003] 1 AC 32, 68, Lord Nicholls of Birkenhead said of new departures in the law:
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> > To be acceptable the law must be coherent. It must be principled. The basis on which one case, or one type of case, is distinguished from another should be transparent and capable of identification. When a decision departs from principles normally applied, the basis for doing so must be rational and justifiable if the decision is to avoid the reproach that hard cases make bad law. [391]

This does not mean that all aspects of tort law have to be consistent. In *White v. Chief Constable of South Yorkshire Police*, one member of the House of Lords bluntly stated that the House was no longer attempting to rationalize the corpus of English law governing tort liability for psychiatric injury. Lord Hoffmann wrote that, in the area of liability for psychiatric injury, "the search for principle was called off" in a prior House of Lords decision; that "[n]o one can pretend that the existing law, which your Lordships have to accept, is founded upon principle"; and, that the House of Lords was "now engaged, not in the bold development of principle, but in a practical attempt, under adverse conditions, to preserve the general perception of the law as system of rules which is fair between one citizen and another." [392] The majority of the panel repeated that concession in *Gregg* in gentler terms, writing that it "was not be practicable or even desirable to attempt to eliminate all inconsistencies in tort law".[393] In *Gregg*, the House of Lords again conceded that this is not plausible, ultimately because of the historical manner in which the law has developed and the accumulation of precedent, for all inconsistencies to be eliminated. That would take "so radical a change in our law as to amount to a legislative act … [and] any such change should be left to Parliament."[394]

It is not without irony, for present purposes, that the change that Lord Hoffmann was writing about was "a wholesale adoption of possible rather than probable causation as the criterion of liability".[395] The point is that, for the reasons I explain in this article,

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[390] [2005] UKHL 2.
[391] [2005] UKHL 2 at para. 89 per Lord Hoffmann.
[392] [1998] UKHL 45, [1999] 2 A.C. 455 at 511. Two of the remaining four members of the Judicial Committee stated they agreed with Lord Hoffmann's reasons. Of the other two, one concurred in the result (dismissing the actions) but did not refer to Lord Hoffmann's reasons. The fifth member of the panel dissented.
[393] *Looking Glass*, at 251, note 70, referring to Lord Hoffmann's comments in *White v. Chief Constable.*
[394] [2005] UKHL 2 at para. 90 per Lord Hoffmann.
[395] [2005] UKHL 2 at para. 89 per Lord Hoffmann. The issue was the adoption of "loss of chance" of a better outcome as a basis for liability in medical malpractice actions. The full text of paragraph 90, which completes the discussion begun in para/ 89, is: "I respectfully agree. And in my opinion, the various control

and that I have explained in my joint articles with Vaughan Black, and that Russell Brown explains in *Hegemony*, the material-contribution-to-risk test, as set out in *Resurfice*, amounts to "a wholesale adoption of possible rather than probable causation as the criterion of liability". In addition, even if it were is not, "the various control mechanisms [the two Resurfice general requirements] proposed to confine liability for [materially increasing, through negligence, the risk of the occurrence of the very type of injury that occurred] within artificial limits do not pass the test for acceptable law. The body of law they will produce will not be acceptable. To be acceptable the law must be coherent. It must be principled. The basis on which one case, or one type of case, is distinguished from another should be transparent and capable of identification. When a decision departs from principles normally applied, the basis for doing so must be rational and justifiable if the decision is to avoid the reproach that hard cases make bad law."[396] The material-contribution test as explained in *Resurfice* does not pass this test.

The reference in *St-Jean v. Mercier* to *Snell* is to the passage in *Snell* where Sopinka J. specifically rejected material increase in risk as sufficient proof of factual causation. I am going to repeat portions of what I wrote in "Materially Increasing The Risk Of Injury As Factual Cause Of Injury: *Fairchild v. Glenhaven Funeral Services Ltd*. In Canada".[397]

> It would be wrong to suggest that, in *Snell*, Sopinka J. was not dealing specifically with the argument that increased risk of injury without more could be sufficient to establish factual causation. He summarized *McGhee v. National Coal Board*, [1972] 3 All E.R. 1008 (H.L.) as follows:
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> > Two theories of causation emerge from an analysis of the speeches of the Lords in this case. The first, firmly espoused by Lord Wilberforce, is that the plaintiff need only prove that the defendant created a risk of harm and that the injury occurred within the area of the risk. *The second is that in these circumstances, an inference of causation was warranted in that there is no practical difference between materially contributing to the risk of harm and materially contributing to the harm itself.* [1990] 2 S.C.R at p. 323 (emphasis added).
>
> He later wrote: "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?" (Ibid., at 326). The "lesser relationship" to which he refers is the relationship that is only material contribution to the increased risk of injury. Sopinka J. concluded:

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mechanisms proposed to confine liability for loss of a chance within artificial limits do not pass this test. But a wholesale adoption of possible rather than probable causation as the criterion of liability would be so radical a change in our law as to amount to a legislative act. It would have enormous consequences for insurance companies and the National Health Service. In company with my noble and learned friends Lord Phillips of Worth Matravers and Baroness Hale of Richmond, I think that any such change should be left to Parliament."

[396] I have recast and paraphrased paragraphs 89 and 90 in Lord Hoffmann's speech in *Gregg*.

[397] (2004), 29 Adv. Q. 253. The relevant discussion is at pp. 260-67

> I have examined the alternatives arising out of the *McGhee* case. They were that the plaintiff simply prove that the defendant created a risk that the injury which occurred would occur. Or, what amounts to the same thing, that the defendant has the burden of disproving causation. *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*. (*Ibid*., at pp. 326-27 (emphasis added)).

These passages show that Sopinka J. specifically rejected the argument that a connection between tortious conduct and injury – in the form of the "lesser relationship" that was only material contribution to increased risk of the occurrence of the type of injury that occurred – is sufficient proof of factual causation. This has to apply to both but-for causation and material contribution causation. There can be no logical basis for suggesting that the increase of risk proposition applies under material contribution even though it does not under but-for. The result is that the passage from *Snell* has to be understood to preclude the *Fairchild* increase-in-risk principle until the Supreme Court of Canada says otherwise.[398]

Athey, too, has to be understood to have rejected material contribution as increase in risk. Again, quoting from "Materially Increasing The Risk":

> I suggest that *Athey* also precludes a *Fairchild*-like material increase in the risk of injury principle. Any other conclusion puts *Snell* and *Athey* in conflict. Major J. wrote, citing both *Snell* and *McGhee*: "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*". *Athey*'s citation of *Snell* has to be taken to include *Snell*'s explicit rejection of the increase in risk principle even though *Athey* does not deal with the question of what the plaintiff has to establish to prove that conduct materially contributed to the injury, beyond the statement that "a contributing factor is material if it falls outside the *de minimis* range".[399]

In any event, the use which *Athey* actually makes of *Snell* is explicit. *Athey*, cites *Snell* (and *McGhee*) for the proposition that "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."[400] It is significant, in deciding what *Athey* means, that four of the seven judges who were on the unanimous *Snell* panel were on the unanimous *Athey* panel: Sopinka J., La Forest J., Cory J. and, the author of *Resurfice*, herself, McLachlin CJ. (then McLachlin J.).

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[398] Materially Increasing, (2004), 29 Adv. Q. at pp. 261-62.
[399] Materially Increasing, (2004), 29 Adv. Q. at 264.
[400] *Athey*, at para. 13.

There are, of course, potential candidates for the source from outside of Canada, from the Commonwealth and elsewhere. The first place to start is the House of Lords. The first is *McGhee v. National Coal Board*.[401] The last is *Fairchild v Glenhaven Funeral Services Ltd.*[402] In between, we have the House of Lords' decision which presaged the *Fairchild* reinterpretation of *McGhee*. It is *Kuwait Airways v. Iraqi Airways*[403] where Lord Hoffmann asserted that the requirements for causation, including the factual connection, depend on the basis and purpose of liability. Lord Hoffmann wrote: "Sometimes the act cannot be shown to have been even a necessary condition but only to have added substantially to the probability that the damage would be suffered. But in some situations even this limited causal connection will suffice: see *Bonnington Castings Ltd v Wardlaw* [1956] AC 613; *McGhee v National Coal Board* [1973] 1 WLR 1."[404] Could anything be more obvious?[405]

There is an extensive amount of scholarship from the Commonwealth and elsewhere listed in *Fairchild v Glenhaven Funeral Services Ltd.*[406] Again, it is worth asking why the Supreme Court chose not to mention even that much. *Fairchild* has approximately 60 references to decisions, treatises, and statutes, ignoring references only in quotations. Geographically, the references circle the globe, covering much of the "western" world: the United States, Canada, the United Kingdom, Continental Europe and Scandinavia, and Australia. Temporally, the references range, in time, back more than 2000 years: to the last century B.C.

If the source is UK law then we are entitled to ask at least these questions. (1) why is the *Resurfice* version of the increased-risk (augmented risk, enhanced risk) based material-contribution test not limited as to when it applies in the manner the *Fairchild* version is limited?[407] (2) Why is the "type" of liability under the *Resurfice* version "joint and several liability" rather than proportional liability (several liability) as is the case under the *Fairchild* version, as the result of *Barker v. Corus (UK) Plc*.[408] And, (3) if the seminal source of the law underlying *Resurfice* is United Kingdom case law rather than Canadian law, what possibly valid reason could there be for the Supreme Court of Canada's decision not to mention that?

Nonetheless, I believe that I can identify the probable Canadian sources of the material contribution principles in *Resurfice* and at least part of the substance, if not

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401 [1972] 3 All E.R. 1008 (H.L.).
402 [2002] UKHL 22, [2003] 1 AC 32 (H.L.)
403 [2002] UKHL 19, at paras. 127-28.
404 Kuwait Airways, [2002] UKHL 19, at para. 127.
405 Of course, we have to ignore the fact that *Athey* cites both *Bonnington* and *McGhee* for its version of the material-contribution test which, as indicated, was used to establish that conduct was an actual cause. *Bonnington*, by the way, is now understood by the English Courts to have used "materially contributed" to mean caused in the but-for sense: see, for example, *Novartis Grimsby Ltd v Cookson*, [2007] EWCA Civ 1261 at para. 66.
406 [2002] UKHL 22, [2003] 1 AC 32 (H.L.).
407 See Part XVII for an outline of the restrictions.
408 [2006] UKHL 20, [2006] 2 AC 572.

necessarily all of the substance. I believe I can also identify the rationale for the "fairness and justice" justification asserted in *Resurfice*.

The scholarship source, in the sense of that a river has an ultimate source, is likely John Fleming's two seminal articles on what I call possibilistic causation[409] and he called probabilistic causation: John G. Fleming, "Probabilistic Causation in Tort Law"[410] and John G. Fleming, "Probabilistic Causation In Tort Law: A Postscript".[411] Fleming discussed recent cases dealing with proof of factual causation. He wrote, in "A Postscript":

> In a paper recently published in this Journal I addressed the problem increasingly faced by some plaintiffs of meeting the traditional standard of proof of causation against negligent defendants in situations where available scientific or statistical evidence cannot tip the balance of probabilities (more probable than not). Thus where a polluter's responsibility for a particular disease or injury, in competition with other natural sources, can only be expressed in terms of statistical or epidemiological evidence short of 50:50, victims would mostly fail under the traditional standard . An even more frequent occasion in modern litigation is the inability of medical experts to explain the aetiology of an injury with a degree of exactitude and confidence postulated by traditional formulas like "reasonable certitude" or "reasonable probability". The inherent limitations of medical knowledge, combined with a tendency of physicians to express outcomes in terms of percentage, create problems of compatibility with legal standards, which are both linguistic and substantive.
>
> Rather than lowering the standard of proof, more controversial have been efforts to circumvent problems of causal indeterminacy by recognizing the mere negligent creation of the risk, or loss of a chance of avoiding it, as sufficient alternatives.[412]

Fleming began a discussion of problems of proof of factual causation, on the use of the but-for test and the requirement of proof on the balance of probability in complicated cases, in "Probabilistic Causation". He stated:

> The dilemma is that insistence on the traditional criteria of proof will deprive many victims of any tort recovery. This result offends not only one's sense of equity as

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[409] Both phrases have the same meaning. Fleming's "probabilistic causation" did not mean causation based on probability. It meant causation based on whatever the numerical value of was of the probability that the conduct caused the damage, whether more or less than 50%; that is, causation based on possibility. It meant causation that is based on some numerical value from 1 through 99 expressed as a percentage, not necessarily one that was greater than 50%. A 25% probability is a 25% possibility, etc. Fleming, for example, used the phrase "degree of probability" when pointing out that all of a 51% probability and a 49% prediction, and a 75% probability and a 25% chance, were conjectural: see, Fleming, "Probabilistic Causation In Tort Law: A Postscript" (1991), 70 Can. B. Rev. 136 at pp. 140-141. Accordingly, I prefer and use "possibilistic" because it makes the point of the doctrine explicit. It also helps to avoid confusion in the legal profession, where many have taken refuge to escape the rigours of science and mathematics. I expect I will be as successful in this campaign as I have been in my quixotic campaign to convince the Canadian legal profession that relevant causative conduct by the injured person, or attributable to the injured person, should be described as "contributory fault" and not contributory negligence.

[410] (1989), 68 Can. B. Rev. 661.

[411] (1991), 70 Can. B. Rev. 136.

[412] Fleming, *A Postscript*, 70 Can. B. Rev at 136

> between an innocent plaintiff and multiple defendants whose negligence contributed in some (albeit uncertain) measure to his injury; it also leads to serious under-deterrence of the harmful activity. On the other hand, the same sense of equity shrinks from holding a defendant liable for the whole harm, although part of it was, or may have been, due to other independent causes, some perhaps "background risks" of non-culpable origin. Least complicated in terms of equity are cases where the negligence of two or more defendants alternatively or cumulatively caused the injury . Rather than denying plaintiffs all recovery obedient to the "more probable than not" standard of proof, several alternatives have suggested themselves. One is to lower the conventional standard and accept exposure to the risk of injury instead of actual injury as a compensable event. Another is to limit liability in an amount proportionate to the risk created by each individual agent. Both of these modifications have gained reluctant and by no means universal acceptance by Anglo-American courts . Failing an unlikely legislative prescription, they represent the outer limit of what judicial craft can do to modify the legal rule without too seriously straining the bounds of the traditional tort system.[413]

He concluded:

> Courts have now been confronted repeatedly with tort plaintiffs whose fate depends on acceptance of probabilistic evidence based on epidemiological or other statistical evidence . Modem technology has contributed to this situation in two ways, by both creating the agents of pollution and other toxic chemicals which give rise to many of these problems, and by increasing scientific knowledge enabling more confident assessments of causation and attribution of responsibility. A principal question is whether legal routines can adapt themselves to changing scientific epistemology based on probabilistic evidence. As is to be expected, the law has moved cautiously, accepting neither the extreme of categorically refusing to budge from its traditional roots nor of abandoning the conventional insistence on particularistic evidence in all circumstances . But as yet we are only on the threshold of this new territory, still in the process of probing rather than expecting definitive answers.[414]

"A Postscript" ends with "We are awaiting the next move in the causality game."[415]

For common law Canada, the next moves after Fleming's articles were *Snell*, followed by *Athey* and *Walker Estate* a few years later. For Quebec, the next moves were *Laferrière v. Lawson* and *St.-Jean v. Mercier*. In theory, in each of these cases, the Supreme Court denied the use of mere possibility as sufficient basis for proof of factual causation: demanding adherence to the more likely than not standard. In practice, at least in common law Canada, something that smelled like proof on a less than probable basis seemed implicit in how some judges applied the *Athey* material-contribution test.

The case law source, or at least a source, of the *Resurfice* material-contribution dicta is seems to be [is a] decision very familiar to British Columbia lawyers; remarkably absent from the jurisprudence east of the Rocky Mountains. It is *Haag v. Marshall*.[416]

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[413] Probabilistic Causation, 68 Can. B. Rev. 661, at pp. 662-63.
[414] Probabilistic Causation, 68 Can. B. Rev. 661, at 681.
[415] A Postscript, 70 Can. B. Rev at 147
[416] (1989), 61 D.L.R. (4th) 371, [1990] 1 W.W.R. 361, 1989 CanLII 236 at paras. 20-25 (B.C.C.A.).

The text that you are about to read should sound very familiar, especially paragraph 23, even if the *Resurfice* use is **significantly** different. The emphasis in bold in paragraphs 23, 24 and 25 is mine.

> [20] That brings me to *McGhee v. Nat. Coal Bd.*, *supra*. . . . The medical evidence was also that it was impossible to tell whether Mr. McGhee would have developed dermatitis at all, or to the same extent, if he had been able to take a shower after work; but that it was possible to say that his inability to have a shower after work and before bicycling home materially increased the risk of his developing dermatitis. The House of Lords decided that the National Coal Board was liable for the loss flowing from Mr. McGhee's dermatitis on the basis of its breach of duty in failing to provide showers.
>
> [23] The "inference" principle derived from McGhee, and from the three Canadian cases to which I have referred, is this: Where a breach of duty has occurred, and damage is shown to have arisen within the area of risk which brought the duty into being, and where the breach of duty materially increased the risk that damage of that type would occur, and where it is impossible, in a practical sense, for either party to lead evidence which would establish either that the breach of duty caused the loss or that it did not, **then it is permissible to infer, as a matter of legal, though not necessarily logical, inference, that the material increase in risk arising from the breach of duty constituted a material contributing cause of the loss and as such a foundation for a finding of liability.** [emphasis added]
>
> [24] **The legal inference permitted by the principle may be prodded along by the concept that as between an innocent plaintiff and a defendant who has committed a breach of duty to the plaintiff and by so doing materially increased the risk of loss to the plaintiff, in a situation where it is impossible, as a practical matter, to prove whether the breach of duty caused the loss, it is more in keeping with a common sense approach to causation as a tool of justice, to let the liability fall on the defendant.** That approach is consistent with the result achieved by the Supreme Court of Canada in *Cook v. Lewis*, [1951] S.C.R. 830, [1952] 1 D.L.R. 1, affirming [1950] 2 W.W.R. 451, [1950] 4 D.L.R. 136 [B.C.]. That is the case where two hunters fired at the same time but it could not be determined whose shot struck the plaintiff. In those circumstances both defendants would be liable. [emphasis added]
>
> [25] **Whether the inference of causation** should in fact be made in any particular case depends on whether it is in accordance with common sense and justice in that case to say that the breach of duty which materially increased the risk **ought reasonably to be considered as having materially contributed to the loss.** [emphasis added]

Haag was decided one year before *Snell* and six years before *Athey*. *Haag* is cited in *Snell* for the inference principle, but you will not find *Haag* again in Supreme Court jurisprudence, not even in *Resurfice*. *Haag does not* say that contribution to risk can, in some cases, be a sufficient basis for a finding of causation even if one cannot infer the connection because the evidence does not exist. It specifically rejects that proposition. Even if it had not rejected the proposition, *Snell* and later Supreme Court cases (before *Resurfice*, none of which are referred to in *Resurfice*) say you cannot. I mention the cases later when discussing material contribution in Ontario. I have also discussed the issue in *Snark*. Remember that *Haag* was cited in *Snell* as a decision allowing an inference of causation; that is, as a case where the facts supported the conclusion that the impugned

conduct was a cause of the harm, even though there was no "positive evidence". Sopinka J wrote in *Snell*:

> Decisions in Canada after *Wilsher* accept its interpretation of *McGhee*. In the circumstances in which *McGhee* had been previously interpreted to support a reversal of the burden of proof, an inference was now permissible to find causation, notwithstanding that causation was not proved by positive evidence: see *Rendall v. Ewert* (1989), 38 B.C.L.R. (2d) 1 (C.A.); *Kitchen v. McMullen* (1989), 100 N.B.R. (2d) 91 (C.A.); *Westco Storage Ltd. v. Inter-City Gas Utilities Ltd*., [1989] 4 W.W.R. 289 (Man. C.A.); and *Haag v. Marshall*, [1990] 1 W.W.R. 361 (B.C.C.A.).[417]

Now we have *Resurfice*'s apparent use of *Haag* for something completely different and contrary to its use in *Haag*, without mentioning *Haag*. Why completely different? Because *Haag*, at least according to *Snell*, is an example of a robust and pragmatic inference of causation.[418]

Curiously, though, *Haag* in the form of material contribution as the "increased-risk is sufficient for factual causation [increased risk as factual causation] principle" *was* used by Donald, J.A., in his dissent in *Mooney v. British Columbia* (Attorney General).[419] The majority in *Mooney* were not prepared to apply this meaning of material contribution to the facts of *Mooney*, although their separate concurring-in-result reasons do not necessarily reject the principle: see, *Trinetti v. Hunter*[420] and *B.S.A. Investors Ltd. v. DSB*.[421] Even more curiously in terms of the provenance of *Resurfice*'s material

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[417] *Snell v. Farell*, at 326.

[418] Ken Cooper Stephenson correctly notes in his recent article "Justice in Saskatchewan Robes: The Bayda Tort Legacy" (2007) 70 Sask. L. Rev 269 at pp. 287-95, that an interpretation of *McGhee* as the source of an increased-risk doctrine for causation was suggested and applied in *Nowsco Well Service Ltd. v. Canadian Propane Gas & Oil Ltd*. (1981), 122 D.L.R. (3d) 228, 16 C.C.L.T. 23 (Sask. C.A.). *Nowsco*, though, held that the result of the doctrine, where it applied, was an onus shift to the defendant so that the defendant had to adduce evidence which established, apparently on the probability basis, that the defendant's conduct was not a cause. If the defendant was not able to, then factual causation was established. The justification for this approach was "public policy or justice". "[I]f causation is overwhelmingly difficult to prove or impossible to prove then it is a matter of public policy or justice that it is the creator of the risk who should be put to the trouble of hurdling the difficulty or bearing the consequences:" *Nowsco* at DLR p. 246. "Hurdling the difficulty" shows that the Saskatchewan Court of Appeal was not blind to the argument that the causation conclusion would not be supportable under any valid application of the scientific method, or any known form of logic looking only at the question of whether the evidence permitted the causation conclusion on a probabilistic basis. As Cooper-Stephenson points out (at pp. 289-90 of the article), Bayda J.A. wrote at DLR p. 245: "Ordinarily, exposure to risk goes to duty of care and its breach, but not to cause. Contribution to any injury goes to cause." The reverse onus approach was rejected, of course, in *Snell*. "Hurdling the difficulty" is a turn of phrase that should resonate for other reasons. Canada's reputation for modesty being what it is, it is apt that Canadian judges should be seen to be doing nothing more than "hurdling" evidentiary difficulties while the House of Lords is "a leaping evidentiary gaps."

[419] 2004 BCCA 402 at paras. 72-74, 80, [2004] 10 W.W.R. 286, 31 B.C.L.R. (4th) 61 (C.A.), leave to appeal to S.C.C. refused [2005] 1 S.C.R. xiii (Mar 5, 2005).

[420] 2005 BCCA 549 at para. 13, 47 B.C.L.R. (4th) 290.

[421] 2007 BCCA 94 at para. 36. See, also my discussion of *Mooney* in *Snark* and Margaret Isabel Hall's discussion of *Mooney* in "Duty, Causation and Third-Party Perpetrators: The Bonnie *Mooney* Case" (2005), 50 McGill L.J. 597

contribution as increased risk principle, *Haag was explicitly cited* in support of this form of material contribution by Lord Hutton in the House of Lords' *Fairchild v Glenhaven Funeral Services Ltd*.[422]

There are no reported Canadian cases from which one could derive the "material contribution means increased risk is legal causation" principle between March 5, 2005 (the release of the decision rejecting leave in *Mooney*[423]) and February 8, 2007 (the release of *Resurfice*). It is worth wondering what it was that happened between March 5, 2007 and February 8, 2007 to change the Supreme Court judges' collective view of the jurisprudence.

There is, of course, one seminal United Kingdom decision: *Barker v. Corus (UK) Plc*.[424] Logic, even common sense, points to *Barker*. But, if that is the case, good scholarship required the Supreme Court mention that. However, it the Supreme Court had done that in *Resurfice*, the Court would have been obliged to spend just a few milliliters of ink setting out the parameters of the doctrine; at least to the extent of indicating whether the *Fairchild- Barker* doctrine was being adopted into Canadian common law with the restrictions set out by the House of Lords, or with more, or with less. The *Resurfice* version of the increased risk as factual causation principle – the *Resurfice* version of the material-contribution test – is not, on its face, limited to the narrow range of cases have evidentiary gaps due to current limitations in scientific knowledge.

The rationale for the "fairness and justice" justification is probably the same rationale that the Supreme Court used in *Bazley v Curry*[425] to explain is restatement of the basis for vicarious liability: the risk-based "enterprise liability doctrine". The

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[422] [2002] UKHL 22 at paras. 103, 106, and 115, [2002] 3 WLR 89, [2003] 1 AC 32, [2002] 3 All ER 305. The paragraphs of *Fairchild* containing the *Haag* references are reproduced in Part XXII.

[423] The last of the Canadian appellate courts to discuss causation prior to *Resurfice* was *Wiebe v. Canada (Attorney General)*, 2006 MBCA 159, [2007] 2 W.W.R. 598, released December 15, 2006; however, *Wiebe* does not contain any discussion of increase-in-risk as causation. The plaintiff, while in prison, was assaulted by another inmate. The trial judge found for the plaintiff, holding that the Correctional Services of Canada were negligent and that there was a causal connection – applying what was probably some version of the *Athey* material-contribution test. The trial judge did not cite any case law. The trial judge wrote (2006 MBQB 5, at para. 66): "[I]t is hard to say how much the deteriorating atmosphere in the house contributed to the assault and it may well not have been a major factor, but I conclude on balance that it likely was a contributing cause and that is all that the plaintiff needs to demonstrate in order to establish the liability of the defendant." The Manitoba Court of Appeal allowed the appeal and dismissed the action. On the causation issue, the Court reviewed the Ont. C.A. decision in *Aristorenas* and the B.C.C.A. decision in *Mooney*, but without adding anything of its own to the jurisprudence, because the Court held the case was an orthodox but-for case: "Here, the "but for" test is not unworkable as the precise cause of Wiebe's injuries is clearly the assault by Westwood. The judge used the material contribution test, not the "but for" test. In doing so, he erred in principle". (2006 MBCA 159, para. 35.) The Court equated the situation to that in Mooney. There was no evidence of any value that there was anything that the Crown could have done that would probably have made a difference. The Court held that the facts were "not capable of supporting th[e] conclusion" that there was any connection, let alone a but-for connection between the alleged failures of the Correctional Service or the prison staff and the assault. (2006 MBCA 159 at paras. 45-46)

[424] [2006] UKHL 20, [2006] 2 WLR 1027, [2006] 2 AC 572 (3 May 2006).

[425] [1999] 2 S.C.R. 534 at paras. 31, 28, 53, and 54.

following paragraphs set out the Court's enterprise-liability rationale. I have italicized portions for emphasis.

> [31] However, effective compensation must also be fair, in the sense that it must seem just to place liability for the wrong on the employer. Vicarious liability is arguably fair in this sense. The employer puts in the community an enterprise which carries with it certain risks. When those risks materialize and cause injury to a member of the public despite the employer's reasonable efforts, it is fair that the person or organization that creates the enterprise and hence the risk should bear the loss. *This accords with the notion that it is right and just that the person who creates a risk bear the loss when the risk ripens into harm. While the fairness of this proposition is capable of standing alone, it is buttressed by the fact that the employer is often in the best position to spread the losses through mechanisms like insurance and higher prices, thus minimizing the dislocative effect of the tort within society.* "Vicarious liability has the broader function of transferring to the enterprise itself the risks created by the activity performed by its agents" (London Drugs, per La Forest J., at p. 339).
>
> [38] *Where the risk is closely associated with the wrong that occurred, it seems just that the entity that engages in the enterprise (and in many cases profits from it) should internalize the full cost of operation, including potential torts.* See generally A. O. Sykes, "The Boundaries of Vicarious Liability: An Economic Analysis of the Scope of Employment Rule and Related Legal Doctrines" (1988), 101 Harv. L. Rev. 563. On the other hand, when the wrongful act lacks meaningful connection to the enterprise, liability ceases to flow: Poland v. John Parr and Sons, [1927] 1 K.B. 236 (C.A.) (noting that the question is often one of degree). As Prosser and Keeton sum up (Prosser and Keeton on the Law of Torts (5th ed. 1984), at pp. 500-501), when the harm is connected to the employment enterprise:
>
> > The losses caused by the torts of employees, which as a practical matter are sure to occur in the conduct of the employer's enterprise, are placed upon that enterprise itself, as a required cost of doing business. They are placed upon the employer because, having engaged in an enterprise, which will on the basis of all past experience involve harm to others through the torts of employees, and sought to profit by it, it is just that he, rather than the innocent injured plaintiff, should bear them; and because he is better able to absorb them, and to distribute them, through prices, rates or liability insurance, to the public, and so to shift them to society, to the community at large.
>
> [53] The third argument, essentially a variation on the first, is that vicarious liability will put many non-profit organizations out of business or make it difficult for them to carry on their good work. It is argued that unlike commercial organizations, non-profit organizations have few means of distributing any loss they are made to assume, since they cannot increase what they charge the public and cannot easily obtain insurance for liability arising from sexual abuse. While in this case, it may be that the loss can be distributed to the public (since the province pays the Foundation for caring for children like the respondent), many non-profit organizations may have no way to obtain contribution from other sources to cover judgments against them. In sum, attaching liability to charities like the Foundation will, in the long run, disadvantage society.

> [54] I cannot accept this contention. It is based on the idea that children like the respondent must bear the cost of the harm that has been done to them so that others in society may benefit from the good work of non-profit organizations. The suggestion that the victim must remain remediless for the greater good smacks of crass and unsubstantiated utilitarianism. Indeed, it is far from clear to me that the "net" good produced by non-profit institutions justifies the price placed on the individual victim, nor that this is a fair way for society to order its resources. *If, in the final analysis, the choice is between which of two faultless parties should bear the loss __ the party that created the risk that materialized in the wrongdoing or the victim of the wrongdoing __ I do not hesitate in my answer. Neither alternative is attractive. But given that a choice must be made, it is fairer to place the loss on the party that introduced the risk and had the better opportunity to control it.*

Some statements are simply too plainly obvious to ignore.[426]

What is also to plain to ignore is a point that I made in "Materially Increasing Risk"[427] when discussing whether the enterprise-liability doctrine was a window for the adoption of Fairchild in Canada. It was apt then. It remains apt now. All I have done is substitute or alter the words that appear in square brackets to change the context so that it refers to *Resurfice*. I do not claim any amount of prescience. If I had any, I would be using it to pick lottery tickets.

> It may be that support for the [*Resurfice*] use of increased risk as sufficient proof of factual causation can be found in the *Bazley* rationale for vicarious liability and particularly the italicized words, subject to the meaning to be given to "ripens into harm". It remains true, no matter what, that [in at least some applications of the *Resurfice'*s material-contribution doctrine] the conduct of one of the two [or more defendants will] not, in fact, [have] ripen[ed] into harm, based on current scientific knowledge. [*Resurfice*] holds, nonetheless, that the conduct of that [defendant] is to be treated as if it did.

Finally, there is an essential item that I might have mentioned at the beginning of this section. It is a necessary, even though never-mentioned, underpinning to the discussion of causation *Resurfice.* It is a necessary underpinning for any finding of factual causation that we might assert might be scientifically valid, if the rationale for our tests for factual contribution are they identify events which are (but-for) or at least might possibly be (material contribution) factual causes of the harm the plaintiff alleges. The application of the *Resurfice* material-contribution test requires satisfactory scientific (historical, factual) proof that the impugned conduct alleged to have increased the risk of the harm that materialized is capable of causing that harm to a person such as the plaintiff. If such evidence does not exist, then there cannot be a finding that the conduct increased the risk of the occurrence of the harm. In some cases, it is self-evident that the impugned conduct could be a cause of the harm. The court does not need extrinsic evidence. It is self-evident that a sharp enough instrument can cut into a plaintiff's body.

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[426] What is curious is that a risk-based enterprise-liability rationale is exactly what McLachlin C.J. rejected some four years earlier in her dissent (with Sopinka J.) *Hollis v. Dow Corning*. It is precisely the rationale adopted by the majority. See Part II: Variations: *Hollis v. Dow Corning*.

[427] Materially Increasing Risk, at 275.

In some cases, though, it will not be self-evident and the court will have to hear appropriate evidence. An allegation of illness due to exposure to toxic substances might be an example of this situation. The conclusion that the type of impugned conduct is, in general, capable of causing in the particular plaintiff the type of harm that materialized is a conclusion that is to be made on the balance of probability. This is not the *Resurfice* material-contribution inquiry. That inquiry is into the subsequent question of whether the impugned conduct of a particular defendant increased the risk for a particular plaintiff. This distinction is the difference between general and specific causation.

The Argument In *Resurfice* at the Supreme Court of Canada

To what extent was material contribution as increased risk an issue on the Supreme Court appeal in *Resurfice*? There is almost nothing on this the facta. There is only one paragraph in one of the facta mentioning the issue.

I will expand. The Resurfice and Leclair facta essentially assert that the facts were ordinary, but-for was the applicable test, and the trial judge was correct in both his understanding of the law and his application of the law; in any event that the trial result was either actually correct on the facts or, even if there might be a contrary argument, there was no palpable and overriding error on any issue. The Hanke factum is premised on the assumption that material contribution could apply. Its thrust, though, was simply that the Alberta Court of Appeal was correct in concluding that the trial judge did not do a proper analysis of the facts and law, regardless of which test was the correct test, and so the it was correct to send the action back for a new trial.

The only mention of material contribution as increased risk appears late in the Resurfice factum, at paragraph 88. The issue does not have its own section. The paragraph is:

> It is understood from this Court's reasons in earlier cases that the "material contribution" test does not imply that a wrongful act which only raises a material possibility of injury (but not a probability) would justify the imposition of legal responsibility. Such a test would be equivalent to accepting that a material increase in risk of an injury is a cause of it. It is further understood that the meaning to be attributed to the "material contribution" test is that a defendant's wrongful act need not be the sole or sufficient cause of an injury in order to justify imposition of legal responsibility. That is, a necessary, but insufficient, cause could still be a legal cause. If these understandings are correct, then the trial judge's findings of fact in relation to the onus of proof, and a probabilistic standard of proof, must stand.

So there was something in the one of the facta. Nonetheless, that "purifying ordeal of skilled argument" thesis that judges have been known to refer to in order to explain why it is important that academic arguments be tested in court? It does not seem to have occurred in *Resurfice*, at least for our new material contribution as increased risk test.

The substance of both the Resurfice and Leclair arguments is that the facts were an ordinary but-for case. Both parties referred to the argument Vaughan Black and I made in *Quantum Uncertainty* that the Alberta Court of Appeal's assertion statement that material-contribution test applies wherever there could be more than one cause eliminates but-for. The Leclair factum does the better job on factual causation issue. It is the only factum that mentions *Fairchild* specifically. However it does not mention *Fairchild* for the material contribution as increased risk conclusion. It cites *Fairchild* just for the proposition that there are extreme limits on the use of material contribution. Both facta clearly treat the *Athey* material-contribution test as one used to make a finding (by means of an inference) that the impugned conduct was a factual cause of the harm. Citing *Cottrelle*, Leclair's factum states that that material contribution, as a test for actually inferring factual causation should be restricted to cases where (1) where it is impossible for plaintiff to establish but-for on a probability basis and (2) the impossibility is because of gaps in current scientific knowledge. Leclair's paragraph 64 contains:

> This Court is now in a position to confirm that considerable restraint is called for in straying from the "but for" test. Deviation may occur where:
>
> > a) a breach of the standard of care has been established; and
> > b) it is practically impossible for the plaintiff to prove the precise cause of the injury by reason of inter alia, a lack of scientific knowledge, destruction of the evidence by the defendant, or exclusive possession of the evidence by the defendant.

Resurfice (in paragraphs 82-87 of its factum) explicitly argues that material contribution was nothing more than an evidentiary presumption, limited to cases where the facts are exceptional (present "challenging evidentiary circumstances" that raise "cases containing unique or complex issues of factual causation" and so justify resort to "material contribution language.

The Hanke factum contains very little on the causation jurisprudence. Hanke argued, in substance, that the Alberta Court of Appeal's decision was correct regardless of any flaws in its method of analysis; that the trial judge's analysis of the facts was not adequate for the reasons set out by the Alberta Court of Appeal; and, the case should go back for a new trial so that the correct analysis could be done. Paras 2 and 3 of the Hanke factum are:

> This appeal is about whether the Alberta Court of Appeal correctly concluded that the Trial Judge's causation analysis was inadequate. The Alberta Court of Appeal noted the Trial Judge did not consider or analyze expert evidence on the design of the ice resurfacing machine or human factors, the discipline that applies human perception, cognition and response to product design. The Trial Judge did not consider or analyze evidence of other rink attendants who had similar experiences with the ice resurfacing machine that lead to the explosion in this case. The Respondent submits that the Trial Judge was required to consider this evidence to properly assess causation against the Defendants. The Trial Judge's decision to not consider this evidence resulted in the Trial Judge not properly applying either the "but for" test or the "material contribution" test to

> the conduct of the Defendants to determine causation. Regardless of which causation test is appropriate under the circumstances, the Trial Judge's causation analysis was flawed.
>
> This appeal is not about accountability based on fault or efforts to achieve distributive justice, as characterized by the Appellant. The Alberta Court of Appeal did not render a judgment against the Appellants. The Court of Appeal sent the matter back to trial.

In short, wherever the Supreme Court found the principle that legal causation may be material-contribution-as- increased-risk, it was not substantially out of the facta. Based on that, I am going to assume the issue was not argued in depth, if at all. So, if we assume the Supreme Court subscribes to the purifying ordeal thesis, whatever crucible it was that purified the *Resurfice* version of the material-contribution test was not the argument the Court heard on *Resurfice*.

Ooh, That Smell, Again: An Alimentary Perspective – GIGO[428] and *When* Does the Material Contribution Test Apply?

> By the pricking of my thumbs,
> Something wicked this way comes.
> Open, locks,
> Whoever knocks!
>
> Enter *RESURFICE*.[429]

What happens when the judge decides it is not dead-fish obvious that the but-for test applies to provide the answers to both "what is a cause of P's injury" and "who is a cause of P's injury"? That is the question.[430]

Resurfice does not tell us anything useful about when either of the but-for or material contribution tests applies, because what it tells us is that each applies when the other does not. In "Looking Glass," Vaughan Black and I explained, in broad terms, why the *Resurfice* criteria for the application of the material contribution test – "the ambit of the risk" and "impossibility" requirements – either have no useful meaning or are so broad as to include practically every case, in which case there is again no useful meaning.[431] I expand on that analysis in this part.

Where the litigation involves a disputed allegation that harm resulted from wrongful conduct, the court will have to decide whether the conduct caused (whatever caused means in that jurisdiction) the harm. In many cases, it will be (or is) obvious why some event occurred. The correct answer to the question "is the defendant's conduct a

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[428] The "garbage in, garbage out" principle.

[429] Shakespeare, The Tragedy of Macbeth, Act IV, Scene I. Actually, that stage direction is "Enter MACBETH," but I trust you get my point.

[430] A related issue is whether both questions have to be answered by the same test. The answer, in principle, seems to be that there is no reason in principle to demand that. That is as far as I intend to go with this question at this time.

[431] "Looking Glass", pp. 247-249.

cause of the plaintiff's injury?" will be as overwhelming as the smell of a weeks-old, rotting, unrefrigerated dead fish. It will be so overwhelmingly obvious that we *will* know it when we see it. Or, even if that answer is not obvious, what is obvious is that the test we will use to determine the answer is the but-for test. However, in other cases the answer, or the answer to the question as to which test to use, will not be that obvious, or obvious at all.

Ask yourself this question. Does *Resurfice* tell us when the but-for test applies? *Resurfice* tells us the but-for test applies where the material contribution test does not apply." Ask yourself the next question. Does *Resurfice* tell us when the material-contribution test does not apply? *Resurfice* tell us that the material-contribution test does not apply where the but-for test applies." This is called circular reasoning. The problem with circular reasoning is that "fails to prove anything because it applies what it is supposed to prove as fact."[432] This might not be what the Supreme Court meant to say in *Resurfice*. The only answer I can give is that I have no idea what the Court meant to say. However, the result that I have described is the necessary meaning of what they wrote in *Resurfice*. There is no other valid interpretation if one gives to what they wrote the meaning that English words are supposed to have if one applies known rules of English

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[432] Wikipedia, at http://en.wikipedia.org/wiki/Circular_reasoning (accessed November 6, 2007) – Wikipedia is reliable enough, here. Circular reasoning is also an aspect of the two general criteria the *Resurfice* asserts determine when the material-contribution may be deployed. It exists in both the "ambit of risk" and "impossibility of proof" requirements. I will devote a fair number of words in this section to the problems in the "impossibility" requirement. I will spend almost no time on the "ambit of risk requirement". That is because there is an immense amount of scholarship dissecting that issue. As such, I limit myself to two references. First, I quote from "Looking Glass", at pp. 247. "We will first consider the criteria. The first-mentioned — injury falling within the scope of the risk — will, *necessarily and by definition of what constitutes negligence*, be satisfied every time the other elements of the tort of negligence are satisfied. All conduct creates risk. Negligence requires unreasonable increase in risk. A plaintiff who has demonstrated the existence of a duty of care, breach of that duty, and injury within the scope of the risk — the elements of the tort of negligence *other than causation* — will invariably have satisfied the 'injury falling within the scope of the risk' criterion. Conversely, if a plaintiff has not suffered an injury that was of the type that fell within the duty of care imposed on the defendant, that plaintiff will never get to the causation threshold. The case will have failed at an earlier stage. So, the 'injury falling within the scope of the risk' criterion may seem coherent but does nothing to advance its advertised goal of making the application of the material contribution test exceptional. In fact, it does nothing." (emphasis in original) I suppose one might say that an argument which adds nothing cannot be circular. I would be prepared to accept that. Making what I believe to be a similar point, Jane Stapleton dealt with circularity in *Fairchild*'s use of the "ambit of risk" concept in "Lords a'leaping" at 64-65. She wrote: "But there is a dangerous circularity in the notion of the sphere of the risk created. If A was historically involved in an outcome it can always be said that the outcome was within the sphere of the risk created by A. Similarly, where the issue of historical connection cannot be established on orthodox principles because of an evidentiary gap, the notion of the sphere of the risk is sufficiently vague to allow manipulation to fit the result desired. Thus, if the [Lord] Hutton requirement is that 'the defendant created a risk and that the injury suffered by the claimant fell squarely within that risk', the claimant will urge a definition of the risk created by the defendant that is broad enough to cover the outcome. . . . . The vagueness of the risk idea also accommodates the pro-defendant manipulation reflected in Lord Rodger's requirement that the agencies operated in substantially the same way."

grammar.[433] So, all I can say is that *is* what the Court wrote. If the Court meant to say something else in *Resurfice*, it ought to have been clearer. It could very easily have been clearer.

Fortunately, about 5 years ago, the Ontario Court of Appeal told us, in practice, when the *Resurfice* material-contribution test will apply. That court was writing about the meaning of "unworkable" but the answer it gave is equally applicable to *Resurfice*'s "impossible". I have mentioned this earlier so I will keep this recapitulation brief. The Ontario Court of Appeal wrote:

> The "but for" test has been relaxed as "unworkable" in cases where, practically speaking, it is impossible to determine the precise cause of the injury. In *Athey*, for example, the Supreme Court affirmed the "material contribution" test as a qualification to the strict "but for" test only when used in cases similar to *Bonnington Castings Ltd. v. Wardlaw*, *supra*, and *McGhee v. National Coal Board*, supra. The more recent House of Lords decision in *Fairchild* . . . also reflects this same tendency to depart from the "but for" standard, but only where the precise cause of the injury is unknown.[434]

Vaughan Black and I explained our "Material Contribution and Quantum Uncertainty: *Resurfice Corp. v. Hanke*" that the "three sentences must be read together as one definition. It is not the case that the first sentence is the definition, with the second and third sentences mere explanation." [435] The problem in *Bonnington*, *McGhee*, and *Fairchild* was a limits of science problem. It is, then, "practically speaking … is impossible to determine the precise cause of the injury" where the answer requires expert evidence but current science cannot provide a probable answer one way or the other. Richard Wright has provided a succinct summary of the problem posed in these situations. The "plaintiff can prove that a defendant's tortious conduct *may have* contributed to the plaintiff's injury, but it is inherently impossible, given the nature of the situation, for the plaintiff to prove that the defendant's tortious conduct *actually* contributed to the injury."[436] "May have, here, means "possibly"; "actually" means "probably".

As I said, there will be some situations where the answer to the causation question, or the choice of the test, will be as obvious as the smell of bad fish, so incontestable that the court does not have to do anything but state the obvious. There will be others in which the smell is not that clear. In this section we will look at how we identify the smell, and why the smell exists. I will explain why *Resurfice* forces lawyers,

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[433] If the Supreme Court has decided that the principles of Deconstruction now determine how Canadians are to know interpret their reasons for judgments, they might have told us more explicitly.

[434] *Cottrelle*, at para. 30.

[435] (2006), 46 Can. Bus. L. J. 155 at 167. This piece is a case comment on the Alberta Court of Appeal decision in *Resurfice*.

[436] The quotation is from Richard Wright, "Liability For Possible Wrongs: Causation, Statistical Probability; And The Burden Of Proof" (emphasis added; forthcoming, 2008 or 2009, used with permission). In our context, "inherent impossibility" should be understood to mean by reference to valid, known, science; i.e., the *Resurfice* current limits of science.

judges and juries, to answer this question, except where it is obvious that the but-for test is the applicable test:

> *Could evidence now exist, or ever have existed, that would be sufficient to establish, in law, that the impugned conduct – the conduct of the defendant or of someone else for whom the defendant may be vicariously liable – is at least a cause of the plaintiff's injury.*

The combination of both the answer to that question and the reason for that answer will determine whether the but-for test or the material contribution test is to be used.

I first eliminate two suggestions as to what might be sufficient to satisfy the *Resurfice* requirements for the application of the material contribution test. "Fairness" or "justice", whatever those terms might mean separately, or joined in a phrase by "and," were not intended as sufficient conditions for the application of material contribution. *Resurfice* should not be understood to mean that we decide whether the but-for or material-contribution tests apply by deciding what is "fair", or what is "just", or what is "fair and just", in the particular case. *Resurfice* should not be understood to have held that it is sufficient basis to hold that the but-for test does not apply that "it would offend basic notions of fairness and justice to deny liability by applying a 'but for' approach." The least reason for this is that "fairness and justice" (whatever that means) is the Supreme Court's justification for asserting that the two general requirements ("ambit of risk" and "impossibility") are adequate to establish when the material contribution test applies. "Fairness and justice" was not one of the requirements. The phrase was the Court's justification for the choice of those requirements. This is clear in this sentence:

> 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 notions of fairness and justice to deny liability by applying a "but for" approach.[437]

The second reason is less argumentative in the sense that it is now based on precedent, so long as one accepts the validity of the precedent. There is now at least one appellate decision – *Seatle v. Purvis*, (B.C. C.A.)[438] – that states, specifically, that *Resurfice* did not establish "fairness and justice" as an independent basis for applying the material-contribution test rather than the but-for test. *Seatle* also stands for the proposition that the

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[437] *Resurfice*, para. 25

[438] 2007 BCCA 349 at paras. 69-71, leave to appeal refused 2008 CanLII 1385 (S.C.C.). The B.C.C.A. wrote: "[69] The appellants urge this Court to fill in the evidentiary gap because, in the words of *Resurfice*, 'it would offend the basic notions of fairness and justice to deny liability'. [70] In my opinion, it was not impossible for the plaintiffs to prove that Dr. Thomas' presence in the delivery room would have materially altered the outcome of Connor's delivery. The plaintiffs were unable to prove causation under either the "but for" analysis or the material contribution analysis permitted in the special circumstances outlined in *Resurfice*. [71] This case does not really fall within the ambit of *Snell* or *Levitt*. There is no scientific gap that requires a departure from the 'but for' test. Rather, this was primarily a fact‑driven case decided well within established legal principles. While the factual issues were challenging, I see no reversible error in the result."

fact that the factual issues are "challenging" is also not sufficient to trigger the application of the material contribution test.[439]

In order to give the but-for test useful meaning, and to make consequences of the *Resurfice* discussion of the material contribution test consistent with the case's earlier explanation of the but-for test – after all, the ratio of the case – we have to assume that the Supreme Court *could not* have meant to assert that the material-contribution test applies wherever and whenever the facts show that the injury the plaintiff actually sustained fell "within the ambit of the risk created by the defendant's breach". This is at least because that assertion would make the material-contribution test the default test, the primary test, for factual causation. That is at least because we cannot have the tort of negligence at all, under any current, mainstream, understanding of tort law, throughout the common law world, unless the injury that occurred fell within the ambit of the risk created by the defendant's wrongful conduct. A theory that "injury within the ambit of risk" is the sufficient condition for the application of the material contribution test eliminates the but-for test. That consequence is contrary to the principal ratio in *Resurfice*. It reinstates the very consequence of the Alberta Court of Appeal decision in *Resurfice* the Supreme Court explicitly held was the reason why the Court of Appeal erred in concluding that the material-contribution test was the applicable test wherever there could be more than one cause of the injury. The Supreme Court wrote:

> [19] The Court of Appeal erred in suggesting that, where there is more than one potential cause of an injury, the "material contribution" test must be used. 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. If the Court of Appeal's reasons in this regard are endorsed, the only conclusion that could be drawn is that the default test for cause-in-fact is now the material contribution test. This is inconsistent with this Court's judgments in S*nell v. Farrell*, [1990] 2 S.C.R. 311, *Athey v. Leonati*, at para. 14, *Walker Estate v. York Finch General Hospital*, [2001] 1 S.C.R. 647, 2001 SCC 23, at paras. 87-88, and *Blackwater v. Plint*, [2005] 3 S.C.R. 3, 2005 SCC 58, at para. 78.
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> [21] First, the basic test for determining causation remains the "but for" test. This applies to multi-cause injuries. The plaintiff bears the burden of showing that "but for" the negligent act or omission of each defendant, the injury would not have occurred. . . . .
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> [22] This fundamental rule has never been displaced and remains the primary test for causation in negligence actions. . . . .[440]

The significant difference is that the *Resurfice* material-contribution test has a very different meaning from the *Athey* version that the Alberta Court of Appeal had applied.

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[439] Some might argue that, in the result, the difference between "challenging factual issues" and "too-complicated rules for the determination of factual causation resulting in the dismissal of a case in which our sense of what is right and wrong – of fairness and justice – tell us that the plaintiff should receive compensation" is so fine that it is too often entirely in the eye and mind of the beholder. Note the last sentence quoted from *Seatle*, in the footnote above: "While the factual issues were challenging, I see no reversible error in the result."

[440] *Resurfice*, paras. 19, 21, 22

Hegemony is an explicit enough word, even if one not used all that often. It means "dominance". It describes *exactly* what the Supreme Court did if the two material contribution requirements are given their plain English meanings. It, unwittingly, but necessarily, raised a new version of the material-contribution test to the primary, default role, while simultaneously stating that any version of the material contribution test could not be the primary, default, test because that role was occupied by the but-for test. Again, Vaughan Black and I showed in *"Looking Glass"*, and Russ Brown will show in *Hegemony*, that the only meaning that the Court's words can have, if they are given the meaning required by the rules of the English language, *is* that the *mere* creation of an increased risk of injury, within the ambit of the risk created by the defendant's breach, *is* the only valid meaning that the rules of English language interpretation allow us to give to the words used in *Resurfice*, whatever other meaning the Court might have intended. So, to repeat the point yet again: in *Resurfice*, the Court did exactly what it criticized the Alberta Court of Appeal for. It replaced the but-for test with another test, still called the material-contribution test, but a new version of that test. The Supreme Court – clearly unintentionally, but necessarily – made the material-contribution test the primary test. However, *all* that Alberta Court of Appeal had done was replace one verbal formulation of a test which is a test by which factual cause is determined with another verbal formulation of that test, where the latter still had to be understood as a test for the existence of factual causation. And, whatever the *Athey* material-contribution formula meant, it was still a test for factual causation based on probability. *Athey* did not allow the court to find causation based on mere possibility less than probability.[441]

Resurfice, however, if applied for what it says, replaces the but-for factual-causation test based on probability with a material-contribution test for legal causation *based on possibility*. Then, the *Resurfice* version of the material-contribution test *imposes* a finding of legal causation so that the court may *impose* a finding of liability, if there was negligence which increased the risk of the occurrence of the injury, all other criteria satisfied. Recall this sentence in *Resurfice*. "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 notions of fairness and justice to deny liability by applying a "but for" approach."[442]

Let us step back in time for a moment, to see how we got to this impasse. The but-for test, the *causa sine qua non*, was the only test the common law had for causation, where causation mattered, across the breadth of obligations law for centuries.[443] It was only in early part of the 20th century, in the United States, and in the middle and latter parts of the 20th century in the Commonwealth, that a different, alternate, test – or, what sometimes seemed to be a different, alternate, test rather than merely another way of stating the but-for test – surfaced. That test came to be called the substantial-factor test in

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441 *Cottrelle, Mooney*; generally, Cheifetz, "*Snark*".
442 *Resurfice*, para. 25 (emphasis added).
443 Klar, Tort Law (3d); Black, *Policyization*

the United States.[444] That test came to be called the material-contribution test in Canada and the Commonwealth. What was clear in the United States was that the substantial-factor test, when it was first proposed early in the 20th century, was *not* intended as merely a restatement of the but-for test for factual causation. It was not even intended to be a test for the existence of historical, scientific, factual causation. It was supposed to be a different test for the existence of a different category factual causation: legal factual causation – what was then called "proximate cause".[445] Most of the leading American tort scholars eventually concluded, and the authoritative American torts texts eventually stated, that the substantial factor test either had no content or no meaningful content. The recent *Restatement (Third) of Torts, Liability for Physical Harm (Basic Principles)* has abandoned the substantial-factor test.[446]

The American substantial factor test was, for all relevant purposes – in any event, for our purposes – the English and Canadian material-contribution test, as that test existed in England before *Fairchild* and *Barker*, and in Canada before *Resurfice*. I summarized the American situation in *Snark*.[447] The

> decades-old American substantial factor test[448] . . . [is] a "fudge" that allows fact finders (judges or juries) to find factual causation so as to be able to impose liability in cases where the but-for test can not be satisfied but the court believes liability is appropriate.[449] . . . [T]he substantial factor test for proof of factual causation is used in cases where … the fact finder decides that the but-for test is inapplicable. The form of the test is: was the tortious conduct a substantial factor in producing the outcome?"[450] The substantial factor test has existed for more than 80 years. There still is no succinct definition of the circumstances under which but-for becomes inapplicable. Numerous commentators have stated that the substantial factor test is used where judges *believe* that liability is appropriate but the but-for test will not produce the required finding of causation; that is, but-for would produce a "wrong" finding of no causal connection. [451]

I also wrote:

> Most leading American tort scholars do not hold the substantial factor test in high regard. It has been described as a "vacuous, or at best impressionistic, incantation".[452] "As a test for determining either causal contribution or the extent of legal responsibility

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[444] *Snark* at pp. 98-100

[445] R. Wright, "Once More into the Bramble Bush: Duty, Causal Contribution, and the Extent of Legal Responsibility" (2001), 54 Vand. L. Rev. 1071 at 1078-79 ("Bramble Bush").

[446] American Legal Institute, (2004), c. 5, Factual Cause, §26, *Snark* at pp 98-100; "rightly abandoned" according to Jane Stapleton, "Cause-in-fact And The Scope of Liability for Consequences" (2003), 119 L.Q.R. 388, at 393 ("Cause-in-fact").

[447] 30 Advocates Quarterly at pp. 98-100. I have changed the footnote numbers, as needed the form and the internal cross-referencing in the citations, eliminated some extraneous material in the citations, and added words for sense if needed. I have not changed the substance of the citations.

[448] A succinct summary appears in Wright, "Bramble Bush", at 1075-80.

[449] Stapleton, "Cause-in-fact", at 393.

[450] Stapleton, "Cause-in-fact", at 393.

[451] *Snark*, at pp. 98-99. The footnote numbers have been changed.

[452] Stapleton, "Cause-in-fact", at 393.

> for tortiously caused injury, the substantial-factor formulation is completely useless."[453] "The substantial factor test is not so much a test as an incantation. It points neither to any reasoning nor to any facts that will assist courts or lawyers in resolving the question of causation."[454] The "substantial-factor formulation does not "resolve" anything, but rather merely restates, confuses, and begs both the empirical issue of causal contribution and the normative issue of legal responsibility."[455] The *Restatement (Third) of Torts: Liability for Physical Harm (Basic Principles)* states that the substantial factor test "may lure the factfinder into thinking that a substantial factor means something less than a but-for cause or, conversely, may suggest that the factfinder distinguish among factual causes, determining that some are and some are not 'substantial factors'."[456] The *Restatement (Third)* adds: "use of substantial factor may unfairly permit proof of causation on less than a showing that the tortious conduct was a but-for cause of harm or may unfairly require some proof greater than the existence of but-for causation."[457]

That description accurately summarizes the Canadian situation before *Resurfice*.

American jurisprudence did not have a positive statement as to when the but-for test applied rather than the substantial factor test. Instead, there was the negative statement. The substantial factor test applied when the but-for test did not. I repeat the last two sentences, written in 2004, from the first paragraph of the quotations above from *Snark*. "There still is no succinct definition of the circumstances under which but-for becomes inapplicable. Numerous commentators have stated that the substantial factor test is used where judges believe that liability is appropriate but the but-for test will not produce the required finding of causation; that is, but-for would produce a "wrong" finding of no causal connection."[458] The Canadian situation under *Athey* was the same. Lewis Klar wrote in *Tort Law* (3d) that there are cases in which judges "will not allow wronged plaintiffs to fall between the cracks due to the formal requirements of proving cause"; rather, judges will create what they believe to be "a just solution" to allow the plaintiff to succeed.[459] The *Athey* version of the material-contribution test applied when the but-for test was "unworkable". However, *Athey* did not define "unworkable"; neither did any judicial decision, adequately, after *Athey* and before *Resurfice*.[460] The consensus in the academic scholarship that "unworkable" was unworkable.[461] I showed in *Snark* that the "jurisprudence in this area features at least 15 different (and mostly inconsistent) answers regarding the applicability of the material contribution test, and 11 different (and mostly inconsistent meanings) for "unworkable."[462]

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[453] Wright, "Bramble Bush", at 1080 (footnote omitted).
[454] D. Dobbs, *The Law Of Torts*, at 416 quoted in Wright, "Bramble Bush", at 1080.
[455] Wright, "Bramble Bush", at 1080, footnote 29.
[456] Tentative Draft No. 2, 2002-04, c. 5, Factual Cause, §26, Reporters' Note to Comment j.
[457] *Snark*, at pp. 99. The footnote numbers have been changed.
[458] *Snark*, at 98.
[459] Klar, *Tort Law* (3d), at 400, quoted in *Cottrelle v Gerrard*, at para. 30.
[460] Klar, *Tort Law* (3d), at 397. See, generally, Cheifetz, *Snark*.
[461] *Snark* catalogues some of the "spilled academic ink" that *Resurfice* states was "neither necessary nor helpful to catalogue"; some of the writing that showed that "unworkable" was unworkable.
[462] "Looking Glass" at 245, footnote 30. The original source is *Snark* at pp. 71-73, 83-85.

That brings us back, finally, to *Resurfice*. As you have seen, *Resurfice* states that the first requirement for the application of the material-contribution test is that

> 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.[463]

There are two parts to the "impossibility" requirement. It is not sufficient that it be impossible for the plaintiff to prove that the defendant's fault caused the plaintiff's injury using the but- for test. The plaintiff must also establish that the impossibility has been caused by – "due" means "caused by" – factors outside of the plaintiff's control. This definition creates a Kafkaesque jurisprudential world where we will not go to sleep as a human being and wake up as insects. Instead, all we have are paradoxes that fit nicely into the concept of "Catch-22".[464] A Catch-22 study-guide states that the substance of the Catch-22 problem is that "if there was a rule, no matter what the rule is, there is always an exception to it."[465]

As I said, there are some examples of factual causation which are overwhelmingly obvious. In many cases where a vehicle strikes a pedestrian, there may be some questions as to *why* the vehicle struck the pedestrian. There may be some issue as to the severity of the impact. However, except in hit-and-run cases or unusual multiple vehicle incidents, there will rarely be any relevant issue on the question: *did this vehicle strike this pedestrian*. There will usually be at least some sufficiently incontrovertible, incontestable, unassailable, evidence of the fact that this vehicle made contact with that pedestrian.[466] For example, where the vehicle ran over the pedestrian, and there are tire tracks on the pedestrian's clothes and on the broken limbs which match the tread of the tires, and the pedestrian is found under the vehicle, and it was necessary to move the vehicle so as to be able to get the pedestrian into an ambulance, and everything was captured on film or video, there usually will not be much issue over the better answer to the question: "was the fact that the vehicle ran over the pedestrian at least a cause of the pedestrian's dirty clothes, and broken limbs?" It is unlikely, absent compelling evidence necessarily demanding the acceptance of that story and nothing else, that a judge or jury will give much credence to the suggestion that the pedestrian's limbs were broken in a mugging that occurred elsewhere, the pedestrian was transported (somehow) to the place where he or she was later found, the pedestrian was the left lying on the ground (at night, in the dark, wearing dark clothes and a dark ski-mask), and vehicle somehow managed to end up stopped on top of the pedestrian without causing additional injury; or, even more outlandishly, that the pedestrian was napping, already badly injured, in the middle of the

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[463] *Resurfice*, para. 25

[464] From Joseph Heller's novel, *Catch-22*.

[465] See, http://www.bellmore-merrick.k12.ny.us/catch22.html (accessed November 5, 2007). The link is to material posted on an American high-school district web site.

[466] Three adjectives making the same point, usually of Latin derivation, are usually enough for most members of the legal profession.

road when the vehicle suddenly dropped out of the sky, or otherwise appeared out of nowhere landing on top of the pedestrian.[467]

Similarly, when a vehicle is found lodged in the front wall of a building, with broken brick and debris all around, some of the debris has paint flecks matching the vehicle paint, there is no evidence of any other object of sufficient size that might have caused the damage, and there is an unaltered video showing the building immediately before the impact, the vehicle striking the building, and the aftermath, it is at least likely that we have the answer to the questions "did the vehicle cause the damage – was the impact between the building wall and the vehicle a cause of the visible building damage?" This type of situation usually does not require eye-witnesses, although there should be even less of a question where the incident was captured in picture or there are reliable eye-witnesses.

Another example would be to assume that a large rock had been found resting on the floor, at centre ice, of Toronto's Air Canada Centre, there was a hole in the roof larger than the circumference of the rock, the edges of the hole were bent inwards, and there was an appropriate amount and type of roof-debris on the floor around the rock, elsewhere in the building, and outside the building.[468] Given that evidence, it would be appropriate to conclude, absent indisputable contrary evidence, that the rock travelled through the roof and that that event was at least a cause of the hole in the roof. We would not conclude, for example, that the rock was teleported ("beamed") into the arena coincidentally with an unrecorded visit of any iteration of a time-travelling spaceship, such as the USS Enterprise, and that, concurrently, some unknown event caused the hole in the roof. Nor would we assume, for example, that the cause of the hole was "blue ice" from a very off-course Airbus 380[469] which (ice) melted on impact or shortly thereafter leaving no traces of ice or any other relevant residue.[470] In addition, we would not need to examine the rock to determine its chemical composition, in order to determine if it possibly or probably came from Sudbury, somewhere in Alberta, or was extra-terrestrial in origin, to form the opinion that the act of the rock travelling through the roof was at least a cause of the hole in the roof, and some of the roof-related debris found strewn

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[467] Or, as Arlo Guthrie said in *Alice's Restaurant*, he put the paper under the pile of garbage at the bottom of the cliff. The assumption is that the vehicle has sufficient mass to injure a natural human person.

[468] And, of course, somebody had captured the event on their cell-phone camera and posted the video on *YouTube*.

[469] http://www.spiegel.de/international/business/0,1518,516399,00.html <accessed November 9, 2007>.

[470] Assumed to have been passing overhead at the relevant time, even though there is no evidence of that airplane having flown in North American airspace at all, yet, let alone at the relevant time over Toronto. Wikipedia states, at http://en.wikipedia.org/wiki/Blue_ice_(aircraft) <accessed November 9, 2007>: "Blue ice in the context of aviation refers to ice formed by leaks in commercial aircraft lavatory waste tanks, a concoction of human waste and liquid disinfectant that freezes at high altitude. The name comes from the blue color of the disinfectant, and as a sardonic reference to the Blue Ice line of products used for cooling ice chests and similar applications. Airlines are not allowed to dump their waste tanks in mid-flight, and pilots have no mechanism by which to do so; however, leaks can occur. . . . These incidents typically happen under airport landing paths as the mass warms sufficiently to detach from the plane during its descent." Of course, given the nature of recent Maple Leaf performances, one could speculate whether it would be possible to accurately pinpoint the probable source of any trace amounts of relevant residue.

about inside the arena. We would need to know the composition of the rock if it were alleged, for some reasons, that it came from Ottawa, or Sudbury (or even Lower Slobovia), but that is a different question. Other cases may be unusual or even outré but will, nonetheless, be adequately explicable.

On the other hand, some cases are not that clear. There may be a myriad of possible explanations but sufficient reliable evidence for a valid conclusion as to *the* probable explanation or even a probable explanation does not exist.[471] One example, because science currently holds that there can be only one source for (cause of) the condition, is the source of the asbestos fibre(s) that cause mesothelioma where the person has been exposed to more than one source of asbestos fibres.[472] That, of course, is *Fairchild*. Another example is the infection whose medical name is necrotizing *fasciitis*, colloquially the "flesh-eating disease".[473]

Recall, then, that in *Resurfice* the Supreme Court stated that one of the requirements for the application of the material contribution test is that

> 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.[474]

This statement tells us that the but-for test is applicable in all cases where that "impossibility" *does not* exist. However, *it does not tell us when that "impossibility" exists*.[475] The quotation does not tell us how to recognize the necessary elements of that "impossibility"; nor do the two case-law examples the court later gives as material-contribution test cases.[476] The example of "current limits of scientific knowledge – which I will deal with in more detail in due course – is of marginal assistance. *Resurfice's* "impossible" criterion suffers from the same flaw as did the *Athey* "unworkable" criterion: it, too, is unworkable.[477]

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[471] There are many events for which there can be more than one probable explanation.

[472] *Fairchild*.

[473] *Aristorenas*.

[474] *Resurfice*, para. 25.

[475] As indicated, it must be at least when the situation is such that it is inherently impossible for the plaintiff to prove anything more than that the tortious conduct may have contributed to the injury.

[476] "Looking Glass", pp. 246-254.

[477] The House of Lords has told the English profession what the House intended "impossible" to mean as used in the *Fairchild* version of the material-contribution test. In *Barker v. Corus*, in addition to re-emphasizing the requirement that lack of sufficient evidence be due to limitations in current scientific Lord Hoffmann wrote at para. 25: "It is an essential condition for the operation of the exception that the impossibility of proving that the defendant caused the damage arises out of the existence of another potential causative agent which operated in the same way. It may have been different in some causally irrelevant respect …. but the mechanism must have been the same. So, for example, I do not think that the exception applies when the claimant suffers lung cancer which may have been caused by exposure to asbestos or some other carcinogenic matter but may also have been caused by smoking and it cannot be proved which is more likely to have been the causative agent." This is the "single agent" requirement. In *Novartis Grimsby Ltd v Cookson*, [2007] EWCA Civ 1261 at para. 72, the Court of Appeal explained: "Although Lord Hoffmann was there saying that the exception would not apply where one causative agent

The quotation does not tell us what it is that *this plaintiff* has to establish to satisfy the court that the problem (whatever it is) that prevents *this plaintiff* from successfully using the but-for test to establish factual causation *should not* result in the action being dismissed but, instead, should result in the action being permitted to continue and this plaintiff being permitted to use what must be a less stringent test to establish the causation requirement. The "current limits of scientific knowledge" example is nothing more than a statement of a general condition that may permit (all other requirements satisfied, whatever they might be) the application of the material-contribution test, provided that the plaintiff has adduced whatever evidence has to be adduced to satisfy the court that the impossibility is due to factors that were, are, and should be assumed will remain (in any relevant sense) in the future, outside of *this plaintiff's* control.

Let us consider the general example given in *Resurfice* – stated to be one instance of impossibility – in more detail. "The impossibility must be due to factors that are outside of the plaintiff's control; for example, current limits of scientific knowledge." Beyond "the current limits of scientific knowledge" is a necessary condition in the *Fairchild/Barker* formulation of the possibility-based material-contribution test, but tied into this being a factor beyond *any* person's control.[478] In "Looking Glass," Vaughan Black and I noted the incongruity of defining impossibility in terms of factors *only* "outside of *the* plaintiff's control" *but not* outside of *any person's* control. In fact, we noted more than the incongruity. We suggested that the *Resurfice* "factors outside of the plaintiff's control" requirement is far too easily satisfied. We wrote, in part.

> The ... [impossibility] criterion ... is vastly overbroad as formulated. The Supreme Court did not provide any explanation of the limit on the relevant reasons for why the factors are outside of *the plaintiff's* control. . . . There will be many cases where, for reasons outside a plaintiff's control, it is impossible for *the plaintiff* demonstrate causation. . . . There are an infinite number of cases where, for reasons beyond a plaintiff's control which have nothing to do with what caused what, *the plaintiff* cannot demonstrate that the defendant's actions had any causal factual relationship with the plaintiff's injury. In many of those cases, that creates no dissatisfaction with the but-for test; nor should it.[479]
>
> . . .
> . . . We suggest that unless the Supreme Court's words in Hanke – "impossible for the plaintiff to prove" – are interpreted as "impossible for anyone to prove (or disprove), Hanke will make the material-contribution test available in too many cases.[480]

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was occupational and the other was smoking, he plainly had in mind that the two agents would act on the body in a different way."

[478] *Fairchild*, at paras. 42, 43, 46, 61, 72, 113, 158. See, also, *Cottrelle,* at para, 30: "The "but for" test has been relaxed as "unworkable" in cases where, practically speaking, it is impossible to determine the precise cause of the injury." That statement, both in context and taken literally cannot mean anything other than "any person". It cannot mean just the particular plaintiff.

[479] "Looking Glass" at pp. 248-49. The "Looking Glass" footnote numbering and cross-references numbering has been altered to match this paper's numbering. Emphasis added except for the last "plaintiff".

[480] "Looking Glass" at pp. 249:

So, we know this much or, rather, the first of the quotations immediately above must be understood, on this point, to assert this much and nothing more: one example of when the plaintiff may use the *Resurfice* material-contribution test is where, (1) on account of "current limits of scientific knowledge" (2) it is impossible for *the plaintiff* to prove factual causation on the balance of probability. Returning to "Looking Glass":

> The problem is *Hanke*'s focus on the impossibility *of the plaintiff* proving causation. Perhaps the Supreme Court's words, "impossible for the *plaintiff* to prove",[481] could be rendered more helpful if we understood them as something along these lines: "impossible for *anyone* to either prove or disprove even if every bit of evidence that could ever be available to the moment of trial were put before the court". This accords with the judgment of the House of Lords, when wrestling with the same problem, in *Fairchild*. Lord Nicholls suggested we might turn to the material-contribution test "when, in the current state of medical knowledge, no more exact causal connection is ever capable of being established."[482] His focus was not on whether the *plaintiff* cannot prove causation, as it is in the *Hanke* formulation, but on whether *anyone* can prove (or disprove) it. Lord Nicholls emphasized this when he added that his suggested criterion for availability of the material-contribution test "is emphatically not intended to lead to . . . a relaxation whenever a plaintiff has difficulty, perhaps understandable difficulty, in discharging the burden of proof resting on him".[483]
>
> Lord Hoffmann made a similar point in *Fairchild* when he authorized resort to the material-contribution test when "medical science cannot prove"[484] what caused the harm in question and, in a similar vein, their Lordships employed or approved the phrase "impossible to say" at several points.[485] We suggest that unless the Supreme Court's words in *Hanke* – "impossible for the plaintiff to prove" – are interpreted as "impossible for *anyone* to prove (or disprove), *Hanke* will make the material-contribution test available in too many cases.[486]

Resurfice does not tell us what it is *the plaintiff* has to show about the "current limits of scientific knowledge" in order that judge (or jury) may conclude that the plaintiff has established that it is *impossible* for *this* plaintiff to "prove that the defendant's negligence caused the plaintiff's injury using the but for test". Put more broadly, the quotation does not tell us the relevant (for the causation inquiry) meaning of any of: "current limits of scientific knowledge;" "factors outside of the plaintiff's control;" or, even "due". There is a problem even in the use of "due to". That is because, in the context "due to" is used in the "impossibility" sentence, "due to" means "caused

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[481] Emphasis added.
[482] *Fairchild*, at para. 42.
[483] "Looking Glass", at. p. 249. *Fairchild*, at para. 43.
[484] *Fairchild*, at para. 61.
[485] The quoted words are those of Lord Hoffmann in *Fairchild,* at para. 46 and again at para. 72. The same words are quoted approvingly by Lord Hutton at para. 113, and used by Lord Rodger at para. 158.
[486] "Looking Glass" at 249. "Looking Glass" footnote numbering altered etc. Some footnotes or portions of footnotes removed, where appropriate, and the text is used elsewhere in the paper.

by". The statement "the impossibility must be due to factors that are outside of the plaintiff's control; for example, current limits of scientific knowledge" could have been written "the impossibility must be caused by factors that are outside of the plaintiff's control; for example, current limits of scientific knowledge." Using "due to" in a part of the definition that one provides for "caused by" is … circular.

I now move to the bludgeon just in case the broadsword I have used to this point missed its mark. The *Resurfice* "outside of the plaintiff's control requirement", if it means the actual plaintiff (a subjective inquiry) or a paradigm plaintiff in the plaintiff's position (a combined subjective and objective inquiry) can, literally, be satisfied every time that there is *any* evidentiary problem which is not attributable, in some relevant way, to the plaintiff's conduct, or the conduct of those persons whose conduct will be attributed to the plaintiff. One obvious example is the case of evidence that plaintiff does not know and never knew existed, where it cannot be said that the plaintiff or anybody else associated with the plaintiff ought to have known it exists or existed, but the nature of the complaint and injury necessitates the conclusion that the evidence must have once existed and might even still exist.

For example, assume that, in 1996, an unidentified, unconscious, male wearing a RCAF uniform *circa* 1944 was found lying in the middle of a Kitchener, Ontario, street, suffering from injuries consistent with having been run over by a World War II vintage Panzer tank. Assume that the plaintiff never recovered consciousness but is still alive. Assume that his injuries required the conclusion that the incident occurred within 48 hours of the time he was found lying on the street.

It is very likely that if somebody competent investigated the situation immediately, that somebody would have been able to determine at least whether there was a WWII vintage Panzer, or something similar enough to that vehicle, present in Kitchener at the relevant time. After that somebody eliminated all other reasonably plausible explanations, that investigation would have produced the plausible, the likely, even the probable, conclusion that a Panzer or an equivalent something was in Kitchener at the relevant time and was at least a cause of the man's injuries. There should be no doubt that, in coming to that conclusion, the competent investigator would have followed the parallel-line track depressions in the pavement and the oil leak to the nearby garage in which John Doe had stored his half-size replica WWII Panzer, built on a Volkswagen frame and supplied by a California company.

Nonetheless, it seems possible to state a very broad outline of general conditions which would seem to necessarily satisfy, or necessarily not satisfy, the *Resurfice* "impossibility" requirement, subject to the meaning of "factors outside of the plaintiff's control, even if the general conditions are of marginal utility. First, it seems self-evident, without the need to state examples, that there are some examples of "impossibility" that could not be due to factors outside of *the plaintiff's* control. If so, that requirement could be dealt with first. The court, then, would not need to deal with the "impossibility" issue, although the judge might decide to (or direct the jury to) for appeal purposes. If that is not

the case, then the public and lawyers before trial, and judges or juries at trial, will have to first determine whether

> (1) it will be, or is, impossible for this injured person / plaintiff (P) to establish, on the balance of probability,
> (2) using whatever evidence is or ought to be available to that P, and
> (3) using whatever resources and methodologies are available for use by that P, or ought to be available for use by that P,
> (4) whether a defendant's conduct caused the plaintiff's injury using the but-for test.

If the plaintiff is able to establish that then the plaintiff has to show that the impossibility is due to factors outside of the plaintiff's control. I ignore, for the moment, the question of what the standard of proof is for that inquiry. If it is probability, how strong a probability? If it is possibility, how strong a possibility? By strong, I mean likelihood expressed as a percentage.

I believe that we have to assume that "outside of *the plaintiff*s' control" means at all relevant times before the trial, at trial, and in some relevant sense always will be in the future, even if the trial is postponed a reasonable amount of time. Again, we do not know the standard of proof.

Since we have been able to state some general conditions, it is possible to identify some criteria relevant to the impossibility test that might apply to all cases, however little use these criteria provide. In addition, it is possible to state criteria which could never be relevant as the basis for the conclusion that the plaintiff may use the material-contribution test. For example, assume the necessary evidence could never have existed. That is undeniably one example of the situation where, for reasons outside of the plaintiff's control, it is impossible for the plaintiff demonstrate causation using the but-for test. Actually, the absence of the necessary evidence requires the conclusion that it is logically impossible for the plaintiff to demonstrate causation at all on any scientifically valid basis that depends on probability. That, however, is exactly the issue that underlies the adoption of the *Resurfice* material-contribution test. Is Canadian law prepared to adopt a test for proof of causation which is not dependant on probability but on some alleged connection between the defendant's conduct which is less than a probable connection, or a connection that cannot exist at all?[487]

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[487] Note that that is exactly what the Supreme Court permitted in *Cook v Lewis*. One of the two hunters did not shoot the injured person. The candidate causes are mutually exclusive alternatives. Similarly, that that is exactly what the House of Lords permitted in *Fairchild*. The conduct of 2 of the 3 employers could not have been a cause of the mesothelioma. That is, the exposure to asbestos at those employment sites could not have been a cause of the mesothelioma. The only cause would have been an exposure at one of three employment sites. All exposures were irrelevant after the exposure that triggered the development of the disease.

It may or may not be "impossible", according to the meaning to be given to "impossible", where it is at least possible that the evidence once existed but not longer exists. It may or may not be "impossible" where it is probable that the evidence once existed but not longer exists. It may or may not be "impossible" where it is certain that the evidence once existed but not longer exists. In each of "may or may not be" instances, it may or may not be relevant to know the possible or probable explanation for why the evidence does not exist. In some of these cases, the answer to the impossibility question is just the first step. The court still has to determine if the impossibility is due to factors outside the plaintiff's control. *Resurfice* provides no help on any of these questions.

Obviously, the "due to factors outside of the plaintiff's control" requirement is satisfied where the evidence never existed. But, for reasons that I have shown above, which should not need more discussion, *the mere fact that the evidence never existed because it could never have existed cannot be sufficient to establish Resurfice "impossibility"*. It cannot be the case that *Resurfice* is to be understood to mean that the plaintiff is entitled to resort to a less stringent test to prove factual causation *merely because the evidence could never have existed that would permit the plaintiff to prove factual causation on a but-for basis.* If this assumption is correct, as it must be, then *Resurfice's* "impossible," to make sense, has to be understood to be limited to those cases where (1) the current limits of science establish allow the conclusion that the evidence could exist, but science cannot identify it now because of current limits or (2) the evidence could have existed, even if it no longer exists.[488]

This identifies another problem in the Supreme Court's use of *Cook v. Lewis* as an example of relevant impossibility.[489] There could be only one shooter. There was only one wound. The problem was not at the level of determining what the mechanism was of the injury. That was simple: Lewis was struck by a bird-shot.[490] The problem was determining who fired the shot.[491] The evidence existed from which that decision cold

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[488] I have restated the requirement that U.S. jurisprudence calls "general causation": the principle that the court does not ask the "specific causation" question – whether the alleged conduct or other antecedent factor could be a cause of this plaintiff's injury – without first asking the general causation question: could that conduct or antecedent factor be a cause, at all, for any person complaining of that injury: **cite ___.**

[489] In addition to the poignant problem I have already identified. The problem in *Cook v. Lewis* had nothing to do with impossibility. It had to do with the jury not having been asked the right question. *Cook* is a straight-forward case of alternate-causation. It did not involve impossibility. It did not involve duplicative-causation. For whatever reason, the Supreme Court seems to have mischaracterized it. That reason may be, at least, in part the mistaken assumption, amongst many in the profession, that the hunters were held liable by the Supreme Court. As shown, that mistaken view exists amongst some judges in the British Columbia Court of Appeal: witness the statement in Jackson v. Kelowna Memorial Hospital, 2007 BCCA 129 at para. 22, that *Cook v. Lewis* was a case of impossibility of proof of the identity of the shooter because "two tortious sources caused the injury". That view of the case would, were it correct on the facts, convert *Cook v. Lewis* to an instance of duplicative-causation.

[490] Lewis was struck in the fact by more than one pellet (shot). However, only one struck him in the eye and that wound caused the loss of the eye.

[491] The route to the answer to that question was as easy as this: all the jury had to do was decide which of Cook or Akenhead to believe as to the direction in which he shot. The jury had to choose. One of the stories had to be true.

have been made. The reason for the factual issue is nicely laid out in the majority reasons:

> It is said that Cook, Akenhead and Wagstaff were proceeding approximately in line, Cook being on the left, Akenhead in the centre and Wagstaff to the right. The dog, which was some little distance ahead of them, came to a point and at about that moment Fitzgerald, who had come into view on Cook's left, called out a warning and pointed towards a clump of trees which was ahead of Cook and Akenhead and in which at that moment the plaintiff was. Cook heard Fitzgerald's call but did not hear what he said. He thought that Fitzgerald was pointing at the 'dog and was calling attention to the fact that the dog was on point. Akenhead states that he did not hear Fitz-gerald's call. Momentarily after this, a covey of some four or five grouse flew up a short distance in front of the dog. Akenhead says that he fired at the bird which was farthest to the right, leaving the other birds to Cook. Cook says that he fired at a bird straight ahead of him. They appear to have fired almost simultaneously. Immediately after-wards there was a scream from the clump of trees, men-tioned above, and the plaintiff appeared. He had received several shot in his face, one of which caused the loss of an eye. John Lewis accused Cook of having shot his brother. Some discussion followed in which both Cook and Akenhead asserted that they had not fired in the direction of the trees in which the plaintiff was hit.[492]

So, at best, *Cook v Lewis* is a problem of an indeterminate (uncertain) defendant, not an uncertain cause. The difference would have been more obvious were there more than two of the hunters who had fired, for relevant purposes, at the same time and in the direction of the thicket in which Lewis was standing. But, on the evidence, it could be said that it was only Cook or Akenhead.[493]

We should look at the facts of *Cook v. Lewis* more carefully since it one of the two cases offered by *Resurfice* as examples of application of the new material-contribution to risk doctrine.[494] As mentioned, what we find is that the Supreme Court's characterization is of a hypothetical version of the *Cook* facts, not the version of the facts that the *Cook* court found to be the case. At least three of the five judges (Cartwright, Estey and Fauteux JJ – who concurred in the majority reasons written by Cartwright J.) held that it was impossible to conclude that the jury had necessarily decided that both Akenhead and Cook shot in the same direction; that is, in Lewis's direction.[495] The finding that both defendant shot in the same direction is essential to the characterization of *Cook* as a case where it was, or even might have been, impossible to determine which of the two defendants shot the plaintiff. The majority, at the least, held that it was possible, on the evidence, for the jury to decide which of the two it was.[496] The

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[492] [1951] S.C.R. 830 at pp. 835-36

[493] Although Cook argued there was a third, almost simultaneous, shot from an unidentified third person: [1951] S.C.R. 830 at 836. The jury had to have either disbelieved that evidence or found that that shot was in a different direction to have concluded that it was one of Cook or Akenhead who shot Lewis.

[494] *Cook v. Lewis*, [1951] S.C.R. 830 affirming [1950] 4 D.L.R. 136 (B.C.C.A.)

[495] [1951] S.C.R. 830 at 840 – see the last 3 sentences of the penultimate paragraph.

[496] [1951] S.C.R. 830 at 842. This is the necessary meaning of the last sentence on the page, beginning at "but I am of opinion, for the reasons given in that case, that *if under the circumstances of the case* at bar the

"impossibility" characterization is, instead, a description of the facts as found in the California case of ***Summers v. Tice***.[497] The majority reasons in *Cook v. Lewis*, state that the *Summers* reverse-onus principle would apply if the facts were as described.

> I do not think it necessary to decide whether all that was said in ***Summers v. Tice*** should be accepted as stating the law of British Columbia, but I am of opinion, for the reasons given in that case, that if under the circumstances of the case at bar the jury, having decided that the plaintiff was shot by either Cook or Akenhead, found themselves unable to decide which of the two shot him because in their opinion both shot negligently in his direction, both defendants should have been found liable. I think that the learned trial judge should have sent the jury back to consider the matter further with a direction to the above effect, in view of their answer to question 3.[498]

The "a direction to the above effect" refers to the onus-reversal principle in *Summers*, from which Cartwright J. had just quoted.[499]

The plaintiff, Lewis, was hunting grouse with his group. Akenhead and Cook were hunting with another group. The two groups met; or, rather, came into shooting range of each other. Thereafter, Lewis was accidentally shot in the face with bird-shot. One shot destroyed one of his eyes. He also had some facial wounds from other shot. He sued two of the hunters in the other group, Akenhead and Cook, seemingly alleging that it was one or the other who shot him.[500] Both admitted shooting at about the same time.

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jury, having decided that the plaintiff was shot by either Cook or Akenhead, found themselves unable to decide which of the two shot him because in their opinion both shot negligently in his direction, both defend-ants should have been found liable." (emphasis added)

[497] 199 P.2d 1 (Cal. 1948). This oddity is not directly germane to the *Resurfice* use of the hypothetical version of *Cook*. However, it is one more reason to conclude that that the Supreme Court's approach to the jurisprudence was more casual than it should have been.

[498] [1951] S.C.R. 830 at 842

[499] ***Cook v. Lewis***, [1950] S.C.R. at 842. The excerpt from *Summers* was also quoted earlier in this article, at ____. "The judgment in ***Summers v. Tice*** reads in part as follows: 'When we consider the relative position of the parties and the results that would flow if plaintiff was required to pin the injury on one of the defendants only, a requirement that the burden of proof on that subject be shifted to defendants becomes manifest. They are both wrongdoers-both negligent toward plaintiff. They brought about a situation where the negligence of one of them injured the plaintiff, hence, it should rest with them each to absolve himself if he can. The injured party has been placed by defendants in the unfair position of pointing to which defendant caused the harm. If one can escape the other may also and plaintiff is remediless. Ordinarily defendants are in a far better position to offer evidence to determine which one caused the injury. This reasoning has recently found favour in this Court.'"

[500] I have written seemingly, because, based on Locke J's dissent, Lewis did not argue that Cook was the shooter. Rather, Lewis argued that Akenhead was the shooter, was negligent, and Cook should also be liable for conduct that contributed to Akenhead's action in shooting in Lewis's direction: see [1950] S.C.R. 830 at 851-52 However, according to the majority reasons of Cartwright J. at 836, Lewis alleged that it was either Cook or Akenhead. Cartwright J. wrote: "It was the theory of the plaintiff that either Cook or Akenhead or both of them had shot him and that each was liable even if only one of them had fired the shot which struck him. The theory of the defendant Cook was that he had fired only one shot and had fired in such a direction that it was quite impossible that any shot from his gun could have struck the plaintiff. He also stated that there had been a third shot fired almost simultaneously with those fired by himself and Akenhead and suggested that an unidentified third person had fired the shot which injured the plaintiff. His counsel disclaimed before the jury any suggestion that Akenhead had shot the plaintiff. Akenhead's position

Both denied shooting in the direction of the trees where Cook was standing, hidden. Cook claimed that there was a third shot from an unidentified hunter at about the same time. The jury held: (1) that one of Akenhead and Cook shot Lewis; (2) it was not able to say which one; and (3) both were not negligent. As a result, the trial judge dismissed the action in light of the third finding. The British Columbia Court of Appeal held, in part, that the third finding was perverse on the evidence and set aside the dismissal of the action, sending the action back for a new trial.[501]

Only Cook appealed. Four of the five Supreme Court justices sided with the B.C.C.A. and dismissed the appeal. The dissenting judge would have allowed the appeal and reinstated the dismissal of the action.[502] All of the majority essentially agreed with the B.C.C.A. the jury's finding that that neither of Akenhead nor Cook were negligent, regardless of which one shot Lewis, was contrary to the evidence, in light of the jury's finding that one of the two had shot Lewis. Therefore, the case had to go back for a new trial. All four also agreed that if the judge or jury found, at the new trial, that one of Akenhead or Cook had probably shot Lewis, then the onus would shift to each of the defendants to show that he probably did not shoot Lewis. If neither of Akenhead nor Cook could do that, then both would be liable. If either one could, he would not be.[503]

All four judges in the majority held that the jury should have been specifically asked which Akenhead and Lewis it was and that, on the evidence, the jury should have been able to answer that question. This is explicit in the reasons of Cartwright J who wrote "that the jury should have been able to decide which one of the defendants fired the shot which struck the plaintiff."[504] It is necessarily implicit in this passage from the reasons of Rand J.

> On the first interpretation, the answer of the jury was insufficient as a return. Their duty was to determine the facts from the evidence laid before them as best they could on the balance of probabilities, and it could not be evaded in the face of such divergent testimony either because of a tender regard for distasteful implications or for any other reason. The jury might have reached a deadlock from which there was no escape: but with the proper direction as to onus, that would have been obviated. The result is that there has been no verdict on an essential question, and the judgment based upon the answer cannot stand.[505]

Cartwright J. also held that it was *not* necessarily the case that the jury had held that Lewis was shot by one or the other of Cook or Akenhead. Cartwright J. wrote, referring to *Summers*: "It is not, I think, necessarily implicit in the jury's findings that one of the

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at the trial was that he had fired to the right, that he could not have shot the plaintiff and that if it was either of them it was Cook and not he who had done so.

[501] *Cook. v. Lewis*, [1950] 4 D.L.R. 136 (B.C.C.A.)

[502] There were concurring majority reasons: by Cartwright J on behalf of himself, Estery and Fauteaux JJ, and separate reasons by Rand J. Locke, J. dissented.

[503] Cook v. Lewis, [1951] S.C.R. 830 at 843 per Cartwright J., at 832-35 per Rand J, explicitly in the first paragraph on p. 833.

[504] Cook v. Lewis [1950] S.C.R. 830 at 843.

[505] Cook, [1951] S.C.R. 830 at 833.

two defendants shot the plaintiff but that they can not decide which."[506] Locke J. dissented. He would have allowed the appeal and dismissed the action on the basis that there was evidence on which a jury, acting properly, could have found that neither of Akenhead or Cook were negligent.[507]

In short, *Cook v. Lewis* was never a case of "impossibility". Rather, the Supreme Court in *Resurfice* simply declared it to be and provided a dictum based on that characterization.[508] It might have been if that had been had the facts and findings been as suggested in *Resurfice*; however, they were not. It also might have been a case where neither of the accused defendants fired the shot that injured Lewis. And, the additional O'Henryish twist is that Lewis might not have argued that it was one or the other of Akenhead or Cook who fired the shot. Lewis might have only argued that it was Akenhead who had fired the shot and that, in the circumstances, Cook should also be held liable. This is asserted in the penultimate paragraph of Locke J's reasons: "The respondent's case is that Cook is liable, even though it was not his act but that of Akenhead which caused the damage."[509]

Another problem in using *Cook* as an example of *Resurfice* material contribution, and an indication of what is required to satisfy *Resurfice*'s requirements, is that we simply do not know, because of how the case was presented, whether there was or could have been evidence indicating which of the two hunters fired the bird-shot beyond their testimony, and the testimony of any other witness, that they did not fire in *Lewis's* direction. Perhaps there was not. However, *Cook is a case where not only could there have been sufficient evidence as to who fired the bullet but there was sufficient evidence. It might have been circumstantial evidence but that is still evidence. Cook is not a case where there could never have been that evidence. All the jury had to do was to decide whether to believe the evidence of one or the other of the two hunters that he did not fire in the plaintiff's direction. The majority reasons in Cook v. Lewis state specifically that on the evidence "the jury should have been able to decide which one of the defendants fired the shot which struck the plaintiff."[510] The problem was they had not been asked the*

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[506] Cook, [1951] S.C.R. 830 at 840. It seems that Rand J. agreed with this: see, p. 833, the paragraph beginning "On the first interpretation".

[507] Cook, [1951] S.C.R. 830 at 851-52.

[508] I suppose there is some sort of irony in the Supreme Court's use of a hypothetical – a description of a case that did not exist – to discuss the solution to an issue which was also a hypothetical since it did not exist on the facts of *Resurfice*.

[509] Cook, [1951] S.C.R. 830 at 851. This assertion is inconsistent with Cartwright J's reasons which assert that Lewis argued in the alternative: see, [1951] S.C.R. at 836. The Court of Appeal's reasons, at [1950] 4 D.L.R. 136, do not provide an answer. What they make clear is that the B.C.C.A, too, thought the jury should have been able to decide, on the evidence, who shot Lewis. That court's reasons state, at para. 8: "I therefore cannot accept the argument that we should enter judgment against both defendants. Indeed I do not think, on the whole, that we can enter judgment against either, though the evidence is much stronger against one, and I do not see that the jury should have had much trouble deciding which was the guilty party. The evidence was by no means all one way; and I fancy we should be usurping the jury's functions if we tried now to decide the point." The reasons do not, elsewhere, identify which defendant it was that the Court of Appeal thought was the guilty party.

[510] [1951] S.C.R. 830 at 843.

question that way. The Supreme Court and the British Columbia Court of Appeal both held that the jury should have made a decision as to whether the shooter was Cook or Akenhead.[511] *In substance, all the jury had to do was to decide which of the two to believe.*

We might ask why the Supreme Court restricted itself to *Cook v. Lewis* and *Walker Estate* rather than other, less problematic, cases, as examples of when the new material-contribution test will apply.[512] The Court might, for example, have mentioned *McGhee*, or *Fairchild* or *Barker*, but then it would have had to explain why the Canadian version of the test is not as clearly limited as is the English version. It might have mentioned Aristorenas, but then it would have had to explain why leave was refused in *Aristorenas*. It might have mentioned *Snell*, but then it would have had to explain whether it was recasting *Snell* and what that meant to everything Snell said about the but-for test. It could, of course, have said that everything that *Snell* had said remained good law. It would have had the same problem with *Hollis*. The Court might have used the well-known two-fire example.[513] So, answering my own question: the answer is rather clear why the Court chose to mention only *Cook v. Lewis* and *Walker Estate*. The Court had tied its hands with the assertion that "Much 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. It suffices at this juncture to simply assert the general principles that emerge from the cases."[514] The Court would have had to abandon

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[511] [1951] S.C.R. 830 at 843 per Cartwright J., (Estey and Fauteux JJ. concurring): "I respectfully agree with the Court of Appeal that the jury should have been able to decide which one of the defendants fired the shot which struck the plaintiff." And, at p. 833 per Rand J. Only Locke J., dissenting, did not address the question specifically; however, the basis of the dissent is that there was sufficient evidence from which the jury could have made a finding in Cook's favour as to which defendant had shot him if it had been so inclined. Accordingly, he was not prepared to find that the dismissal of the action was an error in law. He would have dismissed Cook's appeal. In the result, one point the entire Court agreed on was that there was sufficient evidence for the jury to have made a proper decision as to which of Lewis or Akenhead shot Cook, even if it was by the process of elimination. Again, all the jury had to do was to decide which of Lewis or Akenhead to believe. There was nothing about the evidence of each that made their stories impossible.

[512] As discussed, *Cook v. Lewis* is not an example of duplicative-causation. *Walker Estate* also is not; not as described by the Court or in fact. The problem in Walker Estate is deciding how to deal with the uncertainty attached to the question of what the blood donor would have done had the Canadian Red Cross warning pamphlets had objectively adequate warning information, accepting for this discussion that the contents were not adequate. Would he have read it? Would he have still donated even if he had? So, then, where does that leave the duplicative-causation instances in the *Resurfice*-universe, if neither fall within the Supreme Court's examples? The answer would be that the examples are just that, examples, and not intended to define the limits of the type of case that creates relevant impossibility to validly use the but-for test to provide either a "yes" or "no" answer to the factual causation inquiry.

[513] See, for example, Brown, *Hegemony*, at 435: "The paradigm is the destruction of a house caused by two negligently but independently set fires. In that instance, the but-for test leads to a false, or at least counterintuitive negative: neither defendant is liable because but for one defendant's fire the plaintiff's house would still have burnt down." The implicit assumption is that the fires merge before reaching the house if they are set outside the house. As Brown mentions at 435, footnote 15, the problem of multiple sufficient causes is not new and is well discussed in other jurisprudence and academic scholarship. It is certain that the Court was aware of some of the jurisprudence and some of the scholarship.

[514] *Resurfice*, para. 20.

that pithy dismissal of the debates and face the problems in its jurisprudence, including the new problems it was about to create because *Resurfice* It is, I suggest, clear that the Court was not prepared to do so. Why that is so is for others to debate.

There is a similar problem in the *Fairchild*-type situation. In *Fairchild*, the evidence could never have existed as against at least some of the alleged wrongdoers because the injury, by current medical aetiology could have been caused *only* by the exposure at one of the defendant-employer's sites. It could have been caused by an exposure at any of the sites but not by exposure at more than one of them. The problem was that the science did not provide a way to identify which one and the other evidence was not strong enough, under current legal doctrine, to allow a valid legal conclusion assigning responsibility to one of the defendants even if science was not prepared to. The evidence was not strong enough to allow the court to apply the *Wilsher* (in England) or *Snell* (in Canada) robust, pragmatic, inference because that would result in the court making an assertion about factual consequences that was contrary to the evidence.

It will help to step back and ask what it is we are trying to determine. It is how we, as lawyers (practising or academic) and judges, and the public, are to determine which of the two tests, the but-for test or the material-contribution test, is the applicable test, in the particular case and in general. Again, it will help to restate why it is we are trying to determine this. It is because: (1) in existing disputes, we are trying to answer the question "is this defendant's conduct a cause of the injury alleged by the injured person" so that a "no" answer will produce the dismissal of the action (unless the cause of action is one that does not depend on causation) or a "yes" answer, so that that answer can be used as one of the conclusions that are made in the process of deciding whether this defendant is to be held liable to that plaintiff. And (2) it is because we, as practitioners, need some usable basis upon which to provide advice to our clients about what might happen should they act or not act in a particular way and certain events occur; or, if they have acted, the events have occurred, and we are trying to settle the problem out of court.

Resurfice's admonition that the but-for test is the primary test and that the material-contribution test is to be used only in exception circumstances does not identify when the exceptional circumstances exist. *Resurfice* does not adequately explain how we are to identify the exceptional circumstances. Ultimately, the answer that determines whether the but-for test or the material-contribution test will be used to determine if a defendant's conduct is a cause of the alleged injury lies in the meaning the phrase "the impossibility of proving causation on the balance of probability using the but-for test where the impossibility is caused by factors outside of the plaintiff's control". I suggest the meaning is in the answer(s) to his question:

> *Could evidence now exist, or ever have existed, that would be sufficient to establish, in law, that the impugned conduct – the conduct of the defendant or of someone else for whom the defendant may be vicariously liable – is at least a cause of the plaintiff's injury.*

For Canada, common law or civil law, that question could be restated this way: "Could evidence exist that the law says would be sufficient to establish that the impugned conduct is more likely than not[515] at least a cause of the plaintiff's injury. There are three possible answers to that question: yes, no, and possibly. The answers are mutually exclusive. *Resurfice* provides no help whatsoever in deciding what the consequences are of each of the three answers.

I will now sketch, generally, in the balance of this section, the consequences of each of the possible categories of answer. I do that by means of the flow chart that appears at the end of this section.

Bear in mind that, in each case, the problem is that the judge or jury does not have the evidence (if the case is at trial) or that the parties do not have the evidence, if they are negotiating outside of court, and the evidence will not be adduced if and when the parties ever get to court. Before *Resurfice*, if the answer to the question was a sufficiently certain "no" – sufficiently certain meaning certain enough under whatever standard the legal system – then the alleged wrongdoer could properly refuse to settle and the action would have had to be dismissed, unless the cause of action were, somehow, one where causation did not matter at all. The same situation would have existed, before *Resurfice*, if the answer to the question were "possibly" or "yes". That is because the parties did not have the evidence and the assumption would have been that they would not have had it if the case went to trial. In all three cases, subject to only a possible variation as the result of the *Cook v Lewis* exception, the injured person's action would fail at trial because gap in the evidence meant the injured person would not be able to satisfy the onus of proof. The injured person would not have been able to show, on the balance of probability, that the defendant's conduct was a cause of the injury.

There is a flowchart at the end of this section. The flowchart amounts to taxonomy of the genus "*Resurfice* impossible".

As shown, the question is whether the plaintiff (P) could have obtained the evidence required. That expands to the question which asks whether the evidence have existed and could circumstances have existed which could be held to mean that P should have obtained the evidence, so that P will not be able to succeed on the assertion that it was impossible for P to obtain the evidence due to factors outside of the P's control

The possible answers to the question, by category, are: yes, no, and possibly. There are 12 scenarios– call them 12 variations of "impossible due to factors outside of the plaintiff's control" – that need be considered. There are 12 scenarios because each of the 6 base variations can be posed in the form of "this plaintiff" or "any person"; that is, there are two different inquiries: whether the impossibility is just for this plaintiff or whether it would be impossible for any person.

[515] Probably means "more likely than not".

There are also 5 distinct explanations as to why the evidence does not exist. I call each explanation a "category". In all cases, the evidence could have existed, the conduct of one ore more of the Ds which is their fault destroyed it, or fact that there is more than one candidate D makes it impossible for P to establish causation on the balance of probability using but-for, except as qualified. So, [same] means "the evidence could have existed, the conduct of one ore more of the Ds which is their fault destroyed it, or fact that there is more than one candidate D makes it impossible for P to establish causation on the balance of probability using but-for". You will that I have listed 6 categories. The sixth combines aspects of the first five. It is not a distinct explanation but merits being listed as separate category because of the overlap.

1. Category 1 In this category, the impossibility is necessarily true for all defendants; that is, for D1 through D*n*. ("*n*" represents the total number of defendants.)

2. Category 2 [same] except NOT all Ds, and number of Ds is 2 or more. (D1 plus one or more Ds through D*n*-1). ("D*n* - 1" means the total number of defendants, minus one.) The purpose of this category is to create an example where causation on the balance probability using but-for is possible against some of the defendants.

3. Category 3 [same] except only one of Ds can, in fact, have caused the injury. (This is the *Fairchild* example.)

4. Category 4 [same] except that the conduct of P is *also* a cause of impossibility, *either cumulatively* with the conduct of at least one D, *or separately sufficient* along with the sufficient conduct of at least one D.

5. Category 5 [same] except that the conduct of P alone is the cause of the impossibility.

6. Category 6 all cases where the evidence does not exist but could exist with respect to at least 1 D (called possibility Ds); however, does exist on probability basis with respect to at least 1 D (called probability Ds), but this evidence does not eliminate all of the possibility Ds.

You will see a legend in the middle of the flow chart. It explains the meaning of the (A), (B), (C) and (D) references you will see at the end of process-chains. The letters stand for the reasons why the evidence does not exist. The reasons are the "factors" that put the situation out of the plaintiff's (P's) control. I have used "circumstance" as the collective description for all of the relevant factors.

(A) means a circumstance not involving P conduct.
(B) means a circumstance involving P conduct (or conduct attributed to P) for which P is held responsible, therefore it is not conduct "excused" under (C) or (D).
(C) means a circumstance not involving P conduct equal to fault.

(D) means a circumstances not involving P conduct equal to normative responsibility even if not characterized as fault.

The 6 categories of situation that I have outlined each have one or more of (A), (B), (C) and (D) as the reason(s) why the evidence does not exist.

Flowchart: click here to go to the chart.

Supreme Court of Canada Since *Resurfice*[516]

There are no significant Supreme Court causation decisions as of April, 2008. The Court dealt briefly with causation in *Hill v. Hamilton-Wentworth Regional Police Services Board*.[517] *Hill* contains statements about factual causation and the but-for test that conflict with *Resurfice* if taken at face value. The statements should not be understood to create or to have been intended to create conflict with prior case law. There is a plausible interpretation of the statements in a way that does not create a conflict. In any event, causation was not the major issue in *Hill* and it is unlikely the Court intended to say anything about causation jurisprudence that conflicted with *Resurfice* or otherwise said something new about causation law.

Hill was wrongfully convicted of robbery. He was eventually acquitted after an appeal and a new trial. He sued the police. He alleged that the police investigation was negligent and was a cause of the wrongful conviction. The central issue before the Supreme Court was whether negligent (*i.e.*, improper) police investigation could be a tort. The Supreme Court held[518] that the police owed an actionable, private law, duty of care applicable to investigations of alleged crimes so that negligent police investigation is a tort. However, the police had not been negligent.

On the causation issue, the majority reasons state that the but-for test is the applicable test for the tort of negligent police investigation. The majority reasons do not mention any of *Resurfice*, *Snell*, *Athey*, *Walker Estate*, or any other causation decision. There is no mention of any form of material-contribution test. The words "material contribution" or any variation do not appear in the reasons. The only test for causation mentioned in *Hill* is the but-for test.[519] McLachlin C.J. wrote, under the heading "Causal Connection".

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[516] Most of this portion of *Scraping* appears in almost identical form – there may some minor changes in wording – in my paper "Risk As Legal Causation" for the April 2008 Law Society of Upper Canada Special Lectures – Personal Injury Law.

[517] 2007 SCC 41

[518] By a 6-3 majority (McLachlin C.J. and Binnie, LeBel, Deschamps, Fish and Abella JJ). The reasons are attributed to McLachlin, C.J. The dissenting judges (Bastarache, Charron and Rothstein JJ.) held there was no such tort.

[519] This applies to the dissenting reasons, too.

> [93] Recovery for negligence requires a causal connection between the breach of the standard of care and the compensable damage suffered. Negligent police investigation may cause or contribute to wrongful conviction and imprisonment, fulfilling the legal requirement of causal connection on a balance of probabilities. The starting point is the usual "but for" test. If, on a balance of probabilities, the compensable damage would not have occurred but for the negligence on the part of the police, then the causation requirement is met.
>
> [94] Cases of negligent investigation often will involve multiple causes. Where the injury would not have been suffered "but for" the negligent police investigation the causation requirement will be met even if other causes contributed to the injury as well. On the other hand, if the contributions of others to the injury are so significant that the same damage would have been sustained even if the police had investigated responsibly, causation will not be established. It follows that the police will not necessarily be absolved of responsibility just because another person, such as a prosecutor, lawyer or judge, may have contributed to a wrongful conviction causing compensable damage."[520]

These two paragraphs are the complete discussion of causation in the majority reasons.[521]

The first sentence of paragraph 93 is: "Recovery for negligence requires a causal connection between the breach of the standard of care and the compensable damage suffered."[522] The problem is the meaning of "causal connection". The Court did not explain the usage. The effect of *Resurfice* is the Canadian common law tort jurisprudence *does not* always require any form of *factual* causal connection between "the breach of the standard of care and the compensable damage suffered" in negligence actions. The jurisprudence requires a factual causal connection as part of the tort only where legal causation is to be established under the but-for test. The *Resurfice* material-contribution test requires *nothing more than* the possibility of a causal connection. To avoid conflict with *Resurfice*, the reference to "causal connection" either has to be understood to have been made only in respect of the but-for test, or to include the material-contribution test's possibility of a causal connection. The better interpretation is that the sentence, and both paragraphs, were intended to refer only to the but-for test. That eliminates the apparent conflict. This is entirely consistent with there being no mention of *Resurfice*, or any other causation authority, in either the majority or dissenting reasons.

In addition, paragraph 94 discusses the application of the but-for test to fact patterns involving multiple potential causes. In this context, the first sentence of paragraph 94 is an application of *Resurfice.* The first sentence recognizes the but-for test is capable of being validly applied to harm that is caused by multiple causes. That, of course, was the ratio of *Resurfice*. The second sentence invokes the discussion in paragraphs 17-20 of *Athey*, as summarized in this sentence from *Athey*: "It is sufficient if

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[520] *Hill*, paras. 93 and 94. I note the reappearance, in para. 93, of the "cause or contribute" phrasing. "Contribute", there, cannot mean anything more or less than "cause".

[521] The substance of the dissenting comments on causation seems to be that the but-for test would be the applicable test if a tort existed but the manner in which the majority suggested it would be applied was too expansive, too mechanical, too literal; that is, wrong.

[522] *Hill*, para 93, first sentence.

the defendant's negligence was a cause of the harm."[523] In addition, the third and fourth sentences should be seen as warning against a too-mechanical application of but-for in favour of a finding of factual causation. If paragraph 94 is understood as asserting nothing more than that about factual causation, it does not present any problems of principle.

The other aspect of the discussion of harm possibly caused by multiple causes is that there a number of multiple-cause fact patterns.[524] Some of the alternatives are: multiple, sufficient (independently of each other) causes, i.e., overdetermined[525] causes; cumulative causes; alternative causes; and pre-empting causes. Paragraph 94 does not identify which pattern would have been involved in Hill. This is important if paragraph 94 is to be understood as suggesting that the but-for test is capable of resolving the conceptual problems involved in applying the but-for test to overdetermined harm. The conceptual problems, and resulting apparent contradictions in applying the but-for test to overdetermined harm – the argument that the mere existence of more than one independently sufficient cause prevents the conclusion that any of the causes are but-for causes – is one of traditional reasons for the search for causation tests other than but-for. It is *a* reason for the existence of alternative tests such as material-contribution test, whatever that test means. It is *the* reason for the existence of the *McGhee* principle which, despite the Supreme Court's silence in *Resurfice*, was the reason for the existence of the *Athey* version of the material-contribution test and is the ultimate common law jurisprudential source of the *Resurfice* material-contribution test.[526]

So, paragraph 94 presents a jurisprudential issue if it is to be understood to assert that the but-for test is capable of being applied, validly, to overdetermined harm so as to provide findings that will allow the imposition of liability on fewer than all of the defendants responsible for the multiple, sufficient, causes, rather than all of the defendants. The third and fourth sentences of paragraph 94 clearly assert that the application of the but-for test *would not* require a conclusion that the negligent police conduct is a legal factual cause so as to allow the police to be held liable for the damages flowing from the wrongful conviction, assuming all other requirements in tort were satisfied. This apparent dilemma is resolved by accepting two propositions. The first is that the paragraph should be understood *to not refer to* overdetermined harm. The reason for this is that the police conduct could never be an independently sufficient cause of the wrongful conviction since police do not convict. Only judges or juries make findings of guilt. Only judges convict.

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[523] *Athey*, para. 19.

[524] There is an excellent taxonomy of the patterns in Cooper-Stephenson, *Personal Injury Damages*, c. 13.

[525] Also called duplicative causation.

[526] The tortious and non-tortious reasons could have been cumulative causes of the dermatitis. Or, they could have been independently sufficient causes of different instances of the same or different instances of the dermatitis. See the discussion *supra* at appropriate locations and the jurisprudence referred to there, both case law and academic.

Paragraph 94 has ambiguity. Did the Supreme Court mean to say, by paragraph 94, that multiple, independent of each other, sufficient, or alternative causes, are capable of being handled under some proper application of the but-for test and still produce a situation where at least one of the actors, whose wrongful conduct is one of those causes, will be held to be a person whose conduct is a legal factual cause? Is that sort of situation not precisely what it said the *Resurfice* material-contribution test would now govern rather than but-for?[527] Or, did the Court mean to asset that both the but-for and material-contribution tests apply to this fact-pattern? That, too, would be contrary to *Resurfice*. There is no reason to assume the Court intended to contradict itself. The better interpretation is that aspect of paragraph 94 refers to subsequent conduct of others (the Crown, the judge, a jury) which breaks the chain of factual causation when examined under the but-for test. That interpretation is implicit in this statement: "On the other hand, if the contributions of others to the injury are so significant that the same damage would have been sustained even if the police had investigated responsibly, causation will not be established."[528]

Apart from that, if but-for is applicable to multiple, independent of each other, sufficient causes, then what would be the basis for choosing one but not all of the persons where there is more than one person whose faulty conduct is such a cause? The Supreme Court used the word significant" in the sentence quoted. Significance is normative. It is not scientific. It has nothing to do with factual causation. The Supreme Court has, again, conflated a "proximate" causation inquiry – the "why ought the law to hold his faulty conduct sufficient to be part of the requirements for imposing liability" inquiry – with the factual causation inquiry issues. So, the second is that the third and fourth sentences are better understood as discussions of proximate cause issues. That is the significance of the use of "significant" in the third sentence and "absolved of responsibility" in the fourth sentence. McLachlin C.J. wrote:

> On the other hand, if the contributions of others to the injury are so significant that the same damage would have been sustained even if the police had investigated responsibly, causation will not be established. It follows that the police will not necessarily be absolved of responsibility just because another person, such as a prosecutor, lawyer or judge, may have contributed to a wrongful conviction causing compensable damage.[529]

Discussions of the legal significance of factual causes are a proximate cause issue. Significance is normative. It is not scientific. It has nothing to do with factual causation.

On the surface, the Supreme Court conflated a proximate causation inquiry – the "why ought the law to hold this faulty conduct sufficient to be part of the requirements for imposing liability" inquiry – with the factual causation inquiry issues. As Vaughan Black and I noted in *Looking Glass*, proximate cause

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[527] See *Resurfice*, paras. 25-28.
[528] *Hill*, para. 94, 3rd sentence.
[529] *Hill*, at paragraph 94.

> denotes the situation where a defendant has been found to have breached an applicable standard of care and has been found to have factually caused the plaintiff's injury, but where that injury (or perhaps just certain elements of it) might for some reason be ineligible for legal protection on the facts of the case. These reasons might include factors such as the number of steps in the causal chain between the initial negligence and the resulting injury, or the freakish nature of that causal chain.[530] . . . It would have been better if the Court had remembered to acknowledge that [cause] is used in different ways in negligence claims, and had been a little clearer about the usage.[531]

In the context of proximate cause, the third and fourth sentences of paragraph 94 should be understood to refer back to the but-for discussion in *Resurfice* where McLachlin C.J. adopted the "substantial connection" description in *Snell* as the description of the quality of the causal connection between misconduct and harm required to satisfy the but-for test so as to avoid imposing liability on persons whose conduct is legally unrelated to the harm. The Chief Justice wrote:

> 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": *Snell v. Farrell*, at p. 327, per Sopinka J.[532]

As such, all the Court was saying was that but-for should not be applied mechanically, literally. The mere fact of the involvement of police misconduct would not satisfy the but-for test. The police conduct would not invoke but-for unless it created a "substantial connection."[533]

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[530] *Looking Glass* at 243

[531] *Looking Glass* at 244. The word in *Looking Glass* is "foreseeability", not "cause". The point remains valid.

[532] *Resurfice*, para. 23

[533] This was probably the majority's way of attempting to meet some aspect of the dissenting judges' criticisms. I suppose it is plausible, although unlikely, that what the Supreme Court meant by "On the other hand, if the contributions of others to the injury are so significant that the same damage would have been sustained even if the police had investigated responsibly, causation will not be established" was that it has chosen to reintroduce obsolete, discredited, purportedly factual causation doctrines such as last clear chance, ultimate fault, and even material contribution in the sense of a more than de minimis contributing factor to the injury, into Canadian, or at least Ontario, jurisprudence, at least where provincial legislation permits. For example, Some of the provincial apportionment statutes – for example, Alberta's the *Contributory Negligence Act*, R.S.A. 2000, c.27, s. 3.1 – specifically abolish the last clear chance doctrine: "This Act applies if damage is caused or contributed to by the act or omission of a person, whether or not another person had the opportunity of avoiding the consequences of that act or omission and failed to do so." In addition, there is good Ontario case law, as there is in most of the other provinces and territories that that doctrines such as ultimate fault and last clear chance (the same doctrine expressed in different words) are dead and have been dead long enough that even their shades are beyond recovery: see, for example, *Treaty Group Inc. v. Drake International Inc*. (2007), 86 O.R. (3d) 366 at para. 28 (C.A.), *Rizzi v. Marvos*,

The majority wrote: "If, on a balance of probabilities, the compensable damage would not have occurred but for the negligence on the part of the police, then the causation requirement is met."[534] The majority were not asking themselves whether the facts did, in fact, amount to causative negligence. They were asking whether the but-for test could be validly used to provide a finding that the negligence of the police was a factual cause. The majority seems to have answered that question in this manner: "Cases of negligent investigation often will involve multiple causes. Where the injury would not have been suffered 'but for' the negligent police investigation the causation requirement will be met even if other causes contributed to the injury as well."[535] The problem is that those statements are not the answer the question. They are aspects of the reason why the but-for test is validly applicable.

The assertion in the statement "[w]here the injury would not have been suffered "but for" the negligent police investigation the causation requirement will be met even if other causes contributed to the injury as well"[536] is the result of the factual causation inquiry. It is not the form of the question that would be put to the jury or that a judge would use to instruct himself or herself. The question would be: was the negligence of the police a cause of the wrongful conviction. When the question is asked that way, problems with the use of the but-for test surface appear to resurface. But, they are only apparent problems. Asking the question this does not amount to asking whether the police conduct was *the* cause of the conviction. By definition, it cannot have been, since the conviction required the involvement of the rest of the judicial system: police do not convict. Stating the question in the form "was the police misconduct a necessary part of the causal chain that led to the conviction?" still points to the problem. The police do not convict; only the judge or jury does. The police may lay charges, but there can be no conviction unless the state acts on those charges.

The answer lies in what we mean by the question "was the police misconduct a necessary part of the causal chain that led to the conviction?"[537] We are asking no more than what the judge or jury probably would have done had the criminal charges proceeded to trial in a hypothetical (the counterfactual) where the police acted properly (did not act improperly). We are not asking what the judge or jury necessarily would have done. When this is understood, it becomes clear that the police misconduct could be a but-for, factual, cause if was part of the accumulation of reasons (tapestry is better than

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2008 ONCA 172 at para 93 and *Heller v. Martens*, 2002 ABCA 122 at para. 25, 213 D.L.R. (4th) 124. The Supreme Court could have been just a wee bit clearer on this point, too.

[534] *Hill*, para. 93, last sentence

[535] *Hill*, para. 94, first two sentences.

[536] *Hill*, para. 94, second sentence

[537] It is often said misconduct cannot be a factual cause of harm unless it was a necessary cause of the harm. That statement is a form of shorthand, intended to be understood to mean "necessary taking into account all of the other background requirements that are part of the natural process and would exist even if the misconduct did not exist". Again, that is the point of the discussion, earlier in this article, pointing out that we do not go back to the primeval slime in setting out the parameters of what antecedent factors may ever be included in the list of potential causal candidates.

chain) for the false evidence going to the judge or jury in the criminal charges trial and for the judge or jury convicting on the basis of that false evidence. Viewed this way, the police misconduct becomes a necessary part of the process that led to the wrongful conviction of *this* plaintiff because of the misconduct of *this* defendant (the police) because the judge or jury in fact relied on the false evidence. It is part of the factual cause if we are satisfied that the judge or jury probably would not have convicted Hill without the evidence that resulted from the police misconduct. It is necessary to the harm (the wrongful conviction) because it is probably part of what the judge or jury in fact relied on in making the decision to convict.

It appears, then, that the majority thought it "dead fish" obvious that the applicable test was but-for, on the basis that it was a matter of common sense that the jury or judge would be able to answer the "what-if" question on the balance of probability. The majority concluded that the judge or jury would be able to decide, on the balance of probability, whether or not Hill would have been convicted by a judge or jury acting properly had the police misconduct not occurred. That is because, at the level of the factual cause inquiry, all the judge or jury hearing the tort action would have to decide is what a judge or jury, acting properly in the criminal trial, probably would have done. The judge or jury in the civil trial does not decide what necessarily would have happened. So, this is nothing more than a concrete example of the type of question that judges and juries have to decide in all tort actions.

A form of that analysis is probably why the majority did not think it necessary to explain why the but-for test applied. It was, to them "dead fish" obvious. It was not impossible for Hill to prove causation on a but-for basis if what we mean is that all the judge or jury has to do is decide, on a more likely than not basis, if there would still have been a wrongful conviction without the police misconduct. That is, all the jury had to do, bearing in mind that the plaintiff still had the onus of proof and the risk of non-persuasion, was to draw the proper conclusion as to which result what was more likely than not, using the *Snell* robust and pragmatic inference approach, making such inferences as are valid from circumstantial evidence from whatever admissible evidence there was, using the proper approach to the drawing (making) of such inferences. *Snell* and other cases make it clear that adverse inferences, in relation to factual causation, may be drawn against a defendant based on the absence of evidence. The significance of the onus of proof and the risk of non-persuasion is that if, at the end of the day, the judge or jury concluded that the two results are equally likely, the plaintiff loses. At the end of the day, the problem is "merely"[538] one of deciding what the correct inference is.[539] That approach is, of course, the *Snell* robust, pragmatic, common sense, approach.

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[538] I do not overlook the fact that my use of "merely" could be described as ironic, if not overstatement.

[539] That approach can be used, too, if one is inclined leap logical chasms and to "infer" factual causation: see the discussion of Australian law later in this article. The Australian jurisprudence shows that the inference approach, taken to its extreme, means one does not need any version of a material-contribution test.

The dissenting judges probably agreed with whatever they thought the majority meant to say (but did not) as to why the applicable test was the but-for test. The disagreement would have been in the manner of application of the test. I say that because the minority reasons are scathing in reference to the majority's application of the but-for standard and even more scathing in discussing what the minority reasons describe as the some of the lower courts' "expansive view" of causation requirements.[540] Charron J., who wrote dissenting reasons, referred to the dissent in the Ontario Court of Appeal. That dissent would have held the police liable. The dissent found a "clear causal link" between the improper police conduct and the wrongful conviction.[541] She wrote: "The two dissenting justices not only failed to incorporate the reasonable and probable grounds standard in their analysis; they adopted a very expansive view of causation. Even though the impugned photo line-ups did not even form part of the evidence on the charge in respect of which Mr. Hill was convicted, the two justices were nonetheless satisfied that a sufficient causal link could be established between the line-ups and the conviction."[542]

We might ask ourselves, though, whether there is any other problem with this analysis of what the majority had to have meant. Is it consistent with what the majority wrote? For example, could the police argue that their conduct could not be a but-for cause because, at the end of the day, somebody else had the final say. Or there were too many steps between the end of the police investigation and the judge or jury verdict, involving the intervention of too many people? Could the police not argue that their conduct could never have been a *causa sine qua non* because they do not convict, and, at the end of the day, it was up to the Crown attorney to decide what evidence to call, and up to the judge or jury to decide whether to accept the evidence or not?

Remarkably, that appears to be exactly what the majority said the police could argue.[543] If so, and if intended as a statement about the factual cause inquiry, that is problematic. The mere involvement of someone else in the causal process is not a defence, even if that someone else is also at fault. What did the Court mean by referring to the involvement of the other players in the criminal law administration process? As I explained above, any problems of principle that might be seen in the third and fourth sentences of paragraph 94 vanish if that discussion is understood to be about proximate cause.

In summary, the better explanation of *Hill* is that the causation statements cannot be read literally. The words, phrases, and sentences cannot be taken for what they seem to mean under standard rules of English grammar. Rather, the some statements which seem to be about factual cause are actually about proximate cause. Once we make that assumption, the apparent conflict with *Resurfice* is eliminated.

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[540] See paras. 175-179 the *Hill* dissent.
[541] *Hill*, para. 178
[542] *Hill*, para. 178..
[543] *Hill*, paragraph 94, third and fourth sentences

British Columbia

The British Columbia decisions – for whatever reason, British Columbia currently has most of the reported cases – highlight the problems that trial and appellate judges are having in making sense of *Resurfice*.

In *Marszalek v. Bishop*,[544] the trial judge seems to have thought that the parameters of the *Resurfice* material-contribution test are, somehow, to some extent, still defined by *Athey*. Paragraph 179 amounts to a version of what the Alberta Court of Appeal did in *Resurfice*: rely on *Walker Estate* as a basis for saying that material contribution was the applicable test because the harm was caused by more than one event.

> [179] In this case, the evidence strongly suggests that Mr. Marszalek's death cannot be attributed to a single cause. He died because he suffered a cerebellar stroke and he did not receive surgical treatment to reduce the swelling in his brain. He did not receive surgical treatment for a number of reasons, which I will address below. In this circumstance, it is not possible for the plaintiffs to prove what a particular person in the causal chain would have done had the defendants not committed a negligent act or omission, thus breaking the "but for" chain of causation. The defendants breached a duty of care owed to Mr. Marszalek, thereby exposing him to an unreasonable risk of death, and Mr. Marszalek died. In these circumstances, the material-contribution test for causation is applicable.

This paragraph shows that the "exposure to unreasonable risk" finding was nothing more than a negligence finding. The trial judge does not seem to have realized that *Resurfice* material contribution is a theory of "legal causation" based on causation of increased risk, not causation of injury. Ultimately, however, the judge held that *Laferrière v Lawson* applied, that causation still had to be proven on a probability basis, and the evidence did not permit that conclusion. (paras. 180-182, 202-203, 205). This means that *Marszalek* holds that the conclusion that the conduct increased the risk has to be established on the basis of probability (more probable than not). Given that the existence of any risk-creating relationship is a question of fact, the requirement that the existence of that relationship be proven on a probability not mere possibility basis adds nothing; or it amounts to nothing more than a reminder that junk science will not suffice.

The next case is *Greenall v. MacDougall and HMTQ*.[545] *Greenall* refers to *Athey's de minimis* explanation of the meaning of a contributing factor to the occurrence of the injury as if it is still somehow relevant to the meaning of "material" in the *Resurfice* material-contribution test. *Greenall* treats the *Resurfice* material-contribution test as if identifies conduct that is a cause of the harm. The judge does not seem to have realized that *Resurfice* material contribution identifies only conduct that increased the

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[544] 2007 BCSC 324, at para. 170, especially paras. 178-182, 199, and 205
[545] 2007 BCSC 339, at para. 37-40.

risk of the occurrence of the harm. The trial judge conflated the divisible and indivisible injury issue with the issue of whether the but-for or the material-contribution test is to be used to determine if the event(s) are a cause. The mere fact that two or more events may have been required to cause the injuries does not tell us whether the test to be used to determine causation is but-for or material contribution. If it did, then material contribution (whatever it means) would always be the test because all circumstances have more than one antecedent condition (event) in the chain of connections leading to the circumstance. (We will ignore, for the purposes of this article, issues such as cosmology - the Big Bang; Quantum Mechanics – where, as I understand things, it has been shown mathematically that something can be created out of nothing, so long as that something does not hang around long enough to be counted; and, of course, religion.)

Greenall asserts that multiple sufficient cause harm invokes the *Resurfice* material-contribution test – see the example in para 39(3). "In my opinion, the application of the "material contribution" test in the third example is consistent with the requirements explained in *Resurfice* …: (3) if the sexual assaults alone could have been a sufficient cause, and the other life circumstances alone could have been a sufficient cause, then it is unclear which was the cause in fact of the psychological injury. The trial judge must determine, on a balance of probabilities, whether the defendant's sexual assault(s) materially contributed to the psychological injury"[546] Did the trial judge believe that *Resurfice* material contribution is necessarily the test *whenever* there are indivisible injuries caused by more than one accident?[547] This would amount to a version of the mistake made by the Alberta Court of Appeal in *Resurfice* if the judge were referring to harm caused by alternative events. Alternative, in this sense, means one or the other, not both. On the other hand, it seems that the trial judge thought that, since the injuries were indivisible, they should be seen as having been caused by both accidents, each of which was sufficient on its own to have caused all of the injuries, and this fact satisfied the *Resurfice* impossibility of using but-for requirement. This is the duplicative-causation (overdetermined) harm issue. (I provide references for the scholarship on "overdetermined harm" in *Snark*.) The judge was wrong. One still has but-for conduct and harm. Considered separately, each accident is a but-for cause. It does not cease to be a but-for cause because there is another independently sufficient cause. It affects the way one applies but for; however, that is not the same as saying the application of but-for is impossible.

There are other 2007 B.C.S.C. trial decisions where we find judges quoting both *Athey* and *Resurfice* as if the *Athey* "unworkable" formulation (whatever it meant) is now part of the *Resurfice* statement of the material-contribution test: see, Hall v. MacDougall.[548] All of *Greenall*, *Hall* and *Nash* are based on the misconduct of the same defendant but the decisions are by different trial judges.

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[546] *Greenall* at para. 39. This is overdetermined (duplicative) causation.
[547] Compare the recent Eng. C.A. decision in Novartis Grimsby Ltd v Cookson, [2007] EWCA Civ 1261.
[548] 2007 BCSC 1296 at paras. 9-12 citing Nash v. MacDougall, 2007 BCSC 563 at paras. 62-68.

Ashcroft v. Dhaliwal[549] makes the same errors as *Greenall*. *Ashcroft* also seems to assert that the *Resurfice* material-contribution test could become the applicable test whenever the plaintiff claims for damages alleged to have been caused by more than two actionable events. It, too, is an example of the mistake made by the Court of Appeal in *Resurfice*; the mistake which the Supreme Court specifically identified. The plaintiff was involved in two car accidents. The plaintiffs injuries from the first accident had not resolved when the second accident occurred and the second accident exacerbated the injuries. (para 4). The plaintiff settled her claims arising out the second accident, then sued on the first accident. The trial judge stated that the issues were whether the defendants were liable for the plaintiff's cumulative injuries, including those received in the second accident. This, of course, meant, that he had to determine whether the injuries for which the plaintiff claimed had been caused by both accidents. He held they were, whether the test for causation was but-for or material contribution.

> [44] In my opinion, the "but for" test applies to the present case because the injuries Mrs. Ashcroft suffered in the first accident were the foundation upon which the injuries in the second accident caused exacerbation and aggravation.[550]

The paragraph is a straight-forward conclusion that the second accident injuries were, as a matter of fact, caused by both the first accident and the second accident. However, this was followed by

> [45] If I am wrong in this reasoning, then, in my view, the "material contribution" approach must apply because Mr. Dhaliwal's negligence caused injuries to Mrs. Ashcroft which exposed her to the risk of further injury.[551]

If the proposition in paragraph 45 is correct (it is not), material contribution (whatever it means) must *always* be the applicable test because an injured person's history – everything that made him or her (or it, if is a corporation) what the person is immediately before the event in issue – is at least part of some aspect of the person that exposed the person to the risk of further injury.

B.S.A. Investors Ltd. v. Douglas Symes & Brissenden[552] explicitly call *Haag* an application of the robust and pragmatic inference approach, but for a purpose that is seemingly contrary to what was said in *Haag*. Did the B.C.C.A. in *B.S.A.* intend to recast the meaning of *Haag* and turn it into a *Resurfice* precursor?[553] Remember that *Haag* did

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[549] 2007 BCSC 533, at para. 42-47.
[550] Ashcroft, 2007 BCSC 533, at para. 44.
[551] Ashcroft, 2007 BCSC 533, at para. 45
[552] 2007 BCCA 94, leave to appeal refused 2008 CanLII 2275 (S.C.C.), Jan. 24, 2008.
[553] It seems that it *is* the B.C. C.A.'s view of *Haag* that it does assert the *Resurfice* version of the material-contribution test: 2007 BCCA 556 at paras 3, 5. This citation is the Court's supplementary reasons about costs. The Court explained its holding on the causation issues, referring to *Haag*.

> [3] The trial judge found that there was a paucity of evidence as to what the fraudster, Mr. Mosly, would have done if the solicitor had told him to obtain a second signature on the mortgage.

not say that the inference could be made in the absence of any evidence whatsoever. *B.S.A.* states

> [43] I would add that there is an important difference between drawing an inference as to causation from circumstantial evidence, which is often done, **and drawing an inference as to causation from no relevant evidence at all, which may be done only in the rare circumstances set out above.** This is the difference alluded to by Lambert J.A. in *Haag* when he distinguished between a logical inference and a legal one; the legal reference should not be resorted to unless the logical inference is impossible to establish with either direct or circumstantial evidence.[554]

Have we not just been told that "nothing **will** be enough," albeit only in some rare circumstances? What were the "rare circumstances set out above"? That seems to be the circumstances where it is impossible, in a practical sense, for the plaintiff to introduce the evidence required to prove, on a but-for basis, that a defendant's faulty conduct is a cause of the harm. Mere difficulty is not enough.[555] As to what the B.C.C.A. meant by "impossible in a practical sense" we have a hint: a case that would "involve principles of causation unknown to modern science." The absence of direct evidence is not enough. The Court wrote:

> [41] With respect, I do not consider this to be one of those "rare cases" where such an inference should have been drawn. **The case did not involve principles of causation unknown to modern science**; there may have been no direct evidence on point, but the trial judge was still able – and indeed required – to use the available circumstantial evidence in order to decide the point.[556]

Is there some magic in phrase "principles of causation unknown to modern science"? What did the court mean by "principles"? What about the case where the principles are known to modern science but current limitations of technology prevent the scientists from acquiring the evidence that is needed to formulate a valid conclusion. Did the court mean to exclude that situation? It is not likely that it did.

Consider the *Fairchild* problem: medicine understands the aetiology of mesothelioma. It just lacks the tools to determine which exposure of the various exposures to asbestos trigger the disease, assuming the evidence would be there if

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> The evidence was insufficient to prove causation on a balance of probabilities. In those circumstances, the trial judge applied *Haag v. Marshall* (1989), 39 B.C.L.R. (2d) 205 (C.A.) and drew an inference of causation in favour of the plaintiffs on the basis that DSB's negligence materially increased the risk of Mosly improperly obtaining the funds in question
> [5] We concluded, following *Resurfice Corp. v. Hanke*, 2007 SCC 7, [2007] 1 S.C.R. 333, that it was not 'impossible' for the plaintiffs to prove causation on the standard 'but for' test and there was no need to rely on the 'material contribution' test derived from *McGhee v. National Coal Board*, [1973] 1 W.L.R. 1 (H.L.) and referred to in *Haag v. Marshall.* We allowed the appeal on the basis that, absent such an inference of causation, the reasons of the trial judge established that the plaintiffs could not meet their burden to prove causation and hence the action against DSB should be dismissed."

[554] 2007 BCCA 94 at para. 43 (emphasis added).
[555] 2007 BCCA 94, at paras. 35-42.
[556] 2007 BCCA 94, at para. 41.

medicine had fine enough tools. Alternatively, assume the aetiology of the disease is such that the tumour consumes the evidence of its own creation. In that case, it might be that determining the factual cause would involve principles of causation currently unknown to modern science. Or, consider necrotizing fasciitis, colloquially called the "flesh-eating disease". Medicine knows it is a type of infection. However, medicine cannot say what causes some people to develop the infection when others in similar situations do not. In fact, medicine cannot even say why a person who developed necrotizing fasciitis developed that infection rather than a more benign infection. Medicine cannot even say that the conditions that are the cause of a benign infection necessarily increase the risk of a person developing necrotizing fasciitis. At the most, there is a suspicion they possibly do. In short, there is a gap in medicine's understanding of the aetiology.

Before looking at *B.S.A.* in a bit more detail, let us backtrack to *Jackson v. Kelowna General Hospital*,[557] released at the end of February, 2007. *B.S.A.* was released in early May 2007 and decided by a different panel of judges. *Jackson* holds, in effect that *Snell* and *Resurfice* **do not create** the type of "legal inference" described in *B.S.A.*, at least where the test being used is the but-for test:

> [20] *Snell* ***does not*** *stand for the proposition that an inference of causation may be drawn in the absence of evidence that the negligence caused the injury*. The burden is on the plaintiff to prove that "a substantial connection between the injury and defendant's conduct" is present: *Resurfice* (at para. 23). There must be some evidence that the negligence caused, or could have caused, the injury to justify drawing an inference. There was no such evidence in this case.[558] (all emphasis is added)

However, paragraph 23 in *Resurfice* refers to the but-for test, not the material-contribution test. It is:

> [23] The "but for" test recognizes that compensation for negligent conduct should only be made "where a substantial connection between the injury and 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": *Snell v. Farrell*, at p. 327, per Sopinka J.[559]

So, paragraph 20 of *Jackson* tells us nothing about *Resurfice's* material-contribution test.

Does *Jackson* help us on what the *Resurfice* material-contribution test means? Or what any part of it means? The B.C.C.A. said: (1) that test does not apply when the lack of evidence is due to the plaintiff's failure to ask the experts the right questions; that is, to present evidence that could have been presented and where the plaintiff failed to demonstrate that it was impossible to obtain that evidence and (2) "impossible" in *Resurfice* meant "truly impossible" (when it referring to *Cook v Lewis*) and "impossible" (when referring to *Walker Estate*), neither of which states of impossibility exist where all that has happened is that what is described in (1). *Jackson* states:[560]

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[557] 2007 BCCA 129, leave to appeal refused 2007 CanLII 37198 (S.C.C.).
[558] 2007 BCCA 129, para. 20 (emphasis added).
[559] 2007 SCC 7, para. 23.
[560] 2007 BCCA 129, paras. 21-23 (all emphasis added)

> [21] In *Resurfice*, the Supreme Court affirmed the "but for" test as "the primary test for causation in negligence actions" (at para. 22), but noted (at para. 24) that "in special circumstances, the law has recognized exceptions to the basic 'but for' test, and applied a 'material contribution' test". The appellant argues that this case meets the two conditions set out (at para. 25) for the "material contribution" test: that it is impossible to prove that the defendant's negligence caused the plaintiff's injury, due to factors outside of the plaintiff's control, and the injury suffered by the plaintiff falls within the ambit of the risk created by the breach. The appellant says that the absence of evidence of his condition at the times his vital signs should have been taken makes it impossible for him to prove causation, and the risk that his condition would change while self-administering morphine was the reason for the requirement that he be monitored at hourly intervals.
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> [22] The appellant's reliance on *Resurfice* is of no assistance. In the absence of evidence that the monitoring of his condition when it was required would have revealed a change in his condition that would have alerted his medical caregivers than an event of respiratory distress could occur, he is unable to prove causation applying either the "but for" test or the "material contribution" test. Further, the Supreme Court's articulation of the "special circumstances" where the "material contribution" test may be applied does not apply to this case, but to cases where it is ***truly impossible*** to say what caused the injury, such as where two tortious sources caused the injury, as in *Cook v. Lewis*, [1951] S.C.R. 830, ***or it is impossible*** to prove what a particular person in the chain of causation would have done in the absence of the negligence, such as in the blood donor cases (*Walker Estate v. York Finch Hospital*, [2001] 1 S.C.R. 647).[561]
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> [23] This is an ordinary medical negligence case, where the difficulty in proving causation is the absence of any evidence to support either a finding or an inference that the respondents' negligence caused the appellant's injury. *The required evidence is missing because the hypothetical question was not asked of the experts.* In the absence of that evidence, there is no positive evidence that the negligence caused the breach. The contrary evidence found in the experts' opinions demonstrated that drawing an inference, in the absence of the positive evidence, was not appropriate, as the trial judge found. (emphasis added)

What is the difference between "truly impossible" and "merely impossible"? Is the former an example of Sherlock Holmes' "impossibility", the latter only Holmes' "improbability" which is revealed to be what must be the truth once the impossible has been eliminated? In short, *Jackson* is of no help as to when the *Resurfice* material-contribution test applies, beyond eliminating the obvious situation where the plaintiff failed to show that the missing evidence did not exist and why it did not exist.

I return to *B.S.A.* The explanation for why the B.C.C.A., in *B.S.A.,* would take the unusual step of calling a conclusion based on "no relevant evidence at all" any sort of inference, legal or otherwise, is likely three-fold. First: it was an attempt to bring this

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[561] My emphasis. Note the mistaken description of *Cook v. Lewis*, which has now become a case where it was, in fact, impossible to say which of the two hunters shot Cook. As mentioned, that is not the facts of Cook. The majority reasons in *Cook v. Lewis* state specifically, [1951] S.C.R.830 at 843, that on the evidence "the jury should have been able to decide which one of the defendants fired the shot which struck the plaintiff." The problem was they had not been asked the question that way. Cook v. Lewis was a British Columbia case. That makes it more ironic that even the B.C. courts misuse it.

"inference" within the "legal inference" described in paragraphs 23-25 of *Haag*. However, it is important to realize that *B.S.A's* use of this inference – by conceding that there is no relevant evidence - is different from *Haag's*. It is not clear at all that the B.C.C.A. saw that. *Haag*'s "legal inference" is premised on the assertion that the fact of the increased risk is relevant evidence from which it is open to validly conclude that the conduct *was a cause of the injuries*. This is clear in *Haag*:

> [25] Whether the inference of causation should in fact be made in any particular case depends on whether it is in accordance with common sense and justice in that case to say that the breach of duty which materially increased the risk ought reasonably to be considered as having materially contributed to the loss.[562]

In addition, we must assume that the B.C.C.A. knew that *Haag* had been used by *Snell* as one of the cases supporting the robust and pragmatic approach to inferring causation from the facts, even in the absence of positive evidence.

Second: we have to assume the *B.S.A.* panel knew that, in light of Supreme Court cases prior to *Resurfice*, it could not explicitly say that materially increasing risk through negligent conduct was sufficient to allow a court to find causation; particularly when *B.S.A.* does not did suggest that that is the meaning of *Resurfice's* pronouncements on material contribution. Ultimately, *B.S.A.* holds that its facts did not trigger the application of the *Resurfice* material-contribution test; only a standard application of the but-for test. The case was not one where it was impossible, in any relevant sense, for the plaintiff to obtain evidence establishing causation on the balance of probability, assuming the defendant had acted improperly. The problem was that the plaintiff had failed to obtain and introduce the required evidence which could have existed.[563]

Third: another oddity in *B.S.A.* is the suggestion that in English jurisprudence "it may no longer be proper to call" the *McGhee* material-contribution test an "inference principle".[564] The *B.S.A.* panel had to know, since *B.S.A.* refers to *Fairchild* v *Glenhaven*, that England's material-contribution test ***is no longer*** an "inference principle". Finding causation under *Fairchild* is ***not*** an inference that the conduct is a cause of the injury.[565] Rather, as Lord Hoffmann wrote, three of the five Law Lords in *Fairchild* (and four of the five in *Barker v Corus)* "made it clear that the creation of a material risk of mesothelioma was sufficient for [the imposition of] liability",[566] assuming the other conditions that control that application of the "*Fairchild* exception" were satisfied. The result is that, in England, the *Fairchild* exception to the ordinary but-for test is a principle under which, in very limited circumstances, liability is imposed despite the acknowledgment that that the evidence does not permit the conclusion that a defendant's

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[562] *Haag*, (1989), 61 D.L.R. (4t h) 371 at 379, 1989 CanLII 236 at para. 25 (B.C.C.A.).
[563] B.S.A., 2007 BCCA 94, paras. 45-48.
[564] 2007 BCCA 94 at para. 35.
[565] *Barker v Corus*, at paras. 31-34/
[566] *Barker*, at para. 31, words in brackets added.

faulty conduct is probably a cause: See *Barker v. Corus (UK) Plc* and *Fairchild v Glenhaven Funeral Services Ltd*.[567]

It is worth setting out the House of Lords summary of the *Fairchild* exception, since *Resurfice* does not to mention the jurisprudence. This is part of the spilled ink which the panel thought did not need to be mentioned. In *Barker*, Lord Hoffmann summarized *Fairchild*:

> All members of the House emphasised the exceptional nature of the liability. The standard rule is that it is not enough to show that the defendant's conduct increased the likelihood of damage being suffered and *may* have caused it. It must be proved on a balance of probability that the defendant's conduct *did* cause the damage in the sense that it would not otherwise have happened. In *Fairchild*, the state of scientific knowledge about the mechanism by which asbestos fibres cause mesothelioma did not enable any claimant who had been exposed to more than one significant source of asbestos to satisfy this test. A claim against any person responsible for any such exposure would therefore not satisfy the standard causal requirements for liability in tort. But the House considered that, in all the circumstances of the case, that would be an unjust result. It therefore applied an exceptional and less demanding test for the necessary causal link between the defendant's conduct and the damage.[568]

The "exceptional and less demanding test for the necessary causal link between the defendant's conduct and the damage" is the *Fairchild-Barker* restatement of the *McGhee* material-contribution test allowing the use of *material increase in risk* due to faulty conduct to be the basis of the *imposition* of liability. Lord Hoffmann added in *Barker*:

> The purpose of the *Fairchild* exception is to provide a cause of action against a defendant who has materially increased the risk that the claimant will suffer damage and may have caused that damage, but cannot be proved to have done so because it is impossible to show, on a balance of probability, that some other exposure to the same risk may not have caused it instead.[569]

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[567] *Barker v. Corus (UK) Plc* [2006] UKHL 20 and *Fairchild v Glenhaven Funeral Services Ltd*., [2002] UKHL 22, [2003] 1 AC 32. In *Brett v. University of Reading*, [2007] EWCA Civ 88, the Court of Appeal found it necessary to remind plaintiff's counsel that while *Fairchild-Barker* permits English courts, in limited circumstances, to deem causation to exist even where the evidence does not establish causation, it does not permit courts to take the same approach to breach of duty, nor to shift the onus in a way that will amount to the same result. The plaintiff still has the onus of establishing that component of the tort and all of the other components on the balance of probability. Para. 26 of *Brett* states: "In a case such as this, *Fairchild* exceptionally relieves a claimant who has proved exposure and breach of duty from having to prove causation. What it does not do is to relieve him from proving the other elements." *Brett* is also important, to Canada, because the Court of Appeal, at paras. 18-19 rejected the use of the evidentiary *dictum* in *Blatch v Archer* (1774), 1 Cowp. 63 at 65, 98 E.R. 969 at 970, in a way that would be tantamount to applying *Fairchild-Barker* to the breach of duty issue. The dictum, which readers will recall was also quoted and seemingly applied in *Snell* is: "It is certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted."

[568] *Barker v. Corus*, para. 1 (emphasis in original).

[569] *Barker v. Corus* ,para. 17.

As mentioned, the *B.S.A.* panel was not prepared to concede that the English version of the material-contribution test, whatever it might once have been, is no longer an "inference principle". It was not prepared to concede that English version of the test has become one applicable only in very limited circumstances under which liability is imposed because of faulty conduct which materially increased the risk of the occurrence of that harm, even though it *cannot* be held, validly, properly, appropriately, on a but-for basis that the conduct was a cause of the harm because the required evidence does not exist. That view of the English jurisprudence likely helps to explain the unusual statement in paragraph 43 of *B.S.A.* that an inference may be drawn "from no relevant evidence at all".

It would certainly have been relevant in *B.S.A.*, had the case been decided on a material-contribution basis, to know whether the B.C.C.A. thought material contribution is an inference from evidence that the conduct is a cause of the injury, or the imposition of liability even if the evidence does not permit that imposition on the basis that the conduct increased the risk of the injury. In order to answer that question, *B.S.A.* would have had to do discuss the meaning of *Resurfice's* pronouncements and that, for proper scholarship, would have required *B.S.A.* to consider the English jurisprudence. Instead, *B.S.A.* was able to duck the question because the panel held, as indicated, that the applicable test was but-for.[570]

In any event, *B.S.A.* is an explicit admission of the "gap in the evidence" rationale for and the logical discontinuity in the doctrine that imposes liability based on faulty conduct which materially increases risk – which is the *Resurfice* version, too – so it is worth reading what one of the stars in the tort firmament (Commonwealth and, now, U.S.) had to say about *Fairchild* and the new English version of the risk-based material-contribution test: see J. Stapleton, "Lords a'leaping Evidentiary Gaps".[571]

Next, many British Columbia lawyers will be aware of the B.C.C.A decision in *Levitt v. Carr*.[572] *Levitt* is a decision that, as best as I can tell, is often mentioned in B.C. decisions but rarely (if ever) outside of B.C. It has one reference in the S.C.C., but not on a causation issue. The trial reasons in *Seatle v Purvis*[573] starting at contain an extensive discussion of the factual causation cases. *Seatle* explains *Levitt* this way:

> [164] While there was no scientific evidence that the steroids caused avascular necrosis in the plaintiff's case in particular, the fact that it was known that extended steroid use was one cause of the disease combined with the fact that steroid use was extended in the plaintiff's case, led the Court to conclude that by negligently extending the steroid prescription, the defendant doctor created a "material increase in the risk of harm" to the plaintiff and therefore causation was established.[574]

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[570] *B.S.A.*, paras. 45-48.
[571] (2002), 10 Torts L.J. 276.
[572] (1992), 66 B.C.L.R. (2d) 58, 1992 CanLII 1086 (B.C. C.A.).
[573] 2005 BCSC 1567, starting at para. 162.
[574] *Seatle*, at para. 164.

Shades of *Fairchild*, no? Then, a few paragraphs later, we find this summary of the principles of factual causation:

> [168] I conclude from reviewing these authorities that there are four possible theories of causation available to this plaintiff. At the risk of oversimplification, I would summarize these theories as follows:
>
> > 1. The plaintiff must prove that "but for" the negligence of the defendant no injury would have occurred. This test should not be applied too rigidly, which means that an inference of causation may be made even in the absence of conclusive, precise, scientific evidence (*Snell*).
> >
> > 2. Where there are multiple possible causes of an injury, but the plaintiff can prove the defendant's negligence materially contributed to the injury, liability for the whole loss, subject to claims of contribution, will attach to the defendant (*Athey*).
> >
> > 3. If the plaintiff can establish that the defendant materially increased the risk of a specific injury, and that specific injury occurs, the court may infer on a sufficient evidentiary basis that the material increase in risk was a contributing cause of the injury such that causation is established (*Levitt*, *Webster*). "The evidence is to be applied according to the proof which it was in the power of one side to have produced." (*Snell*)
> >
> > 4. The House of Lords has held that there may be a reversal in the burden of proof for causation such that if a plaintiff establishes that the defendant created an area of risk and the injury occurred in that area, the defendant must show that the injury had some other cause in order to escape liability (*McGhee*). This theory has not been applied in Canada and seems to have been restricted in England to toxic exposure cases.[575]

The third "theory" sounds familiar, no? Shades of *Fairchild*, again. The fourth contains a surprising misstatement of English law.

However, the discussion of the issues in the *Seatle* trial decision is moot, as is probably whatever *Levitt* might have meant. This is because of B.C.C.A. decision in *Seatle v Purvis*.[576] The B.C.C.A. affirmed the dismissal of the claim against the defendant doctor. It held that the plaintiffs had failed to establish causation on either the *Snell* but-for test or the *Resurface* material-contribution test. On but-for, the Court rejected an argument, based on its prior decision in *Haag v Marshall*, that increase in risk as a result of negligence is sufficient to allow an inference that the negligence was, in fact, a cause of the injury.[577] On material contribution, the Court held that the *Resurface* impossibility requirement was not satisfied where the reason for the gap in the evidence was nothing more than the plaintiff's failure to tender evidence which "was within the plaintiffs' power to have tendered … that would have tipped the balance"[578] and where "it

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[575] *Seatle*, at para. 168. (emphasis in original)
[576] 2007 BCCA 349 affirming 2005 BCSC 1567, leave to appeal refused, 2008 CanLII 1386 (S.C.C.).
[577] *Seatle,* at paras. 62-64.
[578] *Seatle,* at para. 68.

was not impossible for the plaintiffs to prove that ... [what the plaintiffs alleged the defendant doctor should have done] would have materially altered the outcome".[579]

It may be, as well, that *Seatle* stands for the proposition that the "gap" in the evidence required by *Resurfice* has to be a "scientific gap". The Court wrote:

> [71] This case does not really fall within the ambit of *Snell* or *Levitt*. *There is no scientific gap that requires a departure from the "but for" test.* Rather, this was primarily a fact-driven case decided well within established legal principles. While the factual issues were challenging, I see no reversible error in the result.[580]

Seatle discusses the *Resurfice* material-contribution test under the heading "legal inference".[581] The reference to *Levitt* is certainly a mistake, meant to be a reference to *Resurfice.* The B.C.C.A. mentions *Levitt* only while setting out the basis of the trial judge's decision. *Levitt* is not discussed in the Court's analysis of the causation issues.

The plaintiffs attempted to bridge the gap in the evidence by citing the *Resurfice* rationale for the *Resurfice* version of the material-contribution test:

> [69] The appellants urge this Court to fill in the evidentiary gap because, in the words of *Resurfice*, "it would offend the basic notions of fairness and justice to deny liability".[582]

The B.C.C.A. rejected the argument, So, *Seatle* also stands for the proposition that it does not offend the basic notions of fairness and justice to deny liability where factual causation is not "incapable of proof" and all that has happened is that the plaintiff has "simply failed to provide satisfactory proof" of causation.[583] The Court provides examples of the evidence that the plaintiffs could have tendered.[584] *Seatle* discusses the *Snell* inference under the heading "common sense inference"[585] although, curiously, never mentioning *Snell*, itself, in this context. *Snell* is mentioned on other issues: (1) for the proposition that factual causation may be established without positive scientific evidence;[586] and (2) in relation to the maxim that an inference may be drawn against a party who does not adduce relevant evidence within the party's power to adduce. The Court, essentially, dismissed the plaintiff's argument that the *Snell* inference should be drawn, applying the *Housen v. Nikolaisen*[587] test of no palpable and overriding error in the trial judge's refusal to draw the inference; although the Court did not mention *Housen.* The B.C.C.A wrote: "Ultimately, the trial judge was not satisfied that the common sense inference could be drawn without the assistance of expert medical

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[579] *Seatle,* at para. 70 (words in brackets added).
[580] *Seatle,* at para. 71 (emphasis added).
[581] *Seatle,* at paras. 62-71.
[582] *Seatle,* at para. 69.
[583] *Seatle,* at para. 68.
[584] *Seatle*, at paras. 68, 70.
[585] *Seatle,* at paras. 57-61.
[586] *Seatle,* at para. 32.
[587] [2002] 2 S.C.R. 235, (2002), 211 D.L.R. (4th) 577.

evidence that Dr. Thomas' presence would have made a difference. I cannot say that she erred in refusing to draw such an inference."[588]

The next case to look at, in chronological order, would be the trial decision in *Bohun v. Sennewald*.[589] I discussed it at this point in prior versions of this article. In *Bohun*, the trial judge applied the *Resurfice* material-contribution test to hold that causation was established where the physician's negligence (a delayed diagnosis) increased the patient's chance (risk) of bad result (death) from about 21% to 25%. The trial judge characterized the issue as one of causation, not loss of chance, in order to distinguish contrary S.C.C. case law. The trial decision was reversed by the B.C.C.A. in *Bohun v. Segal*.[590] The discussion of *Bohun* has been moved to the end of this part where I discuss both levels of the decision.

British Columbia also has this apparent explanation of *Resurfice* on material contribution in *Vasiliopoulos v. Dosanjh*.[591]

> [93] As noted, Dr. Dommisse is an orthopaedic surgeon. … What I say now about the meaning and effect of his evidence is … is my understanding of the meaning and effect of the whole of what this straightforward witness had to say after his evidence is filtered through the legal lens, more specifically the legal lens of causation in tort law – most recently revisited by the Supreme Court of Canada in *Resurfice Corp. v. Hanke,* 2007 SCC 7, 2007 SCC 7 (February 8, 2007).
>
> [100] The result … is that *I find that the defendants' negligence on June 3, 2004 caused or contributed in a material way* to soft tissue injury and resulting pain, suffering, depression and anxiety which is with the plaintiff to this day. (emphasis added)

In other words, *Resurfice* has no effect at all. What test did the judge apply? There is no mention of but-for. "Caused or contributed in a material way" is not the but-for test. If it was material contribution, it was not the *Resurfice* version. It was the *Athey* version.

Now let us return to Lyon v. Ridge Meadows Hospital.[592] *Lyon* does not mention *Seatle*. There are puzzling and contradictory statements in *Lyon* about material contribution. One is this pairing. (1) The conclusion under the *Resurfice* material-conclusion test that causation exists *is an inference of causation drawn from the evidence*[593] which is (2) made *even though an inference of causation cannot be validly made applying the but-for test* as explained in *Snell*.[594] Nonetheless, as I said earlier, it seems that the trial judge's ultimate conclusion – that the plaintiff had not satisfied any of the tests for causation – is correct. The trial judge held that the missing evidence was evidence that the plaintiff could have introduced which would have answered the but-for question one way or the other. The plaintiff did not. Indeed, the trial judge concluded that

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[588] *Seatle*, at para. 61.
[589] 2007 BCSC 269.
[590] 2008 BCCA 23.
[591] 2007 BCSC 703, paras. 93, 100.
[592] 2007 BCSC 1000.
[593] Lyon, para. 28.
[594] Lyon, para. 28.

the existing evidence probably eliminated fault and causation for the doctors,[595] and causation for a nurse.[596] The trial judge wrote that the "key question is whether a surgical consultation would have made any difference to the outcome" however the "plaintiffs' experts ... did not provide an answer to this crucial question on causation."[597]

I mentioned, in the but-for section of this article, that *Lyon* conflates the but-for and material-contribution tests. I will quote the "offending" paragraph, again.

> [23] In establishing causation in medical malpractice cases, the burden of proof lies with the plaintiff. The plaintiff must prove that the defendant's breach of duty of care caused the injury. The plaintiff has the ultimate burden; however, where the defendant has failed to put forward evidence to the contrary, *the courts may draw a "robust and pragmatic" inference of causation, based on the facts, that the defendant's negligence materially contributed to the plaintiff's injury*, even though positive or scientific proof of causation has not been submitted: *Snell v. Farrell* 1990 CanLII 70 (S.C.C.), (1990), 72 D.L.R. (4th) 289, [1990] 2 S.C.R. 311.[598]

This is wrong. I have written why it is wrong, before. I very much hope that the trial judge in *Lyon* was not subconsciously misquoting me, Oscar Wilde's views on publicity notwithstanding. What *Lyon* asserts is that trial judges are "to take a robust, pragmatic, ordinary common sense approach to determining whether some conduct or event that is tendered as a legal factual cause of the injury is a material contributing factor to the occurrence of the injury." This proposition, apart from conflating *Snell*'s but-for test and *Athey*'s material-contribution test, was meaningless as a useful guide in the process of establishing legal factual causation in the *Athey* days.[599] It is equally useless, now. In any event, even if it could have once been an accurately worded statement of the process involved in either test before *Resurfice*, it is no longer, now.

Agno v. Wilson[600] argued in October and November, 2006, reasons released July 31, 2007, is another medical malpractice decision whose reasons: (1) contain extensive quotations from *Resurfice*, and from BC cases quoting from *Resurfice*; (2) tell us nothing about the judge's understanding of *Resurfice*; (3) tell us the judge applied the but-for test; (3) make us guess whether the trial judge applied a correct version of the but-for test or any version of the material-contribution test; or (5) suggest that that judge understood that "materially contributed" in the phrase "caused or materially contributed" means nothing more than "caused the injury" where the issue is factual causation; or (6) leave us in the dark as to the trial judge's understanding of the but-for test. The reasons contain extensive quotations from *Resurfice*, *Jackson v Kelowna Hospital* and *Seatle v Purvis*;[601] however, the trial judge did not explain why he quoted these portions and what the quoted portions meant to the facts of the case. In the end result, all of this does not matter

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595 Lyon, paras. 146-48.
596 Lyon, paras. 134-136. The nurse was negligent.
597 Lyon, para. 136.
598 Lyon, para. 23.
599 *Snark*, at 87.
600 2007 BCSC 1160, at paras. 85-90, 95-103.
601 *Agno*, paras. 85-90.

since the judge applied the but-for test which, on the facts outlined in the reasons, was the applicable test. There is no suggestion in the case that there was any evidence that was not available on account of any factors outside of the plaintiff's control. There was no suggestion that there was an issue determining what the factual cause was. Rather, the case turned on the opinions of the experts who disagreed on the proper conclusions to be drawn from the evidence. The trial judge preferred the defence experts on both fault and causation. The gist of the reason why the action was dismissed is that the plaintiffs failed to adduce and evidence of either fault or even conduct that increased the risk.[602]

The next example of questionable use of *Resurfice* and the material-contribution test is *Mainland Sawmills Ltd. v. USW Union Local – 1-3567*.[603] The reasons fall into many of the *Resurfice* potholes I have described.

> [1] This action stems from an incident that took place at Mainland Sawmills in Vancouver on the evening of December 16, 2003. The plaintiffs were employees of Mainland and members of Local Union 2171 of what was then the IWA Canada. Local 2171 was one of five locals of the IWA, along with Local 1-3567, which worked under the terms of the Coast Master Agreement, a collective agreement with Forest Industrial Relations Limited (FIR). The IWA later merged with the defendant United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (USW), which became its successor union for the purpose of collective bargaining.
>
> [5] The plaintiffs claim that the defendants trespassed on the Mainland premises and shut down the mill operation by means of violence, physical force, intimidation and threats. The principal causes of action are assault and assault with battery. The plaintiffs each claim general, aggravated and punitive damages against all defendants. They claim that the personal defendants are joint tortfeasors and that the IWA Local 1-3567, the USW Local 1-3567 (the Union) and the USW Local 1-3567 Society (the Society) are vicariously liable for the torts of the personal defendants.
>
> [186] Ms. Young submitted that there must be a specific finding of fault against a defendant in order to find liability – in other words, to find that a specific defendant committed a specific assault. In my opinion, this is not necessary. First, all of the personal defendants were at Mainland on December 16, 2003, and the plaintiffs were assaulted by persons who attended. If the defendants are joint tortfeasors, they are jointly responsibility for the torts that were committed. Individual responsibility need not be proven for each of them for what was done. Second, with few exceptions, the plaintiffs were not able to identify or link each of their injuries with the defendant who caused that specific injury. This is through no fault of their own. The very nature of the incident, including the number of people attending, made it impossible for a plaintiff to say definitively which defendant pushed or struck him. I find the principles expressed in *Resurfice Corp. v. Hanke*, 2007 SCC 7, [2007] 1 S.C.R. 333 at para. 27 regarding the exceptions to the "but for" test of causation to be pertinent and analogous here:
>
> > One situation requiring an exception to the "but for" test is the situation where it is impossible to say which of two tortious sources caused the injury, as where

[602] *Agno*, paras. 101, 103,
[603] 2007 BCSC 1433. The key paragraphs are paragraphs 1, 5 and 186-188.

> two shots are carelessly fired at the victim, but it is impossible to say which shot injured him: Cook v. Lewis, 1951 CanLII 1 (S.C.C.), [1951] S.C.R. 830. Provided that it is established that each of the defendants carelessly or negligently created an unreasonable risk of that type of injury that the plaintiff in fact suffered (i.e. carelessly or negligently fired a shot that could have caused the injury), a material contribution test may be appropriately applied.
>
> [187] In this case, the defendants created an unreasonable risk of the type of injuries that the plaintiffs suffered by participating in an unlawful common enterprise. The assaults that took place may have been spontaneous, but they arose from and were related to the concerted action of picketing, trespassing, threatening and forcing Mainland employees to shut down the mill.
>
> [188] Having made this determination, I do not consider that all of the defendants should share equal responsibility. Some are clearly more responsible than others, particularly those who were active in organizing the event and those who trespassed on Mainland property.

Where is the gap in evidence caused by any scientific issues? Where is the evidence that the evidence as to who did what did not exist? I suspect it is safe to assume it existed. Somebody saw something. Somebody knew something that amounted to circumstantial evidence from which proper inferences could be drawn: *Fontaine v. British Columbia (Official Administrator)*.[604] I will return to this point.

Isn't *Mainland Sawmills* simply a case where, for whatever reason, the plaintiff failed to adduce evidence which could exist which would have permitted the court to draw the appropriate factual inferences as to who did what to whom and when? If *Mainland Sawmills* is a valid use of *Resurfice*'s material-contribution test, when isn't that test applicable in any case where the plaintiff says something like: it really was not practicable for me to get the evidence even though we all know it had to exist? If we apply *Mainland Sawmills*, but-for may still be the default test in the universe which it governs, but the universe is the size of a small thimble and is shrinking quickly.

On a collateral issue, although *Mainland Sawmills* is not a class action case, if the material-contribution usage is correct, can we ever have any insurmountable individual-issue related causation problems, particularly if one agrees with the comments about proof of causation in *Windsor v. Canadian Pacific Railway Limited*, 2007 ABCA 294 at paras. 29-33 (Alta. C.A.), a case which is a class action certification motion?

In *Mainland Sawmills*, the trial judge also apportioned fault and made contribution orders as between the defendants held liable: see the discussion starting at paragraph 188.

> [188] Having made this determination, I do not consider that all of the defendants should share equal responsibility. Some are clearly more responsible than others,

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[604] *Fontaine v. British Columbia (Official Administrator)*, [1998] 1 S.C.R. 424, 1988 CanLII 814, 156 D.L.R. (4th) 577.

> particularly those who were active in organizing the event and those who trespassed on Mainland property.
>
> . . . .
>
> [191] To apportion liability among the personal defendants, the Court must look at the causative conduct in terms of relative or comparative blameworthiness or culpability to see in what degrees the parties departed from the norm of reasonable conduct …

The apportionment and contribution as between the wrongdoers was under B.C.'s *Negligence Act*, s. 4: "to contribute to and indemnify each other in the degree to which they are respectively found to have been at fault." There is nothing in the discussion of the apportionment and contribution issues to indicate the trial judge realized that *Resurfice* material contribution is not based on causative conduct. It follows that there is no discussion on how *Resurfice* risk-based liability fits into legislation based on liability which is premised on actually causative conduct.

If we accept, as I suggest we must, that increased-risk based doctrines of "causation" such as *Resurfice*'s version of material contribution – that is, doctrines of causation in which a possibility necessarily less than a probability of an actual causal contribution of any magnitude at all greater than zero may satisfy the "causal" requirement for the imposition of liability for wrongful conduct – fray what a colleague nicely summarized as the "Aristotelian [requirement of] a connection between wrong and harm"[605] – then *Mainland Sawmill*'s use of the *Resurfice* material-contribution test frays the connection even more.

We might well ask ourselves, as I already have, where was the gap or deficiency in evidence due to the limits of science perhaps required by *Resurfice*, and certainly required by B.C.C.A. cases such as *B.S.A. Investors* (which, by the way, was not mentioned in the reasons? Why, we might well ask, was this not just a but-for case under which the proper inferences would be drawn, or not drawn, as the case may be, from the evidence presented or not presented, applying *Snell*'s robust, pragmatic, common sense approach? *Snell* is not mentioned in the reasons. We might also ask why the trial judge did not refer to the court's right to draw adverse inferences in appropriate cases, again as mentioned in *Snell*. Perhaps the reason is that *Snell* is not mentioned in the *Mainland Sawmill* reasons.

We might ask, as well, why the trial judge did not refer to and apply *Fontaine v. British Columbia (Official Administrator)*.[606] It appears to me, from my review of the reasons, that there was more than enough circumstantial evidence from which the trial judge could have with our without the use of direct evidence, made all of the conclusions of fact required to support the use of the but-for test as against all of the defendants who had committed wrongful acts and were being held liable on the basis of their own wrongful conduct. *Fontaine* my have repealed the use of *res ipsa loquitur* as a rule of law or a presumption. It certainly did not prohibit triers of fact from drawing inferences from

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[605] E-mail correspondence with Craig Jones, dated ___Sept 2008, on file.
[606] [1998] 1 S.C.R. 424.

direct and circumstantial evidence. Varying the relevant portion paragraph 27 of *Fontaine* only slightly- by substituting causal terms for "negligence":

> [27] . . . [*res ipsa*] was nothing more than an attempt to deal with circumstantial evidence. That evidence is more sensibly dealt with by the trier of fact, who should weigh the circumstantial evidence with the direct evidence, if any, to determine whether the plaintiff has established on a balance of probabilities a *prima facie* case . . . [*that the defendant's negligence is a historical, actual, cause of the plaintiff's injury*.] Once the plaintiff has done so, the defendant must present evidence negating that of the plaintiff or necessarily the plaintiff will succeed [*if the plaintiff's evidence is accepted*].[607]

I have added the italicized words in brackets. It is implicit in the *Fontaine* statement that the plaintiff will necessarily succeed if and only if the helpful-to-the-plaintiff evidence is accepted and believed, all other requirements met. However, the decision as to whether or not to believe the evidence – the weighing of the evidence – is not made until the end of the trial.

The next point is that the trial judge held that all of those who were liable were joint tortfeasors. The joint-tortfeasor status is a common law status. It has always been the common law (at least for causation purposes) that the wrongful conduct of any one of the joint tortfeasors is deemed to be the conduct of them all. The trial judge was clearly satisfied, even if the judge did not expressly say so, that the but-for finger could be pointed at least some of the main actors: that their conduct would satisfy the but-for test. That, then, was enough to point the but-for finger at all of the rest.

In short, if the evidence as recounted in the *Mainland Sawmills* is admissible, accepted, and accurate, then *Mainland Sawmills* was never a material-contribution case, not under *Resurfice* and not even under *Athey*. The least of it was that it was not it must be impossible for the plaintiffs "to prove that the defendant[s]' negligence caused the plaintiff[s]' injur[ies] using the "but for" test."

The next reported decision is *Sam v. Wilson*.[608] As mentioned, *Sam* holds that the *Resurfice* material-contribution test is not "material contribution" as that phrase was used in *Athey* and it is not a test for factual causation.[609] "[I]t is not a test of causation at all: rather, it is a rule of law based on policy." The complete discussion of the material-

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[607] Para. 27 of *Fontaine* is: "It would appear that the law would be better served if the maxim was treated as expired and no longer used as a separate component in negligence actions. After all, it was nothing more than an attempt to deal with circumstantial evidence. That evidence is more sensibly dealt with by the trier of fact, who should weigh the circumstantial evidence with the direct evidence, if any, to determine whether the plaintiff has established on a balance of probabilities a prima facie case of negligence against the defendant. Once the plaintiff has done so, the defendant must present evidence negating that of the plaintiff or necessarily the plaintiff will succeed."

[608] 2007 BCCA 622. Sam contracted tuberculosis. He was being treated with a drug whose side effects can include permanent liver damage. As a result, there is a monitoring protocol of blood tests to detect the level of liver enzymes in the patient's blood. The level indicates whether the patient is at risk of liver damage from the medication. He was not monitored properly. The drug caused irreversible liver damage and Sam needed a liver transplant.(*Sam*, para. 3-13.)

[609] *Sam v. Wilson*, 2007 BCCA 622 at para. 109.

contribution test in *Sam* is limited to paragraphs 109-111 of the majority reasons and paragraph 34 of the dissent. The Court did not say anything more about the meaning of the material-contribution test, and that applicability of that test was not examined. The reason seems to be that all of the parties agreed that but-for was the applicable test.[610] Neither of the paragraphs explain why this was so, nor why the Court of Appeal agreed. There is no explanation elsewhere in the reasons. There is no indication in the appellate reasons that the plaintiff argued for the application of the *Resurfice* material-contribution test. In the result, all we have is the conclusory statement of the majority: "As my colleague has pointed out, the Province abandoned its submission that the 'material contribution test' should apply in this case. The concession was appropriate since this case is not one to which it would apply. Rather, this case falls to be determined on conventional 'but for' causal principles."[611]

It is not clear what, if anything, we should infer from the fact that *Sam*'s summary of the material-contribution test's requirements is literally wrong in part. *Sam* misstates the impossibility requirement. *Sam*'s version is: "when it is impossible for the plaintiff to prove that the defendant's negligent conduct caused the plaintiff's injury using the 'but for' test."[612] The *Resurfice* version has two sentences. "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."[613] *Sam*'s version is missing the requirements of the second sentence. This is surprising for a number of reasons, the least of which is that the B.C.C.A. had just held, explicitly, in *Jackson v. Kelowna Hospital*,[614] *Seatle v. Purvis*,[615] and *B.S.A. Investors v. DSB*,[616] that the "limits of scientific knowledge" explanation for the gap in the evidence was a necessary part of the Resurfice "impossibility" requirement. The passages are quoted earlier in this part.[617]

There is no explanation for this in the reasons. Perhaps that is because the majority considered it self-evident that the lack of evidence was not outside of the plaintiff's control for any relevant reason, as shown by the fact that the plaintiff called an expert witness whose testimony (until the expert recanted in cross-examination) was that it was probable that the defendant's negligence was the reason that the plaintiff's condition was not discovered in time for him to obtain suitable treatment.[618] Despite its absence from the summary in *Sam*, it is nonetheless probable that Smith J.A. believes that the "outside of the current limits of scientific knowledge" requirement is part of the *Resurfice* test. He included such a requirement in his description of the increased-risk-as-

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[610] *Sam v. Wilson*, paras. 34 (dissent) and 111 (majority).
[611] It is impossible to determine what test the trial judge actually used from the trial reasons. The trial judge did not say. The reasons provide no useful clues.
[612] *Sam v. Wilson*, at para. 109. The same omission occurs in Alberta decisions such as *Bowes v. Edmonton* 2007 ABCA 347.
[613] *Resurfice*, at para. 25.
[614] 2007 BCCA 129, at paras. 22-23.
[615] 2007 BCCA 349 at paras. 68-71, particularly para. 71.
[616] 2007 BCCA 94 at paras 35-42, particularly para.41.
[617] Above, at pp. 78-85 in v.2008rev4.
[618] *Sam v. Wilson*, para. 143.

causation principle in *Mooney v. British Columbia (Attorney General*).[619] He wrote, explaining why the test did not apply to the facts of *Mooney*: "This is not such a case. Proof of causation is not precluded by the limits of scientific knowledge, and there was an independent risk that Mr. R.K. would choose to harm the appellants despite anything Constable Andrichuk might do."[620]

Assuming the evidence is as outlined in the appellate reasons in *Sam*, I suggest that it is open to surmise that the majority and plaintiff missed the argument that the *Resurfice* material-contribution test might be applicable.[621] In *Sam*, the physician's negligence lay in not conducting a particular test at a particular time. "[I]n order to find that Dr. Wilson's failure to adhere to the TB Protocol caused Mr. Sam's liver failure, the trial judge would have had to conclude that blood tests in early or mid-March would likely have disclosed abnormally elevated liver enzymes."[622] So, the question of fact was whether the tests done at that time would probably have shown that the plaintiff was suffering from the condition which ultimately resulted in irreversible liver damage. The defendants' expert's position was always "possibly, but probably not". The plaintiff's expert conceded "probably not" at trial, under cross-examination. Until then, his stated opinion was "probably".[623] The experts' opinions would have been based on the totality

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[619] 2004 BCCA 402.

[620] 2004 BCCA 402 at para 154. On the other hand, British Columbia lawyers should keep in mind what Smith JA wrote in his concurring majority reasons in *Mooney v. British Columbia (Attorney General)*, 2004 BCCA 402. In those reasons (which he mentions in para. 109 of *Sam*) Smith JA asserted that there was no meaningful difference, at least for law, between the risk principle declared in *Fairchild* and the inference principle declared in *Snell*. In *Mooney*, Smith JA wrote: "In my view, the *McGhee* risk principle and the inference principle, which is also derived from *McGhee* … are the same principle stated differently." *Mooney,* at para. 153; also, para. 167. There is more detail on this issue in my discussion of *Mooney* in *Snark* at pp. 78-79 and 95-96. I pointed out in *Snark* that the scope of the risk-based material-contribution test set out by Smith JA in *Mooney* is broader than the scope set out by the Ontario Court of Appeal in *Cottrelle*, in its explanation of when the *Fairchild* principle might be applicable. (*Snark*, at pp. 78-79). If the *Snell* inference principle and the *McGhee* (hence, *Resurfice*) principle are the same principle stated differently, then how can one have restrictions the other does not have and how can one apply in situations where the other cannot and because the other does not? This inconsistency between *Mooney* and *Resurfice* may be another reason why Smith JA did not discuss the *Resurfice* material-contribution test beyond what appears in the *Sam* reasons.

[621] There is a more tactical explanation: Sam's counsel chose not to argue any version of material contribution. I will explore that alternative in sub sequent paragraphs.

[622] *Sam v. Wilson*, para. 143.

[623] *Sam v. Wilson*, para. 142. "In the case at hand, Dr. Wilson led the evidence of Dr. Wright, who said, 'The earliest that Mr. Sam would likely have begun to develop INH hepatotoxicity was in late March' and, 'I think that the chance that the liver enzymes would be abnormal in mid-March when he was in his 6th month of therapy is less than 10%'. This was 'evidence to the contrary' to an inference that Dr. Wilson's failure to adhere to the TB Protocol was a substantial cause of Mr. Sam's liver failure. Had there been other medical evidence that it was likely that blood tests in early or mid-March would have disclosed elevated liver enzymes, it would have been proper for the trial judge to weigh the conflicting opinion evidence and to reach a finding of fact one way or the other. However, Dr. Steinbrecher's evidence did not conflict with Dr. Wright's on this point. At trial, he resiled from his initial opinion that Mr. Sam's liver enzymes would probably have been elevated in mid-March and opined that 'it's probable that [elevated liver enzymes] had occurred as long as a month' before Mr. Sam presented with symptoms on April 27th, that is, 'in late March', and that 'a liver function test conducted on Mr. Sam in early March of 1996 might well have been normal'."

of the information available to them, in light of current knowledge as to what that information probably or possible meant about the level of liver enzymes actually present in Sam's blood in early or mid-March 1996, and what that information meant about the likelihood, at that time, that Sam was at risk of irreversible liver damage.

It is necessarily implicit in the experts' opinions that more information might have produced a different opinion as to the significance of the level of enzyme readings in early through mid-March, 1996. Any other conclusion would require the experts to say that even better tests would not provide a more definitive answer; in other words, that medicine already had all of the relevant information that any test could provide. We should assume that that would not have occurred. One way to obtain more information is to have better tests or different tests. Better or different tests might produce different information, allowing the experts to provide a more definitive opinion as to whether the enzyme levels as they existed, as of the time of the tests, indicated drug toxicity or some other problem related to the drug administration and its effect on the liver that required immediate attention. However, nobody seems to have asked the experts whether better tests or different tests than what existed at the time might have produced a different answer.[624] Given that both experts conceded that it was possible that the elevated liver enzymes condition existed, I suggest that we have to conclude that the experts would have agreed it was at least possible that better or different tests might exist in a few years and that it is at least possible these tests would have produced different information leading to a different conclusion, even one that helped the plaintiff.

As such, why is it wrong to say that *Sam* is a case where it was impossible for the plaintiff, in *Resurfice* terms, to use but-for to prove that the defendant's negligence caused the plaintiff's injury? Why is it wrong to say that, in *Sam*, the impossibility was due to factors that are outside of the plaintiff's control –the then existing (i.e., current) limits of scientific knowledge? This, of course, is the first branch of *Resurfice*. So, if it was the case that the *Resurfice* material-contribution doctrine test might have applied to the facts, and assuming all of the necessary findings of fact had been made, does that not mean that the B.C.C.A. should have decided the issue? Or, that it should have sent the case back for a new trial if necessary evidence was missing? In that respect, it seems there was missing evidence. It was, as indicated, the answer to this question: what would the experts have said if asked about the possibility of science developing better tests that would have provided a more definitive answer at the relevant time? It is at least arguable that the defendants have dodged this proverbial bullet, so far.

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[624] In this, *Sam* is an ironic echo of a comment in the Ontario Court of Appeal's *Barker v. Montfort Hospital*. Consider this from para. 53 of *Barker*: "In the present case, the respondents' have not shown that it was impossible to prove that the delay in carrying out the operation caused Ms. *Barker*'s injury on a balance of probabilities. As I noted earlier, none of the experts was specifically asked to consider the pathology report on the removed portion of the bowel and other evidence to give an opinion on the impact of operating at 1:30 p.m. on April 6 rather than at 11:00 p.m. on April 5 (or within several hours thereafter) *nor were they asked whether such an opinion could be given*. That said, the evidence that was led and that generally addressed the point at which the bowel likely died was unfavourable to the respondents." (emphasis added). *Plus ça change*. The conclusion in the last sentence has to be seen as the reason why the Ontario Court of Appeal went on to hold, in para. 54 , that the *Resurfice* material contribution test did not apply.

This is for those who normally read footnotes. Is there a "junk science" problem lurking in *Resurfice*? What is the law that determines what science is relevant to the question of the current limits of scientific knowledge? Is it implicit in the *Resurfice* "current limits of science" requirement that the limitation in science be one that scientists expect will eventually be overcome? The use of "current" implies a belief that the limitation will not be permanent. If so, how certain do the experts have to be that the limits will be overcome? Do the experts have to express an opinion on the likelihood of an answer and; if so, is there required threshold of likelihood? Science which is too speculative would not be allowed to prove causation. Will the rules be the same where the issue is what the current limits of scientific knowledge are? How will the courts determine what "future" science is valid science for the purpose of the *Resurfice* material-contribution test? Does the *Resurfice* "impossibility" requirement apply even if the scientists say that there is no reason to believe a better answer than "possibility" could ever exist? If the justification for the increased-risk-as-causation test is "policy", then the decision on that question is one of policy, too.

The material-contribution test as defined in *Resurfice* does not exclude, in principle, the situation where the answer as to what the cause was will never be more than possibility. However, policy could also require the conclusion that there are some cases in which the court would have to consider the likelihood that a better test would or would not be found. So, under what circumstances would it be valid to say: "we believe that we will never have better knowledge"? Current knowledge cannot define the limits of future knowledge except where a different answer would breach a supposedly sacrosanct rule of science. If one accepts that the *Resurfice* material-contribution test necessarily eliminates the causation requirement[625] – Smith JA did so in *Mooney* and said so explicitly: "The effect of the risk principle is, in the circumstances where it applies, to dispense as a matter of law with proof of causation."[626] – then it does not necessarily matter that science may never have the answer.

Consider the implications of that answer to medical malpractice actions based on delayed or improper diagnosis where the conclusion is that it is only now possible, but not probable, to determine what the answer would have been at the relevant time if the diagnosis had been performed properly. Doesn't that situation always, necessarily, satisfy the "impossibility" requirement of *Resurfice*, at least so long as there is a possibility that better tests (better knowledge) would allow a knowledgeable person to express a "probable or not probable" opinion? Don't we have the same situation for any other situation where the reason for the lack of evidence is the current limits of science? In such cases, won't the expert always have to concede that if the state of knowledge (or science) was better, the information obtained might have been more conclusive as to the person's condition or the existence of the problem?

Let us digress to a conundrum. Why, then, would the plaintiff not argue that the applicable causation test was *Resurfice* material-contribution? There is no doubt but that

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[625] As Professors Vaughan Black, Russ Brown and I have argued in our articles.

[626] *Mooney,* at para. 156.

irreversible liver damage was a foreseeable risk of the improper administration of the drug. The explanation for why the plaintiff did not argue any version of material contribution – even the version hinted at in the majority's explanation of the meaning of "material contribution" as used in *Athey* – might lie in an issue that the plaintiff won on at trial and that the defendants apparently did not raise at appeal: *contributory fault*.[627] It is possible that plaintiff's counsel wanted to avoid arguing in favour of causal test that would make it easier for the court to find a causal connection between the defendants' conduct and the liver damage, lest that redound to Sam's disadvantage by applying to Sam, too. The explanation would be a concern that that would increase the likelihood of a finding that Sam was also at fault, perhaps to a significant extent, or even that his conduct was the sole legal cause.[628]

Sam had contracted TB while being treated for alcoholism. He had been told not to drink alcohol while undergoing treatment. The combination of alcohol and the drug he was receiving is known to be a potential cause of liver damage. He admitted knowing that he had been told not to drink. Nonetheless, he drank. On any reading of the evidence, it was a significant amount. Nonetheless, the trial judge refused to hold either that the alcohol consumption was either the sole legal cause of the liver damage or even that it was contributory fault.[629] The trial judge did not set out what he thought was the applicable test for causation. The trial judge did not mention either *Snell or Athey*. In fact, the trial judge did not mention any case law on causation.[630] The trial judge did not use any version of "material contribution" or even "but-for" in his discussion of the causation issues. The language used by the judge in the relevant paragraphs of the trial reasons does not provide any useful clues as to which test the trial judge applied.[631] However, we have to assume that the trial judge concluded that the defendants' negligence was a probable cause. This is because he stated that he accepted the evidence of the plaintiff's expert who, according to the trial judge, testified that elevated liver enzymes probably would have been determined if the defendants had not been negligent; that is, if Sam had been

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[627] It is perhaps an overly cynical explanation.

[628] The BCCA pointed out in *Bohun v. Sega*l, 2008 BCCA 23 at para. 53 that the material contribution test is a "less stringent" test.

[629] The trial judge dismissed the contributory fault argument on the basis that evidence about the extent of Sam's drinking was too inconclusive: "because the quantity of alcohol consumed and the times of consumption [were] so vague." (*Sam v. Wilson*, 2004 BCSC 1419 at para 96. If the evidence as to quantity and consumption was vague, that was because Sam, honestly or otherwise, claimed to be unable to remember accurately.) One could ask, rhetorically, why the defendants were being "punished" by the consequences of Sam's bad memory? Why wasn't Sam "punished"? While it is certainly true that the onus to establish contributory fault is on the defendant, the judge was entitled to draw appropriate inferences. Recalling *Snell*, why wasn't *Sam* a case for the application of Lord Mansfield's famous precept in *Blatch v. Archer* (1774), 1 Cowp. 63, 98 E.R. 969, where Lord Mansfield stated at 970: "It is certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted." It was certainly within the power of Sam to have produced better evidence about his drinking. It was unlikely to have been in the power of the defendants to contradict him.

[630] Or any other issue.

[631] *Sam v. Wilson*, 2004 BCSC 1419 at paras. 73-96.

monitored properly and the blood tests required by the TB protocol done at the time required by the protocol.

The trial judge set out the causation issue this way. "There remains one issue that is advanced by the defendants: causation. Was it the INH or the consumption of alcohol or a combination of both by Mr. Sam that brought on this liver failure."[632] The causation conclusions were based on the trial judge preferring the evidence of Dr. Steinbrecher (the plaintiff's expert) over the evidence of Dr. Wright (the defendants' expert).[633] Dr. Steinbrecher is, you will recall, the plaintiff's expert who, at cross-examination, resiled from his opinion that carrying out the required monitoring (blood tests) probably would have disclosed the elevated liver enzyme levels in early to mid-March, 1996.[634] The trial judge wrote about the alcohol-use issue in the context of contributory fault and Sam's obligation to follow instructions:

> [93] In order to meet that standard of the reasonable patient, the patient is required to act with a reasonable communicative care and not take fool-hearty risks. The patient is not expected to possess special knowledge of specific risks which might come about due to his conduct. He is simply required to use common sense. However, in this case Mr. Sam has admitted that he was advised about the use of alcohol while taking INH.
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> [94 There is no doubt that Mr. Sam consumed alcohol during the period in which he was taking the prescription INH. His evidence I find was vague and the quantity is undetermined. We have of course Dr. Steinbrecher's view and Dr. Wright's contrary view as to whether alcohol contributed or caused the increase of enzymes in Mr. Sam's liver thereby causing its destruction.
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> [95] I am required to weigh the evidence of the experts and I may accept or reject portions of any of the doctors' evidence or the reports themselves. However, such steps must be based on consideration of each of the reports and the viva voce evidence and the respective expertise of the physicians.
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> [96] In this instance, on all the evidence, I am unable to conclude that the alcohol consumption was the triggering factor that resulted in the rise of enzymes in Mr. Sam's liver and caused its total destruction. I do so because the quantity of alcohol consumed and the times of consumption are so vague. I prefer the opinion of Dr. Steinbrecher on this issue over that of Dr. Wright. I find therefore that he was not contributorily negligent. I also find that alcohol was not the triggering cause of the destruction of his liver and that it was the INH medicine. I have found earlier in these reasons that Dr. Wilson, the Provincial Crown as the "umbrella" of the Health Unit and the TB Control were negligent in failing to insure that Mr. Sam had liver function tests done according to the TB Control protocol.

In short, it seems as if the trial judge approached causation on the basis that he had to decide two questions: (1) was it probable that the elevated enzyme levels existed in early

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632 *Sam v. Wilson*, 2004 BCSC 1419 at paras. 73
633 *Sam*, 2007 BCCA 622, para. 17; 2004 BCSC 1419 at paras. 93-96.
634 See *Sam*, 2007 BCCA 622, para.142.

to mid-March 1996 and (2) if they did, was the elevation due to Sam's drinking or drug toxicity.

The trial judge decided both questions in Sam's favour. His answer on the alcohol consumption issue is explicit. However, according to the Court of Appeal, the trial judge did not deal adequately (actually, at all) with the evidence on the first question. Contributory fault was irrelevant if the defendants' conduct was not causative. The Court of Appeal wrote:

> [119] Mr. Sam presented with signs of irreversible liver damage on April 27, 1996. Since the last previous prescribed test was in early March 1996, the trial judge had to determine whether a test at or before that time would have revealed abnormally elevated liver enzymes, the sure sign of liver damage, and if so, whether there would have been time to reverse Mr. Sam's condition. Accordingly, it was essential for him to know when in relation to April 27, 1996 abnormally elevated liver enzymes would likely have been present in Mr. Sam's blood. Obviously, if they would not have been abnormally elevated in early March 1996, a test done at that time would not have revealed the problem and Dr. Wilson's failure to ensure that a test was done would have been of no consequence: careless conduct is not actionable unless it causes damage. Both Mr. Sam and Dr. Wilson called expert medical evidence on this question. However, the trial judge did not discuss the evidence in his reasons for judgment and did not make this critical finding of fact.[635]

Rather, according to the Court of Appeal, the trial judge misunderstood Dr. Steinbrecher's evidence. The point is the point is that Dr. Steinbrecher's evidence had been used by the trial judge both to establish factual causation and to reject contributory fault. Dr. Steinbecher, however, had resiled from his opinion that elevated enzyme levels probably existed at the key time.[636] Since the trial judge's conclusions on causation for both contributory fault and causation by the defendants depended on his understanding of and preference for Dr. Steinbecher's evidence, his error should have invalidated both conclusions. However, it seems that the defendants did not appeal the trial holding that there was no contributory fault. Therefore Sam did not have to be concerned about that issue. And, in the end result, the majority held that the defendants' conduct was not causative at all, therefore the majority did not have to consider whether there was also contributory fault.

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[635] *Sam v. Wilson*, para. 119.
[636] *Sam v. Wilson*, para. 142.

There are other issues in *Sam*.[637] It is reasonable to suspect that the plaintiff will seek leave to appeal to the Supreme Court. The plaintiff succeeded at trial. The substance of the dissent was that there was sufficient evidence for the trial judge to have found in the plaintiffs' favour and that the trial judge had not committed either an error of law or palpable and overriding error of fact or mixed fact and law. The majority held that the trial judge had failed to ask or decide the central question – which was what would the tests required of the defendant doctor have probably shown if done at the required time – and this was the error of law requiring appellate intervention. "Both Mr. Sam and Dr. Wilson called expert medical evidence on this question. However, the trial judge did not discuss the evidence in his reasons for judgment and did not make this critical finding of fact."[638]

Anderson v. British Columbia, 2008 BCSC 41, is an example of a very recent decision which suggests that the trial judge understood at least some of what *Resurfice* said about when the new material-contribution test applies, but that the plaintiff's counsel did not. The plaintiff was badly injured in a single motorcycle accident. He lost control, went off the road, was thrown from the motorcycle and was seriously and permanently injured. He sued the owner and driver of another vehicle alleging that vehicle crossed into his path. He also sued British Columbia alleging that the maintenance and design of the road was deficient. The action was dismissed. After analyzing the evidence – the physical evidence, the evidence of the parties, and the expert witness evidence – the trial judge held there was no negligence on the part of the defendants. The trial judge also held that the cause of the accident was entirely the manner in which the plaintiff was driving. The trial stated that the but-for test was to be used to determine causation because it was not impossible to determine the cause of the injury and the facts amounted to "a conventional case often faced by this court". The trial judge wrote:

> [38] In this case, the plaintiff submitted that the "material contribution" test was applicable in addition to the "but for" test. The plaintiff argued that the absence of the centre line and/or the unequal pavement widths and/or the "kink" in the road, caused or "materially contributed" to Mrs. Brown's momentary lapse in not remaining on the proper side of the road. As well, the plaintiff argued that if he allowed his motorcycle to cross over the notional centre line, the absence of the centre line and equal pavement widths and/or the "kink" in the road caused or "materially contributed" to his momentary

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[637] One may be the extent to which the trial judge or jury can disregard contrary expert evidence and decide the causation issue in favour of the plaintiff. Another, related issue, may be whether the *Snell* inference is applicable where there is some positive, scientific evidence, whether favourable or unfavourable to the plaintiff, about the existence of the probable connection. In essence, the dissent applied *Resurfice* for the proposition that it was open to the trial judge to completely ignore the expert evidence. "a trial judge is not obliged to consider the opinions of expert witnesses if he can arrive at the necessary conclusions on issues of fact and responsibility without doing so." *Sam,* para. 42, quoting *Resurfice* at para. 9. I suggest it is doubtful that that is what the Supreme Court meant. The majority did not refer to this paragraph of *Resurfice*. It applied prior British Columbia appellate caselaw – which the dissent did not refer to – that "it is not open to a trial judge to draw a common-sense inference of the cause of a medical condition where both parties have led expert medical evidence of causation. . . . [W]where there is affirmative medical evidence leading to a medical conclusion it is not open to the court to apply "the common sense reasoning urged in *Snell v. Farrell*."

[638] *Sam v. Wilson*, at para 120:

> lapse. In my view, the "but for" test is applicable to this case. The submissions of counsel on the applicability of this lower test were limited. Having reviewed the circumstances of this case, I do not find that it is impossible to determine the tortious causes of the plaintiff's injuries. This is a conventional case often faced by this court and I have determined that the proper test to be applied is the "but for" test.
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> [39] Causation is essentially a practical question of fact best answered by ordinary common sense. Causation is not a matter to be determined with scientific precision. The court is to assess and sort the various aspects of evidence, consistent, contradictory, or otherwise, into a rational coherent whole in order to arrive at a conclusion as to what, in all probability, occurred.

If plaintiff's counsel did, in fact, argue that the material-contribution test is applicable "in *addition to* the but-for test", then plaintiff's counsel missed the part of *Resurfice* which makes it clear enough that the new material-contribution test is *not* applicable in addition to the but-for test. The alternative, of course, is that plaintiff's counsel did not miss the point of *Resurfice*. Rather, he realized that the plaintiff's case would fail on any correct application of the but-for test, so he also argued for what the trial judge described as "this lower test" as a fall-back. The trial judge's statement that the submissions of counsel on the applicability of this lower test were limited" (para. 38) may indicate that plaintiff's counsel realized that the *Resurfice* material-contribution test did not apply.

Bohun v. Segal,[639] is another example of medical error resulting in a delayed or wrong diagnosis and delayed treatment which, fortunately for the plaintiff's overall health did not result in any injury, or at least any significant injury, to the plaintiff. *Bohun* is an action in which the plaintiff alleged the loss of a chance of more favourable outcome. The evidence was that while the physician's negligence increased the risk of the plaintiff having an unfavourable outcome (beyond the risk that existed in any event) the increased amount and the total risk were still significantly less than 50%. Case law prior to *Resurfic*e was that that type of loss of chance claim could not satisfy the but-for test, the *Athey* material-contribution test did not change anything, and actions of this sort had to fail on causation grounds.[640] In addition, even after *Resurfice*, the Supreme Court has continued to refuse leave to appeal in cases raising the issue.[641]

The facts in *Bohun* are straight-forward. Ms. Bohun consulted Dr. Segal, a general surgeon and surgical oncologist, about a lump in a breast and her concerns regarding breast cancer in June 2001. She was referred by her family physician. Dr. Segal did not recommend a biopsy. It was admitted that he should have and that a biopsy should have been done in June 2001 or shortly thereafter. An excisional biopsy was not done until January 2002. The lump was cancerous. However, no evidence of cancer was found in

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639 2008 BCCA 23, reversing 2007 BCSC 269.

640 Except for any claims for damages there were not based on the loss of chance of a better result. See footnote ____ below.

641 A leading provincial case before *Resurfice* is Ontario's *Cottrelle v. Gerrard*, (2003), 67 O.R. (3d) 737, 233 D.L.R. (4th) 45 (C.A.) (leave to appeal refused April 22, 2004). Similar cases after *Resurfice* include *Aristorenas v. Comcare Health Services* (2006), 83 O.R. (3d) 282, 274 D.L.R. (4th) 304, 2006 CanLII 33850 (Ont. C.A.) reversing 2004 CanLII 22088 (Ont. S.C.J.); leave to appeal refused, 2007 CanLII 10550. I discuss *Aristorenas* in some detail, later, in the Ontario part of this article

her lymph nodes. Ms. Bohun had additional breast surgery including a partial right mastectomy. There was no evidence found that the cancer had metastasized. She underwent the standard chemotherapy and radiation protocols. However, her breast cancer was found to have recurred, at the same site, in mid 2004 and thereafter found t to have spread to her lungs. By July 2006, the cancer was even more wide-spread and she died in June 2007. Ms. Bohun sued Dr. Segal and her family physician. She alleged that the delay in the diagnosis of her cancer reduced her life expectancy. She claimed damages "for her reduced life expectancy and her increased pain and suffering during" the years she would be alive. The action was dismissed against the family physician. That decision was not appealed. It succeeded against Dr. Segal. Dr. Segal appealed. The appeal succeeded on all aspects of the claim described as loss of chance claims.[642]

Bohun, the trial judge applied the *Resurfice* material-contribution test to hold that causation was established where the physician's negligence (a delayed diagnosis of breast cancer) increased the patient's chance (risk) of mortality (of dying within 10 years due to cancer) from about 21% (what it would have been had the cancer been diagnosed and treated when Bohun first saw the physician) to 25%. In order to distinguish prior case law, the trial judge held that the case was one of causation, not loss of chance, and held the physician liable applying the *Resurfice* material-contribution test.[643] This is known as asserting that one has validly distinguished otherwise binding precedent. I suggest that the assertion that there is a relevant distinction fails the "reality test".[644] The trial judge held (in effect, since the judge did not explain his rationale) that the *Resurfice* material-contribution test permits and produces findings of causation based on possibility, not probability, even in medical malpractice cases, notwithstanding that the Supreme Court of Canada had ruled otherwise.[645] The trial judge in effect concluded that *Resurfice* had

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[642] The facts are summarized in the Court of Appeal's reasons at 2008 BCCA 23, paras. 1-23. The reasons for the reversal are summarized in paras. 52-54.

[643] *Bohun*, 2007 BCSC 269 at paras. 93-94.

[644] The "reality test" phrase is borrowed from the recent Ontario Court of Appeal decision, *Authorson v. Canada (Attorney General)*, 2007 ONCA 501, leave to appeal refused, 2008 CanLII 1388 (S.C.C.). Academic scholarship, England's House of Lords and the Supreme Court of Canada agree that loss of chance is a form of possibilistic causation: see, *Laferrière v. Lawson*, [1991] 1 S.C.R. 541, *Gregg v. Scott*, [2005] UKHL 2, [2005] 2 A.C. 176, and L. Khoury "Causation and Risk In The Highest Courts of Canada, England and France (2008), 124 L.Q.R. 103.

[645] *St-Jean v. Mercier, Laferrière v. Lawson, Arndt v. Smith*: see, generally, Cheifetz, "Materially Increasing The Risk of Injury As Factual Cause of Injury: *Fairchild v. Glenhaven Funeral Services Ltd. In Canada*" (2004), 29 Adv. Q. 253. Exact page references are in elsewhere in this article. The trial decision in *Bohun* should be compared to another B.C.S.C. decision from 1986: *Seyfert v. Burnaby Hospital Society* (1986), 27 D.L.R. (4th) 96, 36 C.C.L.T. 224, 1986 CarswellBC 698 and an Alberta Q.B. decision in 1998, *Sohal v. Brar*, 1998 ABQB 177 at paras. 190-197, [1999] 3 W.W.R. 553, 63 Alta. L.R. (3d) 280. In *Seyfert*, the trial judge recognized that a loss of chance award was possibilistic causation and made a percentage award. And subsequently, there were the equivalent decisions in *Athey* at trial (1994) and in the B.C.C.A (1995). *Athey*, you will recall, reversed by the Supreme Court. For those who have forgotten what the lower courts decision was in *Athey*: since the trial judge "held that the accidents were only a 25 percent cause of the disc herniation, she awarded 25 percent of the global amount to the [plaintiff]". The B.C.C.A. dismissed the doctor's appeal. See *Athey*, paras. 9 and 10. *Seyfert*, of course, was rendered moot by *Laferrière* and *Athey*, a point recognized explicitly in *Sohal v. Brar*, 1998 ABQB 177 at paras. 190-197. Intriguingly, at para. 189, *Sohal* referred to, and quoted, a portion of a passage in a 1998 B.C.C.A. decision by McLachlin J.A. (as she then was) in which Justice McLachlin recognized the still-existing difference, in law, between

overruled prior Supreme Court of Canada decisions, although the trial judge did not discuss this consequence, either. The trial judge did not explain why the facts should be characterized as creating a causation issue not a loss of chance issue; nor, apparently, did the trial judge realize that a decision in favour of the plaintiff using the material-contribution test is not a finding of factual causation.[646] Finally, while the trial judge asserted that the facts satisfied the *Resurfice* "impossibility" of proving causation on a but-for basis, the trial judge did not explain why this was so. The trial judge wrote:

> This case meets the special circumstances that require an application of the material-contribution test. In the language of *Resurfice*, it is impossible for Ms. [Bohun] to prove that Dr. Segal's negligence caused her injury using the "but for" test. The impossibility is due to factors that are outside of her control. While it is known that the cancer metastasized to other parts of Ms. Johnston's body prior to the first surgery in January 2002, it is impossible, due to the current limits of scientific knowledge, to know whether that migration took place before or after June 2001.[647]

As indicated, the Court of Appeal allowed the appeal and set aside the portion of the judgment characterized as damages for the loss of a chance of a more favourable outcome. There was an award which was affirmed, on consent, on the basis that it was not a claim for loss of a chance. This was the award "for psychological damage suffered by [the plaintiff] from the knowledge of the delayed diagnosis."[648]

The stated explanation for the dismissal of the rest of the action was that the awards were contrary to existing case-law and based on a misapprehension of the facts on the causation issues. The Court of Appeal referred to English case-law rather than the Canadian (which I have mentioned above, even though it quoted a portion of the trial reasons which cited *Laferrière*), but we can overlook that. The Court of Appeal held, in essence, that what the trial judge did was apply the *Resurfice* material-contribution test *merely because* the plaintiff's case would fail under the but-for test. That is probably not an accurate statement of what the trial judge did. It is certainly not an accurate statement of the trial judge's reasons for applying *Resurfice*. In the end result, though, the Court was right that the material contribution-test did not apply. The explanation the Court of

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discounting for contingences in damages assessment, loss of chance, and causation of damage, in breach of contract cases where the gist of the damage is the loss of opportunity (or chance). The case is *Houwelling Nurseries Ltd. v. Fisone Western Corporation*, [1988] B.C.J. No. 306, 49 D.L.R. (4th) 205 at paras. 24-25, 37 B.C.L.R.(2d) 2 (C.A.); [leave to appeal refused, [1988] S.C.C.A. No. 200, 37 B.C.L.R. (2d) 2n.] There is more discussion of damage assessment issues in Part X

[646] It is possible, but unlikely, that the trial judge meant "legal causation" rather than merely factual causation.

[647] *Bohun*, 2007 BCSC 269 at para. 94. In passing, the statement that it was *known* that the cancer had metastasized prior to January 2002 is probably wrong. Ms. *Bohun*'s lymph nodes were negative for metastasized breast cancer in January 2002. This is because there was no evidence of residual malignancy after the excisional biopsy and breast conserving surgery in January 2002: see 2008 BCCA 23 at para. 17. The point is that there was no evidence of metastatic carcinoma as of January 2002. I expect the evidence was no more than it was possible that the breast cancer had metastasized. However, that issue is not the basis upon which the Court of Appeal reversed the trial judgment.

[648] *Bohun*, 2008 BCCA 23 at paras. 38, 54. I will deal with this award at the end of my discussion of *Bohun* as it is an interesting but minor side-issue

Appeal gave is correct, but the medical issues should have been explained in a way that made the reason for the Court's legal conclusion clearer to those in the profession who do not have the luxury of free consultations with expert medical advice. The Court's stated conclusion was that the but-for test applied because the medical evidence that the trial judge accepted meant that "the trial judge had a sufficient and appropriate basis for conducting the 'but for' analysis'.[649] The Court also wrote was that, on the evidence, the physician "had disproved causation".[650]

What that had to mean, although the Court of Appeal does not make this clear enough, is that the medical evidence meant that the doctor's negligence did not make a difference, or at least a probable difference, to the ultimate outcome of Ms. Bohun's cancer. If the doctor's negligence did not make a difference to the ultimate outcome in relation to the loss of chance claims, then there was no change in the plaintiff's original position as a result of the doctor's negligence. If there was no change in the original position, then the negligence did not cause any actionable loss. If that was what the evidence meant, then but-for test was answered. *Athey* states:

> The essential purpose and most basic principle of tort law is that the plaintiff must be placed in the position he or she would have been in absent the defendant's negligence (the "original position"). However, the plaintiff is not to be placed in a position better than his or her original one. It is therefore necessary not only to determine the plaintiff's position after the tort but also to assess what the "original position" would have been. It is the difference between these positions, the "original position" and the "injured position", which is the plaintiff's loss.[651]

Recall that the negligence was in failing to recommend a biopsy. The trial judge had to have concluded that evidence would have been obtained had the biopsy been done which, obviously, did not exist and that it was that gap which could not be filled due to the limits of science, hence the impossibility requirement of *Resurfice* was met.

There was, in fact, no deficiency in the relevant evidence, even though the biopsy was not done in June 2001. This is because, when the excisional biopsy was finally done in January 2002, even though it was only then discovered that the lump was malignant, there was, nonetheless, still no evidence of found of cancer (of metastasized breast cancer cells) in the lymph notes. What this necessarily meant is that, even had the biopsy been done as early as June 2001, the most that would have been found, then, was a smaller cancerous tumour in Ms. Bohun's breast. No cancer would have been found in the lymph nodes. The point is that if cancer was not detectable (or did not exist at all) in the lymph nodes in January 2002, it did not exist in the period from June 2001 to January 2002. The size of the tumour in January 2002 was 4.5 cm.[652] It would, necessarily, have been smaller in June 2001. The trial judge found that it was at least 3.0 cm in size[653] As indicated, no evidence was found of metastasized breast cancer cells (or any other form

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649 *Bohun*, 2008 BCCA 23 at para. 50.
650 *Bohun*, 2008 BCCA 23 at para 52.
651 *Athey*, at para. 32.
652 *Bohun*, 2008 BCCA 23 at para. 16.
653 *Bohun*, 2008 BCCA 23 at para. 15; *Bohun*, 2007 BCSC 269 at para. 84, 85.

of cancer) in the lymph nodes in January 2002.[654] It is, of course, possible that there were cancer cells in the breast and lymph nodes below the level of detection in June 2001 and January 2002. However, the physician could not be held at fault for not arranging for the detection of what could not be detected, even if all required test had been done.

On the unique facts of *Bohun*, then, because there was no evidence of malignancy in the lymph nodes, and because there was expert evidence as to the likely size of the cancerous tumour as of June 2001, medical science (the medical experts) had sufficient information and tools to determine the medical questions to a sufficient level of medical certainty to permit medically valid prognoses as to the original position and the changed position. Medicine was able to provide a valid, on its terms, prognosis as to what the difference was between Ms. Bohun's future (prognosis), given that the cancer was not discovered until January 2002 and her treatment did not start until after January 2002, and what the future (prognosis) would probably have been if the biopsy had been done in June 2001, so that the breast cancer was discovered in June 2001, and her treatment begun about one-half year early. As a result, the trial judge had sufficient information, once he accepted the expert evidence, to apply the but-for test. (The *Snell* robust inference-approach must be available to the physician as well as the patient.) That evidence was that there was a 4% absolute and 20% relative increase in the risk of her dying from cancer within 10 years. The Court of Appeal described the 20% relative increase of the risk of death as a "causation probability" of 20%.[655]

The Court of Appeal held that that, on that evidence, which the trial judge accepted, the trial judge had all he needed to make a decision that the but-for test applied and that the plaintiff's action had to fail because she could not satisfy the but-for test.[656] The Court said that this evidence "disproved causation" under the but-for test.[657]

> [52] The appellant thus contends, and I agree, that based on the evidence of Dr. Olivotto and the application of the ADJUVANT! program to the circumstances that confronted the plaintiff, the defendant, while obviously not obliged to do so, had disproved causation. In order for the plaintiff to succeed, she had to prove that it was more probable than not that proper and timely diagnosis and treatment would have prevented her loss – namely, that she would likely have lived longer had Dr. Segal not been negligent (see *Hotson v. East Berkshire Area Health Authority*, [1987] 2 All E.R. 909 (H.L.)). To state it another way, Ms. Johnston had to establish that Dr. Segal's conduct made it more probable than not that the delayed diagnosis of her cancer would cause her death to occur earlier than it would have but for Dr. Segal's negligence. As Lord Hoffmann stated in *Barker v. Corus*, it was not enough to show that the defendant's conduct increased the likelihood of damage and may have caused it. The evidence of causation in this case fell far short of proof on a balance of probabilities.
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> [53] Having failed to establish causation on the available "but for" test, the causation analysis ought to have come to an end. It was not open to the plaintiff to prove, or to the

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654 *Bohun*, 2008 BCCA 23 at para. 17.
655 *Bohun*, 2008 BCCA 23 at para. 49.
656 *Bohun*, 2008 BCCA 23, at paras. 53-54.
657 *Bohun*, 2008 BCCA 23, at para. 54.

> trial judge to consider, the material contribution test. As stated in *Resurfice*, it must be impossible to prove negligence using the "but for" analysis before resort can be made to the material contribution analysis. I do not read *Resurfice* to mean that, because a plaintiff fails to prove causation on the "but for" analysis, a plaintiff may then resort to the less stringent material contribution test. As this Court recently stated in ***B.S.A. Investors Ltd. v. DSB***, 2007 BCCA 94, 69 B.C.L.R. (4th) 292, leave to appeal to S.C.C. requested, where the reasons of the trial judge indicate that the plaintiff could not meet the burden of proving causation, then the plaintiff's action should be dismissed (at para. 33).

When we excise the case law references from paragraph 52, we get the point that I made earlier. Dr. Segal's negligence did not make a difference, in law.

> In order for the plaintiff to succeed, she had to prove that it was more probable than not that proper and timely diagnosis and treatment would have prevented her loss – namely, that she would likely have lived longer had Dr. Segal not been negligent … [She] had to establish that Dr. Segal's conduct made it more probable than not that the delayed diagnosis of her cancer would cause her death to occur earlier than it would have but for Dr. Segal's negligence. … it was not enough to show that the defendant's conduct increased the likelihood of damage and may have caused it. The evidence of causation in this case fell far short of proof on a balance of probabilities.[658]

The Court of Appeal did not undertake any more analysis or explanation *Resurfice* than is contained in these two paragraphs because it did not need to. To be fair to the trial judge, his reasons do not suggest that he held (or thought) that *Resurfice* means that "because a plaintiff fails to prove causation on the 'but for' analysis, a plaintiff may then resort to the less stringent material contribution test." He specifically stated that that the facts of the case satisfied both of the *Resurfice* material-contribution requirements,[659] albeit he was wrong in that assertion in respect of the impossibility requirement. So, perhaps that statement was directed at Bohun's counsel, trial judges in British Columbia, or the legal profession at large.

The issue that the Court of Appeal did not have touch, and did not, is what would happen if the trial judge had been right about the evidence; that is, if the trial judge had been right in his view that there was a lack of evidence due to the limits of science. Recall what he wrote, in response to the position of Dr. Segal's counsel that the case was a loss of chance claim.

> [94] I do not agree. This is not a "lost chance" case, but a causation case. This case meets the special circumstances that require an application of the material-contribution test. In the language of *Resurfice*, it is impossible for Ms. Johnston to prove that Dr. Segal's negligence caused her injury using the "but for" test. The impossibility is due to factors that are outside of her control. While it is known that the cancer metastasized to other parts of Ms. Johnston's body prior to the first surgery in January 2002, it is impossible, due to the current limits of scientific knowledge, to know whether that migration took place before or after June 2001.

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[658] *Bohun*, 2008 BCCA 23 at para. 52.
[659] *Bohun*, 2007 BCSC 269 at para. 94.

> [95] Dr. Segal's negligence caused the delay in diagnosis and treatment. Any delay in the treatment of breast cancer increases the risk. The delay in treatment materially contributed to the fatal outcome Ms. Johnston now faces. Ms. Johnston's injury falls within the ambit of the risk created by Dr. Segal's negligence when he failed to do a biopsy in June 2001.[660]

Had the Court of Appeal agreed that necessary evidence was missing due to the limits of medical science – particularly where at least part of the reason it was missing would be the fault of the defendant – it would have had to face the problem of deciding whether *Resurfice* applied to medical malpractice claims, or could be distinguished on the basis that it was not a medical malpractice action.[661] Fortunately for the Court, *Bohun* was not an example of an action in which the judges had to decide "whether liability should exist [where] a plaintiff can prove that a defendant's tortious conduct may have contributed to the plaintiff's injury, but it is inherently impossible, given the nature of the situation, for the plaintiff to prove that the defendant's tortious conduct actually contributed to the injury."[662]

Bohun clearly represents an attempt to restrict the scope of the *Resurfice* material-contribution test. The statement "I do not read *Resurfice* to mean that, because a plaintiff fails to prove causation on the 'but for' analysis, a plaintiff may then resort to the less stringent material contribution test"[663] should not be understood to mean anything less than what it asserts. Did the Court of Appeal realize that if it allowed the application of the material-contribution test to the facts of *Bohun*, it would be declaring, in essence, that almost every case with issues of science where the problem was that the defendant was at fault in not doing, or doing improperly, a required test would invoke *Resurfice*? That every such case would become an "exceptional" case? "Exceptional" loses any valid meaning if almost every case is "exceptional". That would make the material-contribution test the default test: a result contrary to the explicit declaration in *Resurfice*. It is most likely that that the Court of Appeal saw that problem.

I end this discussion of the major issue in *Bohun* with a few comments about the sentence that ends the Court of Appeal's discussion of the causation issue. "As this Court recently stated in *B.S.A. Investors Ltd. v. DSB* … where the reasons of the trial judge indicate that the plaintiff could not meet the burden of proving causation, then the

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660 *Bohun*, 2007 BCSC 269, para. 94-95

661 What the trial judge did, then, was take *Resurfice* at its word and do what he was instructed to do. (In this, he was acting somewhat like the Alberta Court of Appeal in *Resurfice* when it applied the Supreme Court of Canada's dictum in *Walker Estate*.) What if, for example, metastatic breast cancer cells had been found in the lymph nodes in January 2002. That is an issue for another day. I suggest that it is a good guess that the B.C.C.A. realized that if they decided that the impossibility requirement was satisfied, they would then have to attempt to decide how to square *Resurfice* with cases such as *Lawson v. Laferrière* and *St-Jean v. Mercie*r, or hold that *Resurfice* did not apply to medical malpractice actions. It is a fair guess that the Court considered both options unpalatable, since that would be cleaning up the Supreme Court's mess.

662 The quotation is from Richard Wright, "Liability For Possible Wrongs: Causation, Statistical Probability; And The Burden Of Proof" (forthcoming, 2008 or 2009, used with permission). In our context, "inherent impossibility" should be understood to mean by reference to valid, known, science; i.e., the *Resurfice* current limits of science.

663 *Bohun*, 2008 BCCA 23, at para. 53.

plaintiff's action should be dismissed."[664] This is explicitly inconsistent with *Resurfice* unless "causation" is understood to mean both factual causation under the but-for test and legal causation under the *Resurfice* material-contribution test. The point of *Resurfice* is that there are some cases in which the fact that the plaintiff cannot meet the burden of proving causation is irrelevant, except to the fact that the plaintiff's action has to fail if actual factual causation is a requirement. As Professor Brown wrote in *Hegemony*, where *Resurfice* applies, causation is not an obstacle to liability in tort if causation is the only obstacle.[665] In any event, this one-sentence reference to *B.S.A. Investors* was clearly not intended to contradict anything said there. And, had it been so inclined, the *Bohun* panel could have used a statement in *B.S.A.* to buttress its decision. "The case did not involve principles of causation unknown to modern science; there may have been no direct evidence on point, but the trial judge was still able – and indeed required – to use the available circumstantial evidence in order to decide the point."[666]

As mentioned, there was an award which was affirmed, on consent, on the basis that it was not a claim for loss of a chance of a better result; that is, a claim that was said to not be contingent on the resolution of the causation issue or the applicability of *Resurfice*. This was the award "for psychological damage suffered by [the plaintiff] from the knowledge of the delayed diagnosis."[667] On the surface, this award tracks the award in *Laferrière v. Lawson*. According to the appellate reasons, the defence conceded that that the award was not contingent on the answer to the causation issue. "Dr. Segal concedes that the award of those damages is not contingent on a finding of causation in that Dr. Segal accepts that [the plaintiff] experienced psychological distress from the knowledge of her missed diagnosis."[668] In principle, this could make sense only if the distress was due to the fact of the diagnosis was wrong, without regard to the extent of the error or its significance. I suppose this is possible but it seems implausible. Otherwise, if the distress was to the plaintiff's belief that the error was significant, it was a belief based on the loss of something which was not legally relevant. And, psychological injury claims based on a small amount of increase in the statistical risk of an unfavourable outcome; a small amount of statistical decrease in the likelihood of the optimal or at least a better result – would raise the issue of whether the injured person was a person of reasonable fortitude.

However, the basis for the award in *Laferrière* was a bit more than just psychological injury. *Laferrière* held that the plaintiff could succeed only for compensable psychological injury caused by knowing that the treatment was delayed or improper and for decrease in the quality of life (or more pain and suffering) if the patient's life under the treatment actually received was worse than it would have been under the treatment the patient would have received had the physician not been negligent. Gonthier J. wrote that was also evidence that "proper and timely treatment would

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[664] 2008 BCCA 23, at para. 53 (citation omitted). The Ontario Court of Appeal now seems to agree: see *Martin v. Glaze-Bloc Products Inc*., 2008 ONCA 377 at para. 2

[665] Brown, *Hegemony*, at 445.

[666] 2007 BCCA 94, at para. 41.

[667] *Bohun*, 2008 BCCA 23 at paras. 38, 54.

[668] *Bohun*, 2008 BCCA 23, at para. 38

probably have provided for the patient a better quality of life even in the face of such a malignant condition."[669] This was stated to be an additional basis for the award. The Supreme Court accepted the evidence and awarded the plaintiff $10,000. The award of $25,000 affirmed in *Bohun* was *only* for damages for psychological injury.[670] Perhaps there was evidence that Ms. Bohun's treatment was different than it otherwise would have been but, if so, it is not mentioned in the reasons. She had received separate awards for non-pecuniary damages, past wage loss, loss of future earning capacity and special damages.[671] As such, it seems the *Bohun* award did not include the quality of life component included in the *Laferrière* award.

The quality of life issue – for example – less intrusive treatment so less pain and suffering – permits the courts to dodge the "person of reasonable fortitude" issues associated with awards for psychological injury unrelated to physical injury. That issue also arises if the distress was due to the belief that the doctor's error was significant, without regard to the extent to which the error increased the chance of a bad result. The issue is not relevant if that distress is characterized as causation-contingent and related to a less than likely event, perhaps even one which might never have existed.

Farrant v. Laktin[672] is another British Columbia contribution to the oeuvre. Its saving grace is, no doubt, that it is the first reported reference (of which I am aware) to *Looking Glass*, my co-written case comment on *Resurfice*.[673] *Farran*t is motor-vehicle accident case. The significant issue was the extent to which the accident was a cause of Farrant's alleged loss of income earning capacity due to back injuries allegedly caused by the accident. He had a history of back problems that predated the accident.[674] The trial judge ultimately concluded that the but-for test applied and that whatever injury it was that was causing the alleged pain that prevented Farrant from working was not caused by the motor vehicle accident. It seems that the judge was satisfied that the evidence existed which allowed a but-for decision to be made on the causation issue. The trial judge wrote: "On a consideration of all of the evidence, I find that the plaintiff has not established that, in probability, the pain symptoms that had their onset in the fall of 2004 would, but for the accident, not have developed. It is the latter that resulted n the disability underlying the plaintiff's claim for damages for loss of his capacity for work." The trial judge also wrote: "The evidence supports a finding that the plaintiff suffered soft tissue injuries as a result of the accident. These were for the most part resolved by July 2004."[675]

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[669] *Laferrière*, at 611. Gonthier J. wrote, at 611: "I am convinced that Mrs. Dupuis experienced a type of psychological suffering which was directly related to the appellant's failure to inform his patient of her condition." The award was not just for this psychological trauma. Gontheir J. also wrote at 611: "Furthermore, I am of the view that while the death caused by cancer was not caused by the appellant's failure to follow up on his patient, it is probable that Mrs. Dupuis was denied the benefit of earlier treatment which would have translated into some real improvement in her admittedly terminal condition."

[670] *Bohun*, 2008 BCCA 23, at paras. 34, 54.

[671] *Bohun*, 2007 BCSC 269, paras. 117-118.

[672] 2008 BCSC 234.

[673] Black and Cheifetz, "Through the Looking Glass, Darkly"

[674] *Farran*t, at para. 1.

[675] The application of the law to the facts is discussed in paras. 99-109. The two quotations are, from, respectively, paras. 108 and 109. "Pain" is not an injury but a symptom of an injury. I suggest that what the

Farrant is another bit of leavening for the roiling stew. *Farrant* has some discussion of the meaning of the material-contribution test.[676] However, neither the discussion nor the use suggest that the trial judge appreciated that the *Resurfice* material-contribution test is not a test for factual causation. On the other hand, *Farrant* cites *Looking Glass*[677] and is weak authority for the argument that the *Resurfice* "impossible for the plaintiff to prove …" requirement should be understood to mean "impossible for anyone to either prove or disprove even if every bit of evidence that could ever be available to the moment of trial were put before the court."[678]

Farrant begins its discussion of causation by referring to *Athey* – "The evidence calls for the application of the well known principles set out in the reasons of Major J. in *Athey v. Leonati* – and then quoting the standard paragraphs.[679] The trial judge quoted from *Resurfice* in the next two paragraphs, first repeating the passage that the but-for test is the "primary test for causation"[680] and then quoting paragraphs 24 and 25 of *Resurfice*.[681] The trial judge then discussed the application of the material-contribution test. The trial judge did not write: "the evidence raises the potential for consideration whether it is impossible for the plaintiff to prove that the defendant's negligence caused the plaintiff's injury using the "but for" test due to factors that are outside of the plaintiff's control; for example, current limits of scientific knowledge." Rather, the trial judge wrote that the issue was whether the but-for test was "unworkable". The trial judge wrote: "The evidence raises the potential for consideration whether the "but for" test is unworkable in the present circumstances."[682] The trial judge did not explain the use of *Athey*'s "unworkable". The trial judge did not state that *Resurfice*'s "impossible" is equal to *Athey*'s "unworkable".

After the sentence that I have just quoted from his reasons, the trial judge discussed the evidence, and held that *the second requirement* in *Resurfice* was satisfied because the defendant had been negligent so the issue was the application of the first requirement.[683] This time, the trial judge used part of the first requirement. He wrote:

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judge meant by para. 108 is that the injury which caused the onset of the pain in 2004 was not caused by the accident. That interpretation is supported by the statement in para. 109 "plaintiff suffered soft tissue injuries as a result of the accident. These were for the most part resolved by July 2004." On the whole, then, I think the better interpretation of the reasons is that, despite any ambiguity, the trial judge did not confuse causation of the injury with causation of the damages; that is, with the assessment of damages.

[676] The discussion of causation starts at para. 89. The discussion of the material-contribution test covers paras. 90-95.

[677] It is said that beggars can't be choosers. Nonetheless, it is ironic that the citation of *Looking Glass* contains a misspelling of my co-author's first name but the correct spelling of surname .

[678] *Farrant*, at para. 94-95 citing *Looking Glass*, at 248-50 (referred to as paras. 24-33) and quoting from page 249.

[679] *Farrant*, at para. 89

[680] *Farrant*, at para. 90.

[681] *Farrant*, at para. 91.

[682] *Farrant*, at para. 92.

[683] *Farrant*, at para. 93.

> In the present case, the second requirement for applying the "material contribution" test is satisfied. That is, by striking the plaintiff's vehicle, the defendant exposed the plaintiff to an unreasonable risk of spinal injury, and the plaintiff has suffered an injury that falls within the ambit of that risk. Whether the "material contribution" test should be applied therefore turns on whether factors beyond the plaintiff's control make it impossible for the plaintiff to prove that "but for" the defendant's negligence, the plaintiff would not have suffered injury.[684]

The trial judge left out the "limits of science" proviso. He then discussed the issue of how to prove this impossibility. He wrote that "[a]nswering this question is difficult because the standard of "impossible to prove" is murky.[685] He discussed some case law and scholarship. He stated that it appeared that the British Columbia Court of Appeal decisions in *Jackson v Kelowna General Hospital* supports the conclusion that the *Resurfice* "impossibility" requirement should be understood to mean "'impossible for anyone to either prove or disprove even if every bit of evidence that could ever be available to the moment of trial were put before the court.".[686]

> The trial judge wrote, in part
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> [94] Answering this question is difficult because the standard of "impossible to prove" is murky. This problem with the test was discussed in V. Black and D. Cheifetz, "Through the Looking Glass, Darkly: Resurfice Corp. v. Hanke", (2007) 45 Alta. L. Rev. 241 at paras. 24 – 33. The authors of that article suggest that "the Supreme Court's words, 'impossible for the plaintiff to prove,' could be rendered more helpful if we understood them as something along these lines: 'impossible for anyone to either prove or disprove even if every bit of evidence that could ever be available to the moment of trial were put before the court.'" The authors note that this understanding accords with the judgment of the House of Lords when wrestling with the same problem in *Fairchild v. Glenhaven Funeral Service Ltd*., [2002] UKHL 22, [2003] 1 A.C. 32. The authors point out that in that case, Lord Nicholls suggested that the material-contribution test would be appropriate "when, in the present state of medical knowledge, no more exact causal connection is ever capable of being established" (Fairchild at ¶42) and emphasized that the availability of the material contribution test "is emphatically not intended to lead to … a relaxation whenever a plaintiff has difficulty, perhaps understandable difficulty, in discharging the burden of proof resting on him" (Fairchild at ¶43). The authors also observe that "Lord Hoffman made a similar point in Fairchild when he authorized resort to the material contribution test when 'medical science cannot prove' what caused the harm in question."

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[684] *Farrant*, at para. 93.
[685] *Farrant*, at para. 94, citing Black & Cheifetz, *Looking Glass.*
[686] *Farrant*, at para. 94. The trial judge quoted this formula from *Looking Glass*.

> [95] Our Court of Appeal appears to have understood "impossible for the plaintiff to prove" along the lines suggested by Vaughn and Cheifetz. In *Jackson v. Kelowna General Hospital*, 2007 BCCA 129, the Court found that the plaintiff was unable to prove causation under either the "but for" or "material contribution" tests. At ¶22, the Court noted, obiter, that "the Supreme Court's articulation of the 'special circumstances' where the 'material contribution' test may be applied does not apply to this case, but to cases where it is truly impossible to say what caused the injury…. [687]

However, the trial judge did not did not express a firm opinion on the question of how to prove "impossibility" as he concluded it was not impossible for causation to be validly proven or disproven on a probably basis, applying the but-for test. After discussing some of the evidence, the trial judge concluded that the plaintiff's expert evidence" that the mechanism by which pain stimuli come to reside in the central nervous system is not well understood does not establish that proof of causation is impossible. Resort to the "material contribution" test is unnecessary."[688]

It appears that the trial judge's rationale was that factual causation could be inferred using the *Snell* robust and pragmatic inference approach, although the judge did not explain his conclusion in those words. Instead, the judge wrote: "If all of the medical opinions are rejected, the causation issue could still be resolved in the plaintiff's favour if an inference is drawn from the temporal connection between the accident and the onset of new symptoms."[689] In the paragraphs following that statement, the trial judge explained his conclusions as to which of the plaintiff's claims had been sufficiently proven on the but-for, probability, basis.

The next decision is *Carlson v. Steeves*, 2008 BCSC 270 (CanLII). *Carlson* is a medical malpractice case. The plaintiff alleged that the defendant, a family physician, failed to disclose the results of some blood tests done in 1998 that showed elevated enzyme levels indicative of the possibility of pancreatic disease; that as result the plaintiff did not alter his lifestyle as he otherwise would have; and, that as a result the plaintiff developed pancreatitis.[690] Carlson claimed, of course, that had he been properly informed, he would have altered his lifestyle. In 2001, the plaintiff suffered an acute, painful, attack of pancreatitis which hospitalized him for about 10 months and caused him to lose income.[691] Carlson alleged that Steeves, was negligent in that the physician "failed to disclose the results of a blood test taken in August 1998 and the consequences of the results."[692] The physician had asked Carlson to take further blood tests; however Carlson did not and the physician did not follow up. Carlson claimed that he did not get

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[687] *Farrant,* at paras. 94-95.
[688] *Farrant,* at paras 96-97. The quotation is from para. 97.
[689] *Farrant,* at paras. 98.
[690] "In pancreatitis, the enzymes that the pancreas produces, rather than being released into the small intestine, are released into the pancreatic tissue, resulting in the pancreas digesting itself. This causes inflammation and pain." See, *Carlson*, at para. 125.
[691] Mr. Carlson was a practising lawyer.
[692] Carslon, para. 2.

the tests done because Steeves had not told him of the blood test results and the risk of pancreatitis, a problem that Carlson did not then know about. The problems he knew about were longer-term health problems related to his heart and his obesity. Carlson claimed that had he been told about the risk of pancreatitis, he would have had the blood tests, followed the prescribed treatment, and that the attack of pancreatitis probably would not have occurred.[693]

Dr. Steeves had a duty to disclose because the consequences of pancreatitis were serious, even though Carlson's risk of developing it was low.[694] The reason for the trial judge's conclusion that "Mr. Carlson ha[d] failed to prove on a balance of probabilities that but for Dr. Steeves' failure to disclose the triglyceride results, he would not have gone on to develop pancreatitis" was entirely factual. The trial judge stated, correctly, that the first question was what a reasonable person in Carlson's position would have done if he had been given the proper information. Based on the evidence, the trial judge did not believe that Carlson would have changed his lifestyle.[695]

A better way to put it was that the trial judge was not satisfied, on the balance of probably, that Carlson would have done followed treatment protocols and changed his lifestyle. The crux of the case appears in paragraph 5 of the reasons. Pancreatitis can be caused by alcohol use. Carlson's pancreatitis could (would?) have been caused by his alcohol consumption even if he had had the blood tests and received the treatment prescribed for people with elevated triglyceride levels. People with elevated levels of triglyceride are not supposed to drink alcohol. The trial judge did not believe Carlson would have stopped drinking. In addition, the Carlson did not adduce the evidence that would have allowed the trial judge to make a decision as to the probable cause of the pancreatitis. According to the trial judge, the only expert evidence there was that the pancreatitis was caused by Carlson's alcohol use and not the high triglyceride levels. Carlson had elevated levels of triglyceride for several years without developing pancreatitis. The pancreatitis developed in August 2001. The defence led evidence that this is medically significant. The plaintiff's own experts "were not asked to, and did not, express an opinion" on this issue. Some treating physicians "were not able to come to a conclusion with respect to the cause of the pancreatitis".[696]

In effect, the trial judge was being asked to infer, using *Snell*'s robust and pragmatic inference approach, notwithstanding the absence of positive scientific evidence, indeed in the fact of contrary scientific evidence, that the cause of the pancreatitis was the high triglyceride levels and not Carlson's alcohol use. Not surprisingly, the trial judge declined, on the state of the evidence and the state of medical knowledge about the relationship between high triglyceride levels, alcohol use and

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693 *Carlson*, paras. 1-7.
694 *Carlson*, paras. 86-93.
695 *Carlson*, para. 122.
696 *Carlson*, para. 126.

pancreatitis.[697] Hence, the problem for the plaintiff.. There was clear evidence that obesity and alcohol use were risk factors and could cause pancreatitis. There was evidence of both, sufficient to allow the judge to conclude there was a probable causative connection. On the other had, that was not the case for the argument that there was etiological, causative, medical relationship between pancreatitis and high triglyceride levels. The trial judge had accepted the evidence of Dr. Steeve's expert that alcohol use is "is one of the most common causes of pancreatitis" and that Carlson's pancreatitis was caused by alcohol use.[698]

Carlson does not develop the jurisprudence. The trial judge quoted from *Resurfice*[699] but did not discuss the meaning of the material-contribution test. The trial judge then referred to the B.C. Court of Appeal's reminder in *Bohun v Segal*[700] that the Resurfice material-contribution test does not become applicable merely because the but-for test applies but, when it is applied, the plaintiff fails. In "*Bohun* … the Court of Appeal … [said] it is not appropriate, if the 'but for' test fails, to then resort to the material contribution test."[701] The trial judge then analyzed the facts in a orthodox analysis to determine what the reasonable person in the plaintiff's position would have done if the physician had properly disclosed the relevant risks; in other words, on a but-for basis.[702]

The trial judge did not believe Carslon's evidence relating to his alcohol consumption. He held that Carlson was an admitted alcoholic who probably would have continued to use drink even if had been told not to. In short, he would not have followed the advice and treatment even if had been given and prescribed.[703] However, that is not the basis upon which the case was dismissed. That basis is that Carlson had not satisfied the but-for test[704] and had not proven, on the balance of probability, that elevated triglyceride rather than alcohol use caused the pancreatitis.[705] While he did not explicitly say so, and did not have to make the finding, the trial judge held, in effect, that the likely cause of the pancreatitis was the plaintiff's alcoholism. In the end result, the trial judge,

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[697] *Carlson*, paras. 132-133. "Dr. Chan-Yan's uncontradicted evidence is that the relationship between pancreatitis and elevated triglyceride levels is incompletely understood. I accept that evidence."

[698] *Carlson*, paras. 147, 149, 151.

[699] *Carlson*, paras. 20-27.

[700] 2008 BCCA 23.

[701] *Carlson*, at para. 121

[702] *Reibl v. Hughes*, [1980] 2 S.C.R. 880, 1980 CanLII 23 (S.C.C.) and *Arndt v. Smith*, [1997] 2 S.C.R. 539, 148 D.L.R. (4th) 48, 1997 CanLII 360

[703] *Carlson*, paras. 147, 150, 155-158.

[704] *Carlson*, para. 159

[705] *Carlson*, paras. 7, 147, 152-160. "I have concluded that Dr. Steeves had a duty to disclose the test results and their implications to Mr. *Carlson* and he breached that duty by not doing so. I am satisfied that with respect to causation, a reasonable person in Mr. *Carlson*'s position would have done the re-testing suggested and would have followed the recommended treatment if he had been told. However, Mr. *Carlson* has failed to prove on a balance of probabilities that but for Dr. Steeves' failure to disclose the triglyceride results, he would not have gone on to develop pancreatitis". (para. 7.) "Mr. *Carlson* has failed to prove on a balance of probabilities that but for Dr. Steeves' failure to disclose the results, he would not have gone on to develop pancreatitis." (para. 160)

having concluded that the but-for test governed, concluded and wrote: "The "but for" has not been met. The special circumstances in which the material contribution test applies do not exist."[706]

The jurisprudence in *Taylor v. Liong*[707] is problematic, given Resurfice, even if the finding of fact on the etiology of the alleged injury is not. The trial judge found that the evidence required the conclusion that the accident probably did not cause the particular injury in issue. However, the trial also seems to have accepted, as a fact, that there was medical evidence that there was a possibility that the accident had caused the injury. The case was dismissed on the basis of an orthodox application of the Snell "robust and pragmatic" inference approach. The trial judge was not prepared to infer factual causation in the absence of positive evidence and in the fact of contrary positive scientific evidence.[708]

The plaintiff had multiple sclerosis. The plaintiff was in a car accident. The plaintiff sustained some bodily injury. The MS symptoms got worse. The plaintiff alleged that injury suffered in the accident made aggravated the MS symptoms. I suggest that on the trial judge's findings of fact, the *Resurfice* material-contribution test was applicable and the plaintiff should have succeeded, subject to one caveat that I will mention in the next paragraph. The reason for that is the following. (1)The judge found that the accident was the fault of the defendant. (2). The judge accepted the medical evidence that MS symptoms can be made worse by physical trauma and injury such as the plaintiff sustained in the accident. However, (3) the trial judge applied the but-for test and dismissed the action because the plaintiff could not prove that it was probable that the accident was a cause of the worsening of the plaintiff's symptoms. The most the plaintiff could prove was possibility – a 5% possibility, expressed statistically. That was not probability that the accident caused the plaintiff's problems.

> [122] I find that the likelihood of a causal connection between trauma and MS exacerbation is significantly less than that of a coincidental connection, in light of all the evidence adduced, and the opinion of a substantial majority of the scientific community.
>
> [123] I thus conclude that even on a robust and pragmatic view of the evidence, it does not support proof of a causal connection between mild trauma, including whiplash, and MS exacerbation, on a balance of probabilities.[709]

The plaintiff's problems were that that is the best evidence that science currently had. That does seem to satisfy the Resufice impossibility requirements. The caveat, though, is the second *Resurfice* "general requirement" – that the injury be within the ambit of the risk. Is exacerbating the plaintiff's pre-existing MS a duty issue, a proximate cause issue, or an assessment of damages issue? In other words, it is a duty or causation

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[706] *Carlson*, para 159.
[707] 2008 BCSC 242
[708] In that respect, his decision was jurisprudentially correct but, more importantly for him, consistent with British Columbia appellate authority: see, *Snark*, at 31-36, 46-49.
[709] *Taylor*, pars. 122-123.

or scope of liability question (which would include some "crumbling skull issues) or is it a thin-skull damages assessment issue? The trial judge did not discuss this issue in any detail, likely because he dismissed the action on the basis that the plaintiff had not established the causal link on a probability basis. He wrote:

> [116] My conclusion is neither intended to nor capable of resolving any lingering scientific debate on the effect of trauma on MS. My reference to and reliance on the scientific evidence in this case, as I expressed in my ruling on admissibility, is necessary to understand whether the plaintiff's MS exacerbation could fall within the scope of the risk of injury to which the defendants' tortious behaviour exposed her.[710]
>
> [117] In finding that the evidence falls short of establishing a causal link on a balance of probabilities, I also rely on the fact that a substantial majority of the relevant scientific community has rejected the notion of a causal connection based on developments in understanding the pathogenesis of the disease, epidemiological studies, reanalysis of previous studies said to support the link, and a weakening of the biological plausibility of the theory through studies such as the Werring Study and the Filippi Study. In the result, I have an advantage over the court in *Dingley*, *supra*, in knowing what the future held for the issue in the scientific community in the years following that judgment.
>
> [118] I do not find, in the evidence before me, persuasive proof of a causal relationship between trauma and MS exacerbation. Dr. Poser, who was the primary witness for the plaintiff, testified as an advocate for a theory that once had currency but has since been eroded by the advance of scientific studies and knowledge. I found in his evidence a tendency to overstate the implications of studies that he relied on, and to be unduly dismissive of those that undermined his theory. While he has clearly achieved the status of a foremost expert in his field of neurology, I find that his commitment to his own theory of causation has to some extent impaired his objectivity and reliability as an expert witness.

One explanation why might be that the trial judge did not consider the foreseeability issue to be one that caused any problem in the but-for analysis at the duty level.. If this is correct, then it could not be a problem for the material contribution test. That leaves only the thin-skull issue.

The defendant moved to have the action dismissed, essentially on the basis that motion judge accepted: the plaintiff's inability to establish probable cause. The following excerpts form the reasons complete the picture.

> [1] This is an action for damages for injuries arising out of a motor vehicle accident which occurred on May 22, 1998. At issue on this application for judgment brought by the defendants … is whether the evidence proves on a balance of probabilities that trauma can make multiple sclerosis ("MS") symptomatic or otherwise alter the natural course of the disease.

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[710] *Taylor*, paras 116

[22] … I am not being asked through this application to determine a scientific rather than a legal issue. The question before me is whether the evidence adduced proves on the balance of probabilities that trauma, including mild head trauma or whiplash, is capable of triggering or exacerbating MS symptoms. That is a question that is necessary to answer to reach a meaningful conclusion in this law suit. In other words, it is a legal question, the answer to which is neither designed nor conducive to resolving any lingering scientific debate on the issue within the medical or scientific world.

[24] Moreover, while I appreciate that the ultimate issue of causation is whether the plaintiff's MS symptoms were triggered or exacerbated by the accident, the general issue – whether trauma can trigger MS symptoms – dominates the ultimate or specific issue to such an extent that it must be proved on a balance of probabilities to engage even a remote possibility of a connection between the accident and the plaintiff's ensuing symptomatic MS. In other words, if the Court does not accept on the balance of probabilities that MS can be triggered by trauma, how can the plaintiff prove on a balance of probabilities that her MS symptoms were exacerbated by the trauma of the accident? If the plaintiff's specific circumstances, condition, and course of treatment constituted meaningful evidence of a causal connection between trauma and the onset of MS, those issues would have been cogent considerations on the issue of the reliability and hence admissibility of the impugned expert evidence. They were not.

[25] Hence, it would simply not be logical to conclude that the ultimate issue of the causation of the plaintiff's MS onset could be proved on a balance of probabilities while concluding the general proposition necessary to establish could not be proved.

[26] Such an illogical result would be amplified in the present case in which, on the plaintiff's own theory, the MS symptoms induced by trauma occur in something less than 5% of all cases.

[27] I therefore conclude that what is at issue is not a general scientific theory, but rather an essential element of the plaintiff's case insofar as she asserts a causal connection between the accident and the onset or exacerbation of her MS symptoms.

[115] …The question before … [is] whether trauma, including mild head trauma or whiplash injury, can cause the exacerbation of MS symptoms … I conclude that the plaintiff has not proved on a balance of probabilities that such a causal connection exists.

[121] … I do not find in any of the studies or analysis relied on by the plaintiff, taken either individually or collectively, a logical linchpin for proof of the causal relationship being espoused ….

[122] I find that the likelihood of a causal connection between trauma and MS exacerbation is significantly less than that of a coincidental connection, in light of all the evidence adduced, and the opinion of a substantial majority of the scientific community.

[123] I thus conclude that even on a robust and pragmatic view of the evidence, it does not support proof of a causal connection between mild trauma, including whiplash, and MS exacerbation, on a balance of probabilities.

The motion judge did not explain why these findings did not trigger *Resurfice* given that there was at least some evidence that trauma could exacerbate MS symptoms. The only explanation might be that the motion judge held that none of this evidence was valid (or sufficiently persuasive) any more.[711] A problem for that view is that that these paragraphs disclose the existence of *some evidence* of causal connection. Finally, there is the fact that the judge had ruled the evidence admissible.[712] That meant it was more than junk science.

All the motion judge did was quote from *Resurfice*[713] What seems to have happened, if the reasons are accurate, is that the plaintiff did not argue that the material-contribution test applied. Instead, the plaintiff argued that he was entitled to succeed on the basis of the *Snell* "robust and pragmatic approach to the facts". I believe that this is known as cutting one's throat.

> [111] Counsel for the plaintiff does not contend that this is a case where the court is entitled to make an inference of causation in the absence of scientific proof. Rather, the plaintiff submitted that the court should not approach the question of causation rigidly, but with common sense following "a robust and pragmatic approach to the facts". Counsel for the plaintiff submitted the following in para. 85 of his written submissions on this application:
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> > Pursuant to Snell, the Court is entitled to take a pragmatic approach to causation even in the absence of supporting medical information. In other words the Court is entitled to consider the Plaintiff's previous health and the temporal connection with the Accident. If no alternative explanation was offered by the Defendants an inference of causation would have been likely, because there would have been no evidence to the contrary. Where, as here, the defence does adduce contrary information, the Court must consider whether it was in the Plaintiff's power to adduce more evidence of causation or whether more evidence contrary to causation could have been adduced by the Defendant. In doing so the Court ought to take a robust and pragmatic approach to the facts.[714]

The judge rejected that argument, citing and applying a number of older cases where the argument had been made and rejected.[715] The trial judge summarized his view of the evidence this way. "I do not find, in the evidence before me, persuasive proof of a causal relationship between trauma and MS exacerbation."[716] "I thus conclude that even on a robust and pragmatic view of the evidence, it does not support proof of a causal connection between mild trauma, including whiplash, and MS exacerbation, on a balance of probabilities."[717]

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[711] *Taylor*, paras. 117-19.
[712] *Taylor*, at para 3; *Taylor* v. Liong, 2007 BCSC 231, 2007 BCSC 231, 70 B.C.L.R. (4th) 284
[713] *Taylor*, para 110, quotes paras 20-25 of *Resurfice*, r
[714] *Taylor*, para. 111.
[715] *Taylor*, paras. 112-117, for example.
[716] *Taylor*, para. 118.
[717] *Taylor*, para. 123. The motion judge wrote in para. 122: "I find that the likelihood of a causal connection between trauma and MS exacerbation is significantly less than that of a coincidental connection,

The motion judge should have considered whether *Resurfice* applied. He had made findings that there was at least a possibility that there was, for this plaintiff, at least a possibility that the accident caused the MS symptoms exacerbation.[718] As such, it is important to realize that the motion judge did not rule that there was no valid evidence that trauma could cause an exacerbation of MS symptoms. Had that been the situation, then the case would have been analogous to *Aristorenas*, where there was no valid medical evidence that delay in treatment could be a cause of necrotizing fasciitis. This is shown by the motion judge's discussion of the specific and general medical and general scientific issues.[719] I is clear enough that what the judge meant was that neither general causation – that trauma could exacerbate MS symptoms – nor, necessarily then, specific causation – that the trauma exacerbated the plaintiff's MS – could be proven to be more likely than not.

Taylor leaves us with at least the following questions. I from the reasons, again, to set the context

> [25] Hence, it would simply not be logical to conclude that the ultimate issue of the causation of the plaintiff's MS onset could be proved on a balance of probabilities while concluding the general proposition necessary to establish could not be proved.
>
> [26] Such an illogical result would be amplified in the present case in which, on the plaintiff's own theory, the MS symptoms induced by trauma occur in something less than 5% of all cases.[720]

If, as I have suggested, they were not intended to mean that Taylor had failed (because she could not) to establish general causation at all, then why did the judge and the plaintiff not see that the foundation for *Resurfice* material contribution might exist? Why, seemingly, did the plaintiff argue but-for under the *Snell* robust and pragmatic approach?

The answer, given *Resurfice,* has to be the fact that the plaintiff had some experts who asserted that that trauma was a probable cause of the exacerbation of the plaintiff's symptoms. They were reputable physicians. Perhaps that is the answer, and nothing more. Recall that first of the *Resurfice* criteria is:

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in light of all the evidence adduced, and the opinion of a substantial majority of the scientific community." Could we conclude from this that a connection "significantly less than that of a coincidental connection" would not be enough of a possibility even for the *Resurfice* material contribution test? That might well depend, in practice, though it should not in principle, on whether the extent of liability is solidary or proportional.

[718] *Taylor*, para. 26: "Such an illogical result would be amplified in the present case in which, on the plaintiff's own theory, the MS symptoms induced by trauma occur in something less than 5% of all cases." *Taylor*, para. 27: "I find that the likelihood of a causal connection between trauma and MS exacerbation is significantly less than that of a coincidental connection, in light of all the evidence adduced, and the opinion of a substantial majority of the scientific community."

[719] *Taylor*, paras. 24-27 and elsewhere.

[720] *Taylor*, paras. 25-26.

> 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.[721]

Taylor had expert evidence. That evidence had been held to be admissible. That evidence, if accepted, would have proven Taylor's cause on the balance of probability. Taylor, then, by the way she presented her case, eliminated the material-contribution test.[722]

One circumstance that seems to be contributing to the welter of conflicting, inconsistent, trial and appellate decisions about the meaning of the *Resurfice* material-contribution test is what is the apparent inability, or unwillingness, of counsel to do the required few moments of research to make sure their law is up-to-date, and the seeming inclination of some judges to accept the inadequacy of the law they have been given as all there is. Given the existence and ease of use of *free* databases such as CanLII, even in areas as remote as Vancouver, how else should we explain the existence of decisions such as *Crane v. Surrey (City)*[723] in which the trial judge wrote that in *Resurfice*, the Supreme Court "reaffirmed and elaborated upon the test it set out in *Athey v. Leonati* …. Under this test, it is for the plaintiff to demonstrate on a balance of probabilities that, "but for" the negligence of the defendant, the accident would not have occurred."[724] That is the extent of the discussion of *Resurfice* or the question of the applicable test for proof of factual causation.[725]

The trial judge then proceeded to analyze the facts. It seems that Crane had been riding his bike in the concrete bowl of a skateboard park. He fell off. He sustained injuries including a concussion, some broken bones and sprains to various parts of his body including his groin. He sued Surrey, alleging that he fell because actionable problems in the condition of the surface of the bowl. The problems included a small amount of wet paint on the surface of the bowl.[726] Crane alleged that his tires skidded on the paint. Unfortunately for Mr. Crane, the trial judge had significant difficulty with

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[721] *Resurfice*, para. 25.

[722] Based on what the judge said about the change in the scientific communities' views, the reasons make me wonder what might have happened if the plaintff's expert evidence had been different, so that the experts merely said words to the effect of "Based on new information, we can't say anything more than possible."

[723] 2008 BCSC 274

[724] 2008 BCSC 247 at para. 52. I have omitted the citation.

[725] *Athey* and *Resurfice* are the only cases mentioned on the issue of the applicable test. Crane was tried in June and November 2007 with additional written submissions on January 29 and, ironically, February 8, 2008, the anniversary date of the release of *Resurfice*. An oddity of *Crane* is that this statement could be seen as, literally, explicitly, an application of the decision of the British Columbia Court of Appeal in *Sam v. Wilson*, at paras. 107-109, where the B.C. C.A. seems to have inserted, or reintroduced, or injected, or "somethinged" the meaning of Athey's material-contribution test, whatever that meaning was, into the meaning of the but-fort test after *Resurfice*. However, the trial judge did not cite authority for the quoted summary of *Resurfice*.

[726] 2008 BCSC 247 at para. 2, 3. Mr. Crane is the only plaintiff. Liability was the only issue. I assume tha that is why the reasons do not mention the consequences of the groin sprain.

aspects of his evidence on liability,[727] found that even if the bike wheels skidded on the paint it had not been applied by Surrey employees but by unknown and unauthorized persons,[728] Surrey was not otherwise negligent,[729]and dismissed the action on the basis that Crane had not "not demonstrated on a balance of probabilities that the City was negligent."[730]

Dewitt v. Takacs[731] is an example of a trial decision which may well be correct in result, and may not be appealed because neither side wants to risk a new trial or an unfavourable result on appeal. However, it contains questionable jurisprudence

The plaintiff was involved in a motor vehicle accident. He sustained soft-tissue injuries to his back and neck. He had pre-existing, chronic, long-standing, depression as well as some back and neck problems. At the time of the accident, he had been off-work for about 8 months because of his depression. The back injuries did not resolve as might have been expected. He attempted to return to work – a job as a steel fabricator involving heavy work, lifting, and climbing – but he unable to continue on account of back pain. Not surprisingly, The plaintiff's position at trial was that, but for the accident, he would have returned to work in due course; he was a "thin-skull" person who, on account of his pre-existing physical and psychological problems, suffered more severe consequences that might have been expected from the accident; but was nonetheless totally disabled from returning to work as result of the accident.[732]

The trial judge summarized the plaintiff's position this way:

> The plaintiff's counsel says that he suffered chronic depression prior to the accident. He argues that as a result of the injuries to the plaintiff's back, given a pre-existing degenerative condition, or given the existence of the ongoing depression, it has caused a circular and continuing situation that will likely be permanent such that the plaintiff is totally disabled from his chosen work and any reasonable remunerative physical work.[733]

The defence position was that the plaintiff was exaggerating, his accident-related complaints were minor and had resolved, if they had not it was because he failed to take

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[727] For example, 2008 BCSC 247 at paras. 67, 72-74
[728] 2008 BCSC 247 at paras.77-80
[729] 2008 BCSC 247 at paras. 80-82
[730] 2008 BCSC 247 at para. 90. A remarkable aspect of the case is that the trial judge declined to find that Crane assumed the risk of exactly what happened, given that Crane was apparently an experienced rider who saw the paint and nonetheless attempted a very risky stunt knowing that he would ride over the paint in the course of the stunt. (See para. 89.) Did Crane, in fact, ride over the paint and fall on it? As the trial judge noted, for some unexplained reason, Crane did not produce his clothing. And, apparently, the paint on his bike tires did not match the paint used by City forces. (See, para. 72.)
[731] 2008 BCSC 314
[732] 2008 BCSC 314 at paras.4-9.
[733] 2008 BCSC 314 at para. 8.

proper treatment, and his complaints were not related to the accident but were due to his pre-existing problems.[734]

The trial judge preferred the plaintiff's version, just not to the extent that the plaintiff and counsel might have hoped. The judge found that the accident exacerbated the plaintiff's pre-existing back and neck problems to some extent but not to the extent alleged by the plaintiff and, of course, that the plaintiff could not recover for pre-existing problems or problems that would have manifested even if the accident had not occurred..[735]

> Mr. Dewitt is not entitled to damages for his pre-accident state. His depression predated the accident and would have existed in any event. However, I find because of his injuries on top of his pre-existing psychological state, he continues to suffer low back pain and to the extent he has, he is entitled to be compensated. The plaintiff has established that he has continuing low back problems and his continuing low back problems were caused by the defendant's negligence.[736]

The trial judge held that if the accident exacerbated the depression at all, the effect was minor.[737]

The trial judge did not discuss the meaning of the *Resurfice* material-contribution test. All the trial judge did was quote and apply paragraphs 107-109 of the B.C. C.A's discussion of *Resurfice* in *Sam v. Wilson*.[738] That amounted to: (1) quoting paras. 21-23 of *Resurfice* – the paragraphs which state that the but-for test is the primary test; (2) applying *Sam* for the proposition holding that the defendant would be liable for any "indivisible damage" caused by both the accident and the plaintiff's pre-existing problems so long as the accident "made a material contribution beyond *de minimis* to the damage; that is, applying the *Athey* material-contribution test as the meaning of the but-for test on the basis that was what the but-for test now meant, after *Resurfice*; and (3) necessarily connected to point (2), applying *Sam* for the proposition that "material contribution" as used in *Athey* "is synonymous with 'substantial connection' as that phrase was used by McLachlin C.J.C" in *Resurfice*.[739] What about the *Resurfice* material-contribution test? The trial judge was careful to also quote the *Sam v. Wilson* admonition that "material contribution" as used in *Athey* is a "causal yardstick should not be confused with the "material contribution test" in *Resurfice*.[740] The trial judge said nothing more about that test.

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[734] 2008 BCSC 314 at paras. 12-16.
[735] 2008 BCSC 314 at paras. 78, 85, 93-96.
[736] 2008 BCSC 314 at para. 85.
[737] 2008 BCSC 314 at para. 79.
[738] 2007 BCCA 622.
[739] 2008 BCSC 314 at para.81.
[740] 2008 BCSC 314 at para 81.

One logical, although perhaps cynical, explanation for the approach to *Resurfice* taken by the trial judge might be this. The judge concluded, probably correctly based on the evidence outlined in the reasons for judgment, that his conclusion as to the extent of the connection between the accident and the plaintiff's post-accident complaints depended primarily on the plaintiff's credibility. There was no issue of science and no gap in the evidence for any other reason. The issue, then, was a simple (and as difficult) as this. The trial judge had to decide "what caused what", applying (though he did not quote it) the passage in *Blackwater* where McLachlin C.J. wrote:

> In reality, all these sources of trauma fused with subsequent experiences to create the problems that have beset Mr. Barney all his life. Untangling the different sources of damage and loss may be nigh impossible. Yet the law requires that it be done, since at law a plaintiff is entitled only to be compensated for loss caused by the actionable wrong. It is the "essential purpose and most basic principle of tort law" that the plaintiff be placed in the position he or she would have been in had the tort not been committed: *Athey v. Leonati*, 1996 CanLII 183 (S.C.C.), [1996] 3 S.C.R. 458, at para. 32.[741]

The case was all about fact and not law. So, the trial judge might have reasoned this way. (1) It was obvious, on the facts, that the but-for test was the applicable test. (2) He was going to award the plaintiff a bit more than $100,000 on what might be a generous view of the facts ($40,000 for general damages, $45,000 for past loss of income and $25,000 for loss of earning capacity). (3) Therefore, it was safe to avoid discussing the *Resurfice* material-contribution test because the only person who might complain would be the plaintiff. Perhaps the trial judge assumed the plaintiff would think twice before inviting a cross-appeal on the damages assessment by appealing the amount of the award. Only the plaintiff would appeal on the grounds that the trial judge erred in applying the but-for test rather than *Resurfice* material-contribution. Obviously, the defendant would not.

Would the plaintiff have had any jurisprudential basis upon which to complain? That is, could the plaintiff have referred to case law which held that the Resurfice material-contribution test applies in cases of indivisible injury caused by multiple causes? Cases asserting this already exist. At least three of them are British Columbia Superior Court decisions. They are referred to earlier in this part: *Greenall v. MacDougall*,[742] *Ashcroft v. Dhaliwal*[743] and Marszalek v. Bishop.[744] All three cases assert that the *Resurfice* material-contribution testis the applicable test whenever the plaintiff claims for indivisible damage alleged to have been caused by two or more events. The reasons do not tell us what case law the trial judge was given.

The trial judge's assessment of the effect of the accident on the plaintiff may well be factually correct, in reality, as well as correct on the evidence that was before the

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741 *Blackwater v. Plint*, at para. 74.
742 2007 BCSC 339, at para. 39.
743 2007 BCSC 533, at para. 44-45.
744 2007 BCSC 324 at para. 170, especially paras. 178-182, 199, and 205.

court. And, of course, the trial judge was bound by *Sam v. Wilson*. However, that does not excuse the fact that we now have one more case which disinters the corpse of the *Athey* material-contribution test – more than de minimis equal material contribution equals factual cause – dressing this up in the Emperor's new clothes bearing the label "substantial connection".

Pelkinen v. Unrau[745] is a March 2008 trial decision. The case seems to equate the *Resurfice* impossibility requirement – "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"[746] – with the *Athey* "unworkable" requirement – "[t]he "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."[747] The trial judge did not quote the "unworkable" passage from *Athey,* though quoted other portions, and did not explain why she had used "unworkable" rather than "impossible". Having said that, the reason the trial judge gave for stating that the case was not one where the but-fort test was "unworkable" necessarily means the facts would not satisfy the *Resurfice* impossibility requirement. Essentially, the trial judge concluded that there was enough evidence to make a valid decision as to whether the defendant's negligence was or was not a probable cause of the plaintiff's injuries.

The case was tried in November 2007 and March 2008. The trial judge referred to *Resurfice*, stating "the principles of causation reiterated by the court are as follows":

> 1. The basic test for determining causation remains the "but for" test. This applies to multiple injuries. The plaintiff bears the onus of showing that "but for" the negligent act or omission of each defendant, the injury would not have occurred.
>
> 2. 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. A defendant is not liable for injuries that may be due to other factors and not the fault of anyone.
>
> 3. In special circumstances the law recognizes exceptions to the basic "but for" test and applies a "material contribution" test where (1) it is impossible to prove the defendant's negligence caused the injury using the "but for" test because of factors outside the plaintiff's control, i.e. beyond the limits of current

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[745] 2008 BCSC 375.
[746] *Resurfice*,, para. 26
[747] *Athey*, at para. 15: 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".

> scientific knowledge; and (2) it must be clear that the plaintiff's injury falls within the ambit of the risk created by the defendant's breach of the duty of care.[748]

The trial judge then quoted from *Athey*. "In regard to the application of the "but for" test, the Supreme Court of Canada said in *Athey v. Leonati* at [paras]16 and 17":

> 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; as Lord Salmon stated in *Alphacell Ltd. v. Woodward*, [1972] 2 All E.R. 475, at p. 490, and as was quoted by Sopinka J. at p. 328, 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.[749]

The trial judge then stated that the but-for test applied rather than the material-contribution test because the facts were

> not one of those cases where the "but for" test is unworkable and must be replaced by the "material contribution" test. This is merely a situation where the court must determine whether all or any portion of the plaintiff's symptoms are substantially connected to the accident.[750]

The trial judge did not define "substantially connected". The trial judge concluded that the plaintiff had established but-for cause with respect to some but not all of her complaints. For example, the trial judge wrote that "[b]ased upon this evidence, I find that Ms. Pelkinen has established on the balance of probabilities a substantial connection between the defendants' negligence and the panic disorder she continues to suffer from"[751] but "[t]here is insufficient evidence, however, to establish that the panic attacks and post-traumatic stress disorder have caused her almost complete withdrawal from all activities due to exhaustion and lack of motivation. There is simply no medical evidence

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[748] 2008 BCSC 375, para. 73.
[749] 2008 BCSC 375, at para. 74.
[750] 2008 BCSC 375, at para. 75.
[751] 2008 BCSC 375, at para. 82.

to support a connection between these severe symptoms of depression and the motor vehicle accident."[752]

Dewitt v. Takacs[753] seems to be the decision of a very astute trial judge who realized that that all he had to do to formally deal with whatever it was that *Resurfice* means to the but-for test was to not use "cause" as the verb rather than any version of "materially contribute" as the verb.[754] For example, rather than stating that the defendant's negligence "materially contributed" to the compensable injuries, the trial judge wrote that the accident "caused" the compensable injuries: "Upon a consideration of all of the evidence, I find that the plaintiff's complaint of continuing low back pain was caused by the motor vehicle accident"[755] and

> Mr. Dewitt is not entitled to damages for his pre-accident state. His depression predated the accident and would have existed in any event. However, I find because of his injuries on top of his pre-existing psychological state, he continues to suffer low back pain and to the extent he has, he is entitled to be compensated. The plaintiff has established that he has continuing low back problems and his continuing low back problems were caused by the defendant's negligence.[756]

The fact pattern was one which could very well have resulted in the trial judge applying the *Athey* version of the material-contribution test had the case been tried before *Resurfice*. The plaintiff had pre-existing back problems and psychological problems. He alleged that he accident caused new neck and back problems and exacerbated his pre-existing physical and psychological ailments.

It is not rhetorical to ask what it means if we assume that *Dewitt v. Takacs* is correctly decided, now, and would have been correctly decided before *Resurfice* as an application of *Athey* material-contribution. One answer is self-evident: that *Athey* material-contribution was but-for in other words.

Randhawa v. Hwang[757] is another example of the fact that the message as to the meaning of the *Resurfice* material-contribution test is not getting through to some members of the bar and the judiciary. Based on the result and the trial judge's reasons, it is clear that the trial judge thought that the Resurfice material-contribution test is a test for the existence of factual causation.[758] *Randhawa* is nothing more than a case that that trial judge would have been decided on *Athey* material-contribution grounds prior to

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[752] 2008 BCSC 376, at para. 83.
[753] 2008 BCSC 314.
[754] See 2008 BCSC 314, at paras. 79-85.
[755] 2008 BCSC 314, at para. 84.
[756] 2008 BCSC 314, at para. 85.
[757] 2008 BCSC 435.
[758] That fact, alone, makes it exquisitely clear that the trial judge either was not aware of, or misunderstood, *Sam v. Wilson*, 2007 BCCA 622. The statement by Smith J.A. in para. 109 of *Sam* is explicit enough. The Resurfice material-contribution test "not a test of causation at all: rather, it is a rule of law based on policy." *Sam* is not mentioned in the reasons, nor is any other B.C. Court of Appeal decision on the meaning of *Resurfice*.

Resurfice. The plaintiff had pre-existing physical and psychological problems which at least overlapped with the additional problems she claimed resulted from the attributed to the car accident in respect of which she sued the defendant.[759] The trial judge found that the plaintiffs problems after the accident were different from those before the accident.[760] The trial judge held that accident probably caused the new problems.[761] The trial judge accepted the plaintiff's expert medical evidence that her new complaints were probably caused by the accident and rejected the defence evidence that there was no difference or that the complaints were a continuation of the prior condition.[762] The trial judge held that "on the balance of probabilities" the accident "materially contributed" to the injuries.[763] Yet, despite all that, the trial judge held that she was deciding causation based on *Resurfice* material contribution because it was impossible for the plaintiff to establish factual causation on a but-for basis.[764]

The trial judge did not explain why it was impossible for her to find that the plaintiff had established causation on a but-for basis when she had accepted the evidence of the plaintiff's physicians that the accident probably caused the plaintiffs new, different, complaints. There is nothing in the reasons to suggest that the experts opined that it was not possible to express an opinion in terms of probability. All the reasons contain is the statement that all of the experts agreed that there were some aspects of the plaintiff's aetiology which might not show up on MRI or CT scans and that some people have complaints of "pain related to musculoligamentous injury that cannot be attributed to 'hard, organic pathology' visible on MRI or CT scans."[765] The trial held that this meant that it was impossible for the plaintiff to establish causation on a probability basis using but-for.[766]

The trial judge seems to have misunderstood the point of the experts' evidence on this issue since it is clear, from what she said their opinions were, that they were able to opine on the basis of probability. It is explicitly clear that the experts did express opinions in terms of probability. The plaintiff's experts said "probably yes" and the defendant's said "probably no". There is nothing in the reasons that explains why the trial judge did not, simply, say that she accepted the evidence of the plaintiff's doctors that the accident was a probable cause of the new complaints. There is nothing in the reasons that explains why the trial judge did not mention any of *Sam v. Wilson*, or *Bohun v. Segal*, or *B.S.A. Investors v. DSB*. In fact, the reasons mention no appellate cases on the meaning of the *Resurfice* material-contribution test and mention. The only case mentioned, other than

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[759] 2008 BCSC 435 at paras 1 and 3. This is not surprising. The plaintiff had been involved in at least five prior motor vehicle accidents and had at least one prior work-related accident.
[760] 2008 BCSC 435 at para. 19.
[761] 2008 BCSC 435 at paras. 37-38.
[762] 2008 BCSC 435 at paras. 37-38.
[763] 2008 BCSC 435 at para. 38.
[764] 2008 BCSC 435 at para. 23.
[765] 2008 BCSC 435 at para. 23.
[766] 2008 BCSC 435 at para. 23: "In this case, Ms. Randhawa's injury falls within the ambit of the risk created by the defendant's breach. In addition, it is not possible for Ms. Randhawa to prove, using scientific evidence, that her injuries were caused by the collision of the two vehicles in 2003."

Resurfice, on the meaning of *Resurfice*, is in *Farrant v. Laktin*.[767] I assume that, in light of her findings of fact, the trial judge would not have held that the Resurfice material-contribution test applied she had the reasons in *Sam v. Wilson*. I assume that the judge would have cast her reasons in accordance with Sam and held that the accident was a probable cause, and a but-for cause, of the new complaints because it was a materially contributing cause. *Randhawa,* like *Dewitt v. Takacs,* is more proof that the *Athey* material-contribution was but-for in other words.

There is another aspect of *Randhawa* which is more evidence that the trial judge did not have the appellate reasons in *Bohun v. Segal*, that the trial judge was confused as to the meaning of the *Resurfice* material contribution-test, and that what the trial judge did, on causation, was to apply either the but-for test or the *Athey* material-contribution test. In *Bohun*, the trial judge had held that the defendant was at fault, that it was impossible for the plaintiff to establish causation using the but-for test on account of limitations in scientific knowledge, that the Resurfice material-contribution test applied, but that there was an 80% change that the problem would have occurred in any event for pre-existing reasons unrelated to the defendant's negligence. Therefore, the trial judge gave the plaintiff judgment for 20% of her assessed damages.[768] The Court of Appeal reversed the trial decision holding that there was sufficient evidence for a decision to be made on a but-for, probability, basis, and that that decision was that the defendant's negligence was not a probable cause.[769]

In *Randhawa*, in assessing damages, the trial judge correctly instructed herself, applying orthodox damages jurisprudence, that she had to look at the positive and negative contingencies; that is, that she had to compare the plaintiff's original position with what it was, now. The trial judge, of course, cited *Athey*.[770] She then stated: "I find the risk that the pre-existing condition of Ms. Randhawa's spine and her psychological fragility would have detrimentally affected her in the future, regardless of the defendant's negligence, to be 40%."[771] What that statement means is that she found that there was 60% chance the problems would not have occurred if the accident had not occurred. That means that she was able to conclude, on the evidence, that the accident was a probable cause of the symptoms. That, of course, of course, means that the *Resurfice* material-contribution test never applied.

Randhawa is not a correct application of the *Resurfice* material-contribution test. If it were, what we would have is a case where: (1) the trial judge rejected, without explanation, the positive, scientific, evidence of the plaintiff's experts that the accident was a probable cause; (2) the trial judge rejected without explanation, the positive, scientific, evidence of the defendant's experts that the accident was not a probable cause;

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[767] 2008 BCSC 234 discussed and distinguished 2008 BCSC 435 at paras. 39-41. Defence counsel sent *Farrant* to the trial judge after argument was complete.
[768] See 2008 BCCA 23 at paras 31-33. See above.
[769] 2008 BCCA 23 at paras. 49-54. See above.
[770] 2008 BCSC 435 at para. 46.
[771] 2008 BCSC 435 at para. 48.

and, (3) the trial judge formed her own opinion, on some other evidence, that the accident was a sufficiently possible cause to trigger the application of the *Resurfice* material-contribution test. While it is true that *Resurfice* repeats the mantra that the trial judge is not required to accept expert evidence and opinions on issues of fact if the trial judge "can arrive at the necessary conclusions on issues of fact and responsibility without doing so",[772] *Resurfice* does not say (nor does any other case say) that the trial judge is entitled to accept the expert evidence and opinions and then mot apply that evidence for what it means.[773]

By now, British Columbia judges and defence counsel should know that the British Columbia Court of Appeal has held that the *Resurfice* material-contribution test is not the *Athey* material-contribution test.[774] However, that does not seem to be the case. For example, *Notenbomer v. Andjelic*[775] may be an example of the trial judge repeating defence counsel's misunderstanding of the law. If not, it is an example of counsel and judge not doing their homework because the case suggests, without discussion, that the *Athey* version of the material-contribution test still exists.[776] It is not clear who got the law wrong. Defence counsel should certainly avoid suggesting to a trial judge than the *Athey* material-contribution test still exists, given that it is easier to satisfy than but-for and, by definition, would be more often applicable than *Resurfice* material-contribution. In *Notenbomer*, the trial judge wrote: "According to the defence, there is conflicting medical evidence, and the facts of this case do not meet the requirements of the more permissive "material contribution" test, as set out in *Athey v. Leonati* … That test can only be used in very limited circumstances, inapplicable here."[777]

One explanation would be that *Sam v. Wilson* was not put to the trial judge.[778] In any event, that error in law was irrelevant as the trial judge held that the but-for test applied and accepted the plaintiff's evidence over that of the defence.[779] The trial judge then stated:

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[772] 2007 SCC 7 at para. 9.

[773] In this sense, *Randhawa* is the antithesis of *Bohun*. In *Bohun*, the trial judge accepted expert evidence which necessarily meant that the negligence *was not* a probable cause. In *Randhawa*, the trial judge accepted evidence which necessarily meant that the defendant's negligence *was* a probable cause. In another sense, Randhawa is an example of what went wrong in *Cook v. Lewis* at trial. There, as the Supreme Court of Canada said, the jury had all the evidence it needed to decide, on a probability basis – the more likely than not basis – which of the two hunters shot Lewis. However, the jury did not. As result, the case went back for a new trial. Similarly, in *Randhawa*, the trial judge had all of the evidence she needed to decide, on a probability basis, whether the complaints were probably new and were probably caused by the accident. Indeed, she accepted the evidence that they were. Yet, for whatever reason, the trial judge did not apply the but-for test even though she found factual causation to be established.

[774] *Sam v. Wilson*, at para 109, per Smith J.A.

[775] 2008 BCSC 509.

[776] 2008 BCSC 509 at paras. 109, 119.

[777] 2008 BCSC 509 at para.109 (citation omitted).

[778] We should assume that she would have mentioned it. She cited the B.C. C.A. decision in *Bohun*. See 2008 BCSC 509 at para. 110.

[779] 2008 BCSC 509 at para. 117.

> On causation, I am satisfied, on a balance of probabilities, that the motor vehicle accident of August 8, 2004, more likely than not, was the cause, or contributed to the injuries of the plaintiff. No other conclusion makes sense. The chronic pain would not have occurred except for that accident. I conclude, on a balance of probabilities, that the right-sided pain would not have recurred, but for that accident, and that the left-sided pain was due to the accident, without question.[780]

The paragraph conflates but-for and *Athey* material-contribution. The "or contributed to" is, of course, *Athey* material-contribution test wording. However, the "would not have occurred" is a but-for conclusion.

Ghani v. Umran[781] seems to be another case where *Sam v. Wilson* was not provided to the trial judge. The trial judge wrote: "In *Resurfice Corp. v. Hanke* ... the Supreme Court of Canada made clear that the burden is usually on the plaintiff to show that the injury would not have occurred "but for" the defendant's negligence. Only in special circumstances can a plaintiff rely on the less-stringent test of whether the defendant's negligence materially contributed to the injury".[782] The quoted sentences are immediately followed by the text of para. 25 of *Resurfice*. The trial judge does not mention *Sam v. Wilson*. However, the trial judge's misunderstanding of *Resurfice* on the material-contribution test is irreelevant to the merits of the decision. The trial judge did not apply a material-contribution test. The judge applied the but-for test to hold that the accidents had probably caused the the injuries for which damages were awarded.

Glowinski v. Knowlton[783] is a personal injury action decided in favour of the plaintiff. The trial judge stated that he was applying the but-for test to find factul caustion. I suggest that had the case been tried prior to *Resurfice*, if the trial judge chose to find for the plaintiff, it is at least as likely as not that the causation decision would have been described as application of the *Athey* material-contribution test and on the basis that the defendant's negligence "materially contributed" to the occurence plaintiff's injuries. This is is particulary so given that the plantiff did not have a expert evidence connecting the incident which was the result of the tortious conduct to the injury. The plaintiff had been injured in a motor vehicle accident on August 13, 2005. On October 14, 2005, he lost conciousness and fell. He broke his leg in that fall. The motor vehicle accident was the defendant's fault. The issue was whether the motor vehicle accident was a cause of the the plaintiff losing consciousness and falling. The trial judge wrote:

> [50] I am satisfied on a balance of probabilities that the plaintiff demonstrated that his MVA-related symptoms contributed to his collapse on the ferry on October 14, 2005. Although no expert opinion was produced to state that the MVA was a cause of the plaintiff's loss of consciousness, I accept the plaintiff's testimony that he was

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[780] 2008 BCSC 509 at para. 119. See also paras. 120-21.
[781] 2008 BCSC 585 (tried March 2008, reasons May 9, 2008).
[782] 2008 BCSC 585 at para 36 (citation omitted).
[783] 2008 BCSC 662

> overwhelmed with an MVA-related headache and neck pain immediately prior to the fainting incident.
>
> [51] The evidence is that the plaintiff did not have a history of such symptoms, and "ordinary common sense" dictates that the collapse was in part a result of the defendant's negligence. Although the plaintiff's MVA-related symptoms were aggravated by his decision to drive to Princeton and back, the fact remains that the defendant originally caused the symptoms. If the plaintiff was feeling exhausted as he reported to his doctor, then I am satisfied that a contributing factor was the plaintiff's poor sleeping patterns due to the pain from the motor vehicle accident. The defendant offered no plausible alternative explanation for the plaintiff's collapse.
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> [52] I find that the plaintiff's general fatigue and headache were significant factors in his loss of consciousness. There was a "substantial connection between the injuries and the defendant's conduct" (*Resurfice Corp.*). I am satisfied that but for the defendant's negligence which caused the initial injuries, the plaintiff would not have experienced headache, neck and shoulder pain on October 14, and he would not have passed out and further injured himself on the ferry.[784]

"Loss of consciousness" is a fancy phrase for "fainted". The plaintiff's case, accepted by the trial judge, amounts to nothing more than : (1) I had never fainted before the accident; (2) everybody knows that fatigue and headaches due to accidents can contribute to the possibility of fainting; and (3) that is what happened here.

The trial judge's "common sense" conclusion that there was a medical connection between the accident symptoms and the collapse amounts to a medical diagnosis that none of the physicians were prepared to make. According to the reasons, the only expert medical "evidence" connecting the accident and the collapse was what the trial judge described as a "speculative statement" in the report of the physician who seems to have been the plaintiff's family physician and to have seen the plaintiff the most often in relation to his complaints: "Dr. Partridge, in his report of January 25, 2006, wrote the speculative statement that "[i]t is conceivable that the pain from the MVA contributed to the loss of consciousness."[785] The trial judge did not accept this opinion as a sufficient evidence. He stated that "no expert opinion was produced to state that the MVA was a cause of the plaintiff's loss of consciousness".[786]

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[784] 2008 BCSC 662 at paras. 50-52. I think it is a fair guess that if the plaintiff had complained that he suddenly went blind because of the accident, and that he tripped because he could not see, the trial judge would have been less inclined to make a "common sense" diagnosis connecting the motor vehicle accident to the medical condition and, thus, to the fall. In the absence of any medical evidence other than speculation connection connecting the accident to the "loss of consciousness", the trial judge's statement that the defence offered "no plausible alternative explanation for the plaintiff's collapse" amounts to reversing the onus of proof. Any medically valid theory by the defendant would be no less speculative, and therefore just as valid, as the plaintiff's theory. The trial reasons do not disclose whether the defence offered no theory at all, or one or more theories that the trial judge rejected.

[785] 2008 BCSC 662 at para. 43.

[786] 2008 BCSC 662 at para. 50. Would the trial judge have decided the case in the planitiff's favour if the doctor had been cross-examined and had testified that no valid medical diagnosis could be anything more than speculation? If the witness had agreed that there was no basis for describing the connection as a

Neither of *Sam v. Wilson* nor *Snell* are not mentioned in *Glowinski*. The cases cited on the factual causation issue are *Resurfice* and *Athey*. The result in *Glowinski* could be seen as a very robust application of the *Snell* "robust and pragmatic" common sense, inference, principle. Alternatively, if we assume the trial judge was aware of *Sam*, then *Glowinski* can be seen as an application of the *Sam* proposition that, for the purposes of the but-for test, "substantial" in *Resurfice* means what "materially contributed" did in *Athey*[787] which is some contribution to cause greater than trivial.

Ontario

The situation in Ontario may be summarized in one word: remarkable. In substance, Ontario judges who have provided reported reasons continue to insist that all that *Resurfice* did was: (1) affirm that the but-for test is the primary test for factual causation and (2) clarify the criteria which determine when the material-contribution test established by *Athey* applies. As of June 2008, no Ontario judge has suggested, in reported reasons, that *Resurfice* created a test for legal causation which depends on creation of risk and does require a finding that the tortious conduct was a cause of the harm. Indeed, if one takes the Ontario Court of Appeal decisions at face value, they assert that the *Resurfice* material-contribution test is the *Athey* material-contribution test with the more restrictive criteria for application, but nothing else changed.[788] It would be ridiculous to assume that Ontario judges are not aware that there is already a substantial body of case law from the courts of other provinces, particularly British Columbia, considering the meaning of *Resurfice*. None of it is mentioned in the Ontario decisions.

I start in Ontario by backtracking to the period just before the release of *Resurfice* in order to look at the state of Ontario causation jurisprudence. I will examine three cases: the two leading Court of Appeal decisions, *Cottrelle* (decided in 2003) and *Aristorenas*, decided in 2006 (with leave to appeal to the Supreme Court denied after the release of Resurfice); and, *Latin v. Sick Children's Hospital*,[789] a Superior Court of Justice trial decision released in early January 2007, a bit more than one month before *Resurfice*.

Latin contains a succinct summary of the state of existing Ontario factual causation jurisprudence as it was immediately before the release of Resurfice. The trial judge wrote:

> [128] The recent decision of the Court of Appeal in *Aristorenas v. Comcare Health Services*, reviews and summarizes the law with respect to the determination of causation and clarifies the application of the two approaches — the "but for" test and the "material contribution" test. The Court (Macpherson J.A. dissenting), concludes that the "material

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"realistic possibility" because, if there was, that was what the witness would have written in the resport ? We should assume not, because mere speculation which is less than a realistic possibility is not enough even in damages assessment.

[787] That means we will have to ignore that slight problem that "materially contributed" either meant but-for or had no useful meaning.

[788] With one possible exception that I note later in this section.

[789] 2007 CanLII 34 (Ont. S.C.J.)

> contribution" test is applied to cases where multiple inputs have all harmed the plaintiff and is invoked to overcome "logical or structural difficulties in establishing 'but for' causation". Otherwise, the "but for" test is used as the standard test for establishing causation in most negligence cases. On either test, the plaintiff has the burden of proving on a balance of probabilities that the test is met.
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> [129] Causation is established where the plaintiff proves that the defendant's negligence caused or contributed to the injury and that the injury would not have occurred but for the negligence of the defendant. Causation need not be proven to a level of medical or scientific certainty. Although medical experts determine causation in terms of medical certainties, the law demands a lesser standard. The legal or ultimate burden remains with the plaintiff, although whichever test is applied, the court may take a "robust and pragmatic" approach to the evidence as described by Lord Bridge in *Wilsher v. Essex Area Health Authority* and adopted by Sopinka J. in *Snell v. Farrell*.
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> [130] The focus of the discussion in *Aristorenas* is the proper application of the "robust and pragmatic" approach. The majority of the court found that the trial judge had erred in inferring causation in the absence of evidence that could support a finding of causation on the balance of probabilities. It held that this approach is not a substitute for evidence but an analytical tool that a judge can apply to the evidence that may enable the judge to draw an inference of causation even though medical and scientific expertise cannot arrive at a definitive conclusion. However, there must be some evidence that links the negligent conduct with the injury. The approach is "robust and pragmatic" because the weight of evidence, including expert evidence on causation, might not otherwise satisfy the "but for" test.[790]

The "relaxed view" argument is encapsulated in the last sentence of paragraph. 129: in the words, "whichever test is applied, the court may take a "robust and pragmatic" approach to the evidence." Was there, then, an Ontario appellate summary of what that meant in practice? That question is rhetorical. There was: *Aristorenas*. The majority of the Court of Appeal had written:

> In *Athey*, Major J. speaks of avoiding a rigid application of the test or requiring scientific precision. He also says that common sense can aid in the determination of causation. Further, an inference may be drawn without scientific proof. While this language does evoke a more "relaxed" standard to proving causation, it does not alter the requirement that the plaintiff must establish causation on a balance of probabilities. In my view the "robust and pragmatic" approach modifies the type of evidence as well as the factors that the court may consider. It does not modify the amount of proof required to establish causation.[791]

Ontario lawyers should compare the results and comments in *Bohun* at trial and appeal to, say, *Cottrelle* or *Aristorenas*; or, to the result in Smith v. Liwanpo.[792] The result of the appellate decision in *Bohun* is, of course, entirely consistent with what the Court of Appeal said the law is in *Cottrelle* and *Aristorenas*. *Cottrelle* and *Aristorenas* are, similarly, orthodox applications of pre-*Resurfice* law. Both cases were medical

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[790] 2007 CanLII 34 at paras. 128-130 (Ont. S.C.J.)
[791] *Aristorenas*, para 60.
[792] 2007 CanLII 13517 (Ont. S.C.J.)

malpractice actions. Both were actions alleging negligence resulting in delayed diagnoses and treatment. In both cases, the physician's negligence was alleged to have injured the plaintiff or, at the least, made the result of a pre-existing problem that the physician was treating worse than it would have been had the physician acted properly. In both cases, it was alleged that the medical negligence deprived the plaintiff of a chance of avoiding an unfavourable outcome or increased the risk of an unfavourable outcome.

Bohun is an ironic echo of *Cottrelle*, with *Resurfice* substituting for *Athey*. The plaintiff succeeded, at trial, in *Cottrelle*. The trial judge had applied Athey's material contribution test and held that the physician's' negligence "materially contributed" to the injury without considering whether applying that "test" as the basis for imposing liability produced a result at odds with the Supreme Court of Canada jurisprudence. The trial judge's rationale is quoted in the appellate reasons.

> The remaining issue is whether the "loss of chance" doctrine is applicable and if so whether a plaintiff is entitled to compensation for such a loss. The defendant asserts that Mrs. Cottrelle lost only a chance of reversing the infectious process and that such a loss of chance cannot ground liability in a medical context (see *Laferrière v. Lawson*, 1991 CanLII 87 (S.C.C.), [1991] 1 S.C.R. 541). In *Athey v. Leonati* the Supreme Court of Canada at p. 474 described the loss of chance doctrine as one which suggests that plaintiffs may be compensated where their only loss is the loss of a chance at a favourable opportunity or of a chance of avoiding a detrimental event. The Court concluded that such a doctrine was not applicable to the facts of that case and they neither approved nor disapproved of the doctrine.
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> In my view the loss of chance doctrine is not applicable to this case. I am satisfied that Dr. Gerrard's failure to meet the requisite standard of care caused the infection to deepen and that such infection contributed to the development of gangrene which mandated the amputation[793]

The Court of Appeal reversed:

> [25] I agree with the appellant's submission that in an action for delayed medical diagnosis and treatment, a plaintiff must prove on a balance of probabilities that the delay caused or contributed to the unfavourable outcome. In other words, if, on a balance of probabilities, the plaintiff fails to prove that the unfavourable outcome would have been avoided with prompt diagnosis and treatment, then the plaintiff's claim must fail. It is not sufficient to prove that adequate diagnosis and treatment would have afforded a chance of avoiding the unfavourable outcome unless that chance surpasses the threshold of "more likely than not."
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> [36] In my view, the respondent established no more than the loss of a less than 50% chance of salvaging her leg had the appellant not been negligent. Unfortunately for the respondent, under the current state of the law, loss of a chance is non-compensable in medical malpractice cases: see *Laferrière v. Lawson*, *supra*; *St-Jean v. Mercier*, [2002] 1 S.C.R. 491; *Hotson v. East Berkshire Area Health Authority*, [1987] A.C. 750 (H.L.). The trial judge did not explain the basis for her conclusion that "the loss of chance doctrine is not applicable to this case". In view of the evidence I have reviewed, and in view of the

[793] (2003), 67 O.R. (3d) 737, 233 D.L.R. (4th) 45, at para. 21, quoting paras. 71 and 72 of the trial reasons.

> respondent's concession that there was no evidence to suggest that it was more than likely a better outcome would have followed had the appellant acted with care, the trial judge's finding reveals either a misapprehension as to the law or a palpable and overriding error on the facts.[794]

The last sentence of paragraph 25 – "It is not sufficient to prove that adequate diagnosis and treatment would have afforded a chance of avoiding the unfavourable outcome unless that chance surpasses the threshold of 'more likely than not.'" – is, of course, exactly what the British Columbia Court of Appeal said was the reason why all but a small portion of the *Bohun* claim was dismissed. The Ontario Court of Appeal added:

> [37] The exclusion of recovery for the loss of a chance in medical malpractice cases has been criticized as being unduly rigid and harsh: see. Klar, *supra* at 403-405; John G. Fleming, "Probabilistic Causation in Tort Law" (1989) 68 Can. Bar Rev. 661; S.M. Waddams, "The Valuation of Chances" (1988) 30 Can. Bus. L.J. 30; S.M. Waddams, *The Law of Damages*, looseleaf (Toronto: Canada Law Book, 2002) at 13.260-13.370; Salvatore Mirandola, "Lost Chances, Cause-in-Fact and Rationality in Medical Negligence" (1992) 50 U. T. Fac. L. Rev. 258. Recovery based upon the loss of a chance would require substantial reduction of the damages to reflect the value of the less than 50% chance that was lost. In any event, the authorities cited in para. 36 preclude us from considering such an award.

What is equally "of course" is that *Cottrelle* and *Aristorenas* predate *Resurfice*. What might be equally "of course" is that that fact of timing is a reason why *Cottrelle*, at least, was not mentioned in *Bohun*.

The Court of Appeal asserted, in *Barker* and *Rizzi*, that *Resurfice* did not change causation law, only clarified it. If so, the law as declared in *Cottrelle*, and restated (or affirmed) in *Aristorenas*, as explained in *Latin*, is still the law of Ontario. Borrowing the words of the Court of Appeal in *Authorson v. Canada*,[795] that suggestion that *Resurfice* did not change the jurisprudence fails any reality test.[796] However, until a judge entitled to say so agrees that *Barker* was wrong, the law of Ontario, now, is the law as it was immediately before *Resurfice*. For Ontario, all *Resurfice* does is help to clarify what that law was. So, those readers who practice law in Ontario, or care about the status of the law in Ontario, should read on. The rest of can skip the balance of this section and go to the Alberta section.

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[794] (2003), 67 O.R. (3d) 737, 233 D.L.R. (4th) 45.

[795] 2007 ONCA 501 at para. 163

[796] About 8 years after the release of *Polemis*, Middleton J.A. wrote, no doubt sardonically, in *Harding v Tatisich*, 64 O.L.R. 98, 1929 CanLII 23 at paras. 17-18 (C.A.): "Although this decision was regarded as revolutionary, it has apparently been accepted by the Courts without challenge, while much criticised in other quarters. Lord Justice Atkin in *Hambrook v. Stokes Brothers*, [1925] 1 K.B. 141, 156, says: 'The full effect oil the decision in *In re Polemis and Furness Withy & Co*. has not yet, I think, been fully realised, even though that case laid down no new law.' Most will, I think, conclude that even if the case did not lay down new law it certainly rendered obsolete the many decisions in which the question of proximate cause had been laboriously discussed."

With that in mind, I turn to *Aristorenas v. Comcare Health Services*. What follows amounts to an extended case comment.[797] I believe the title to the discussion is a good hint as to one reason why *Barker v. Montfort* Hospital is wrong.

Nothing Is Still Not Enough

Introduction: *Plus Ça Change*[798]

Aristorenas v. Comcare Health Services,[799] is the last, pre-*Resurfice*, Ontario appellate decision dealing with factual causation in the medical-error context. Ms. Aristorenas developed an infection. That infection became necrotizing fasciitis, known in lay circles as "the flesh eating disease". She sued her health care providers. She succeeded at trial. The judgment was reversed on appeal, by a 2-1 majority. The Supreme Court denied leave to appeal.[800] The appeal decision was argued and decided ***before*** *Resurfice*. The dismissal of the leave to appeal application was ***after*** *Resurfice*.

Aristorenas purports to say something useful about the applicable principles. It suggests that it does not and much of what it does say muddies the waters. It does not clarify causation rules. The only valid points it makes clearly about factual causation are not new: (1) factual causation, however it is established, must be established on the balance of probability[801] and (2) no evidence at all is not enough even for *Snell*'s robust and pragmatic approach.[802] That is not new. Whatever else the cases mean, that point is the least that *Snell*, *Athey*, *Resurfice*, and a host of other Supreme Court decisions established.

Aristorenas should be seen as nothing more than a *Housen v. Nikolaisen* dispute between the majority and dissent as to the sufficiency of the evidence and the judge's understanding of the evidence. The majority held there was no admissible evidence upon which the trial judge could have based the conclusion that factual cause was proven on the balance of probability. The dissent held there was enough. If the majority analysis did say anything new about the law that governed proof of factual causation in Ontario before *Resurfice* – on the meaning of material contribution, on the meaning of "unworkable", on the interplay between the but-for and the material contribution tests - it muddied the situation even more. Much of what is in the majority reasons is analytically wrong, self-

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[797] On March 6, 2008, the Ontario Court of Appeal released *Moore v. Wienecke*, 2008 ONCA 162. For present purposes, *Moore* is remarkable for a number of reasons. The first is that it discusses *Resurfice* without mentioning *Barker v. Montfort Hospital* or *Misko v. Doe*. Another is that the Court of Appeal's description of the basis upon which the trial judge decided the causation issues is clearly wrong. A third is that it is difficult to see how the *Moore* panel missed the fact that their description of what the trial judge did is wrong. A fourth is that *Moore* muddies the Ontario waters even more.

[798] "Those who cannot remember the past are condemned to repeat it." George Santayana, *Life of Reason, Reason in Common Sense*, Scribner's, 1905, at p. 284. It took almost 50 years before the consequences of *Polemis* were expunged from Canadian tort jurisprudence.

[799] 2006 CanLII 33850 (Ont. C.A.), leave to appeal refused 2007 CanLII 10550 (S.C.C.) (Binnie, Deschamps and Abella JJ.).

[800] With costs.

[801] *Aristorenas*, paras. 56,60.

[802] *Aristorenas*, para. 76.

contradictory, and is inconsistent with the law as it existed before *Resurfice*. *Resurfice* did not change that.

The only issue between the majority and dissent was whether the evidence was sufficient to establish that the delay was a probable factual cause of the injury. The majority said the trial judge misunderstood the evidence as to the relationship between the admitted delay in treatment and the injury. They said the evidence was not and could not be sufficient to allow a conclusion of probable factual cause - using any theory - because there was no admissible evidence, expert or otherwise, to support the conclusion of any link, let alone an actual link of sufficient strength to be a probable cause.[803] I quote:

> [75] Even assuming that the plaintiff's theory of the case is correct and that a delay in treatment can cause or materially contribute to the contracting of necrotizing fasciitis, none of the evidence led at trial addresses whether in this case it was the delay in treatment or some other factor that caused the plaintiff to contract necrotizing fasciitis. There are many theories of causation, and the evidence leaves us in a position where we do not know which one is correct or the most probable. None of the evidence provided by the parties provides a link between the negligence of the defendants and the harm suffered by the plaintiff.[804]

The dissent took a different view of the evidence, holding there was admissible evidence and it was sufficient to permit the trial judge to conclude as he had (implicitly, even if other judges would not have), therefore there was no palpable and overriding error. *Housen v. Nikolaisen*[805] applied.[806]

Without the benefit of the transcript of the evidence, none of us have sufficient information to decide which reading of the evidence was the better reading. All I will add on this is that there is a puzzling failure in both sets of judgments to address the conflict on the issue of whether the plaintiff's experts were qualified to opine on the factual causation link. The majority reasons specifically say they were not. It is necessarily implicit in the dissenting reasons that they were. Otherwise, we would be forced to conclude that the dissenting judge was prepared to hold lay evidence sufficient to establish factual causation on a matter outside the scope of knowledge of the lay person – after all, isn't that why expert evidence is admitted in the first place? – even in the absence of any relevant scientific evidence; not just the absence of "positive" scientific evidence (whatever positive means in this context.)

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[803] *Aristorenas*, paras. 70-75.
[804] *Aristorenas*, para. 75.
[805] 2002 SCC 33, [2002] 2 S.C.R. 235.
[806] *Aristorenas*, paras. 31-45, summarized particularly in paras. 44-45, ending with this sentence in para. 45: "In my view, the trial judge's causation analysis in this case was faithful, in tone and substance, to these instructions." "These instructions" refers back to quoted admonitions from *Snell* and *Athey* that the but-for test is not to be applied "too rigidly".

The Ontario Court of Appeal had held in 2003 in *Cottrelle v Gerrard* that that delay in medical treatment has to be a probable cause of the injury for factual causation to be established. If it is not, the case fails. Mere possibility (a chance of 50% or less) is not sufficient. In *Aristorenas*, the majority held that the trial judge found that delay was the negligence and the question of fact was the connection between the delay and the injury. So, in order to succeed, the plaintiff had to show that the delay was a probable cause of her condition, or the worsening in her condition. The majority reasons hold that Ms. *Aristorenas* failed to do that on the balance of probability. They have to be understood to say that she failed to do that whether the applicable test for proof of factual causation (on the balance of probability) was but-for or material contribution.

It is worth setting out what the trial said in *Aristorenas* about the applicable law and how the trial judge held causation was established.[807] It is probably the case that the trial analysis is a material contribution analysis of some sort, even though the trial judge stated explicitly that he was applying the "robust and pragmatic approach" from *Snell*.[808]

> [71] This is an appropriate case to apply the principles set out in *Snell*, supra. Necrotizing fasciitis still remains a mystery to the medical profession. No evidence was called to establish precisely what caused it in the plaintiff. And accordingly, the "but for" test should be relaxed in this case.
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> [73] This would seem to be an appropriate case for the "robust and pragmatic approach" to fact finding in relation to causation permitted by *Snell* v. Farrell, supra. This rare disease can be a complication of an infected wound. It is a matter of common sense that the negligence or delay on the part of the defendants allowed the wound to reach a complicated state and lead to rapid unpredictable consequences. There is absolutely no evidence to suggest that the plaintiff would have otherwise developed this serious complication but for the negligent diagnosis and treatment by the defendants. Therefore, as a matter of common sense, I conclude that the plaintiff has established, on a balance of probabilities, that the defendants' negligence materially contributed to the injury.[809]

If the last sentence summarizes the trial judge's rationale for finding factual causation, then he used *Athey* and not *Snell*. The phrase "the defendants' negligence materially contributed to the injury" is, of course, pure *Athey*. Just as in British Columbia's *Lyon v. Ridge Meadows Hospital*, the trial judge conflated the two tests which, whatever material-contribution then meant, were still separate tests.[810] In any event, the majority in

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[807] See 2004 CanLII 22088, paras. 71 and 73.

[808] Although the Court of Appeal decision focuses on the but-for test, the Court wrote, at para. 57: "The nature of necrotizing fasciitis poses difficulties in proving whether the negligent delay was causally related to the plaintiff's harm. Assuming in the plaintiff's favour that it was open to the court to adopt the material contribution test for causation and to view the facts in a robust and pragmatic fashion, the fact that the cause of the disease is a mystery did not relieve the plaintiff of the burden of proof."

[809] 2004 CanLII 22088, paras. 71, 73.

[810] The trial judge could respond, very logically, that both the but-for conclusion and the material-contribution conclusion are inferences. Then the trial judge would ask: "what is the principled basis for not applying the robust and pragmatic approach to the drawing of the inference to the material-contribution

the Court of Appeal appears to have assumed that the trial judge had used the *Athey* material-contribution test and that it is a plaintiff-favouring test.[811] Query whether this was in order to give the plaintiff what was considered an "easier" causation test to satisfy, so that if she could not satisfy even that test it would necessarily follow that she could not satisfy the but-for test.[812]

The Majority Reasons

First, I suggest that we have no idea which of the material contribution or but-for tests the majority thought was the applicable test. Second, we do not know what the majority thought material contribution meant and when that test applied. All that we know is that the majority had to have concluded that, regardless of the test, the plaintiff had failed to establish factual causation on the balance of probability, because it dismissed the action. That situation exists because (1) the majority held there was no admissible evidence whatsoever upon which any valid connection could be made between the defendants' fault and the onset of necrotizing fasciitis and (2) the majority did not explain what the test would have been had there been any admissible evidence.

Is there anything in the facts as found by the majority reasons that helps us on the question of when the material-contribution test is applicable rather than the but-for test? No. Did the majority conclude that material contribution was the applicable test? We cannot say. What we have, instead, is this.

> [57] The nature of necrotizing fasciitis poses difficulties in proving whether the negligent delay was causally related to the plaintiff's harm. Assuming in the plaintiff's favour that it was open to the court to adopt the material contribution test for causation and to view the facts in a robust and pragmatic fashion, the fact *that the cause of the disease is a mystery* did not relieve the plaintiff of the burden of proof.[813]

There are two points to be made, immediately, about the contents of paragraph. While it is was probably an inevitable development, there was no valid law before *Aristorenas* that conflated the *Snell* and *Athey* tests by stating that the procedure by which the trier of fact decided whether some event materially contributed to the harm was to view the facts in a robust and pragmatic fashion. And, if the cause of the disease was, in fact, a medical mystery in the general sense – not just in the particular sense – how could the plaintiff ever have proved her case on the balance of probability?[814]

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test?" The answer would have to be: "there cannot be any principled basis." This is more evidence that the *Athey* material-contribution test was only another way of saying "but-for", and nothing more.

[811] *Aristorenas*, para. 57: "Assuming in the plaintiff's favour that it was open to the court to adopt the material contribution test for causation …".

[812] It is instructive that, in the lifetime of the *Athey* material-contribution test, we never once saw, in reported reasons, the recognition that the test was capable of being used as pro-defendant test. This lacuna exists despite almost 80 years of American recognition of that not-so-immaterial tidbit.

[813] *Aristorenas*, para. 57 (emphasis added).

[814] A third point is the obvious one. Given that that the defendants admitted they were negligent (at appeal) and if we assume the cause of the disease was a mystery, we have to ask ourselves why the Supreme Court denied leave to appeal on the issue of whether the *Resurfice* version of material contribution applied.. The

While we are not told why the majority made that assumption in the plaintiff's favour – that the material contribution test, whatever it means, is the applicable test – it could only be a valid assumption if the majority assumed that the facts of *Aristorenas* could be slotted into at least one of these variations: (1) paraphrasing from the reasons, the facts permitted the conclusion that the case involved multiple inputs that all harmed Ms. *Aristorenas* which resulted in logical or structural difficulties in establishing but for causation;[815] or, (2) paraphrasing from paragraph 49, the majority concluded that, practically speaking, it was impossible to determine the precise cause of the injury; or (3) both, since paragraph 57 amounts to the majority stating that they were assuming without deciding that material contribution was the applicable test.

Resurfice, of course, prevents Ontario judges using *Aristorenas* as support for the first explanation because it is the very rationale used by the Alberta Court of Appeal and which the Supreme Court held was wrong. Nonetheless, I will outline what the majority said on this issue. If the majority meant what they wrote, they abolished the "but for" test and replaced it by the "material contribution" test. I suggest it is clear that that is exactly what the words used by the majority meant, even if they did not realize that or mean that. The majority made the remarkable (and erroneous[816]) assertion that the material-contribution test applies in every case where there is more than one factual cause of the injury.

> [53] Thus, it would seem that the material contribution test is applied to cases that involve multiple inputs that all have harmed the plaintiff. The test is invoked because of logical or structural difficulties in establishing but for causation, not because of practical difficulties in establishing that the negligent act was a part of the causal chain.[817]

I will leave it to others to parse the last sentence, particularly the meaning of "logical or structural difficulties in establishing but for causation", especially since some versions of the content of that sentence have survived *Resurfice* and have played a part in subsequent provincial superior or appellate court decisions on the meaning of the *Resurfice* material contribution test. I will simply remind those who undertake the task that that Canadian judges have asserted that they do not like metaphysics.

It should not come as a surprise to anyone that, according to Western modes of logical, scientific, analysis, all verifiable events always have more than one historical (factual) cause. Law may choose to ignore the some of the links in the chain but you that

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only answer that makes logical sense is that the leave panel concluded that there was no evidence (or there was not sufficient evidence) that the negligent conduct materially increased the risk of the possibility of the manifestation of necrotizing fasciitis.

[815] *Aristorenas*, para. 53.

[816] Made all the more remarkable because it was inconsistent with *Cottrelle*, is now contrary to *Resurfice* because it is the exact error made by the Alberta Court of Appeal. However, the Supreme Court did not have to grant leave to appeal to the *Aristorenas* defendants, and deal with the error of law made by the majority, because the action was dismissed .

[817] *Aristorenas*, para. 53.

does not mean they do not exist. You do not have to accept my word on this. You can accept Lewis Klar's[818] or John Fleming's[819] word.

Despite the plain meaning of their words, it should be trite that the majority couldn't have meant that but-for was dead for at least the reasons that: (1) they did not say so and we should assume that if they intended such a radical change in Ontario law, they would have said so expressly; (2) the Ontario CA does not yet have the jurisdiction to overrule the Supreme Court; and (3) the majority were bound by, quoted from, and seem to have accepted that *Cottrelle* determined the scope of the material contribution test in Ontario.[820] Yet, the quotation from *Cottrelle* is followed by the next paragraph *Aristorenas* as if that paragraph (para. 53) is a summary of what *Cottrelle* held.[821] Whatever *Cottrelle* does say, it DID NOT hold that it is sufficient for the application of material contribution rather than but for that the case involves multiple inputs that all have harmed the plaintiff.

Worse, yet, the majority, earlier in their reasons, had set out what explicitly purports to be the majority's summary of *Cottrelle*'s explanation of the material contribution test: "The second approach, material contribution, is used where the 'but for' test is unworkable, that is, 'in cases where, practically speaking, it is impossible to determine the precise cause of the injury.'"[822] Again, this is not what *Cottrelle* held, a point made rather obvious by the majority's quotation of the key portion of *Cottrelle*, unless what the majority meant by "practically impossible" are the limitations set out in *Cottrelle*.[823]

And, even worse, paragraphs 49 and 53 of *Aristorenas* set out entirely different explanations as to when material contribution is the applicable test.

What, then, is the basis of the majority decision? It is simply this. First, there was no admissible evidence at all on causation. As such, the evidence could not show the consequence was "more likely than not". And, of course, the evidence did not, therefore, even show that that the plaintiff had a possibility (a chance of 50% or less) of avoiding what happened.

> [80] I return to what Sharpe J.A. said at para. 25 of *Cottrelle*, which in my view is fatal to the plaintiff's position: "if, on a balance of probabilities, the plaintiff fails to prove that the unfavourable outcome would have been avoided with prompt diagnosis and treatment, then the plaintiff's claim must fail. It is not sufficient to prove that adequate diagnosis and treatment would have afforded a chance of avoiding the

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818 Klar, *Tort Law* (3d), at 391.
819 Fleming, *The Law of Torts* (8th), at 193.
820 *Aristorenas*, para. 52.
821 *Aristorenas*, para. 53.
822 *Aristorenas*, para. 49
823 *Aristorenas*, para. 53.

> unfavourable outcome unless that chance surpasses the threshold of more likely than not."[824]

Is there anything at all that is helpful in the majority reasons? This much. It is the earlier, explicit, reminder that "[e]schewing scientific certainty does not eliminate the need for *any* evidence to support causation. If causation can be inferred in the absence of any proof, then it is indistinguishable from reversing the burden of proof, something Sopinka J. clearly disapproved of in *Snell*."[825] However, that is not new, either.

There was either no admissible evidence on the existence of any linkage between the delay and the necrotizing fasciitis or there was some. If there was none, that is the end of the matter under current Canadian law. But what if there was some? That would have to be at least some expert *opinion* evidence which presumes the existence of some "non-expert" factual evidence. Let us assume that that is some expert (scientific) evidence and some other evidence. The expert evidence is the possibility of a connection. What is the other evidence? It is the existence of the condition after the doctor's mistreatment. The fact is that the plaintiff did not have the condition before the doctor's malpractice and had it afterwards. We will ignore that this is the *post hoc ergo propter hoc* fallacy ("after this, therefore because of this" fallacy) if it is seen as conclusive – and the *post hoc* fallacy is exactly what the *Snell* approach invites.

Let us now return to *Aristorenas*. None of the physicians were prepared to say that the connection was probable. The dissent conceded this. None of the physicians were prepared to say that the connection could be probable. The dissent conceded this. Expert evidence was admissible precisely because the question of the existence of any linkage – the aetiology of necrotizing fasciitis – was outside the scope of knowledge of the lay person. The lay evidence could not have been sufficient enough, by definition, and logically, even without the "by definition".

The majority held that there was no admissible expert evidence on the nature of the connection, if any, between the actual delay in Ms. Aristorenas treatment and the onset of the infection.[826] May we conclude that the majority would have agreed with the dissent that what scientific evidence there was as to linkage would have been enough had the majority accepted the dissenting view, which is, necessarily, that there was at least some admissible evidence of the linkage? Probably not.[827]

> [75] Even assuming that the plaintiff's theory of the case is correct and that a delay in treatment can cause or materially contribute to the contracting of necrotizing fasciitis, none of the evidence led at trial addresses whether in this case it was the delay in treatment or some other factor that caused the plaintiff to contract necrotizing fasciitis. There are many theories of causation, and the

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[824] *Aristorenas*, para. 80.
[825] *Aristorenas*, at para. 76 (emphasis added).
[826] See *Aristorenas*, paras. 70-73.
[827] See *Aristorenas*, paras. 74-78, particularly para. 75.

> evidence leaves us in a position where we do not know which one is correct or the most probable. None of the evidence provided by the parties provides a link between the negligence of the defendants and the harm suffered by the plaintiff.[828]

The last sentence is key. It cannot be understood to suggest that some evidence would have been enough regardless; that is, that amounting to mere possibility – which is the equivalent of evidence increasing the risk – would have been enough. (see para. 78). So, this paragraph means that the some evidence would have had to be enough to allow a conclusion as to probable cause. But, in this sort of case, the experts have refused to say that the evidence is enough for a probable linkage by their standards. Does *Aristorenas* tell us how to get from "the evidence is not enough for scientific certainty" to "the evidence is enough for legal probability"? I suggest it does not.

The majority seems to have created two classes of considerations relevant to factual causation decisions. Consider this passage:

> [79] In addition to there being an absence of evidence that could support a finding of causation on a balance of probabilities, there were no other factors that could aid in determining causation under the "robust and pragmatic" approach. The defendants did not have superior knowledge regarding the development of necrotizing fasciitis in the wound. Further, the defendants did not create a situation where the plaintiff was unable to prove causation; the difficulty in proving causation came from the nature of the illness itself.[829]

What is the nature of the difference between the two classes of "factor" referred to in the first sentence? The first class seems to contains the "ordinary" evidence of events upon which conclusions are based. The second class contains considerations that explain the strength or weakness of the evidence.

The Dissenting Reasons

The necessary, logical, underpinning for the dissent must be that whatever scientific evidence there was enough: that legal principle permits the uninformed ("unexpert") trier of fact to say that scientific evidence of mere possibility is enough for law to say probability. That is, after all, one reading of the *Snell* assertion that legal probability does not mean (is not equivalent to) scientific certainty. Put another way, the dissent has to be understood to assert the radial position that it is open to the uninformed ("unexpert") trier of fact to conclude that probable cause exists on questions of science outside the trier of facts scope of knowledge, so long as the experts will concede that the factual linkage is at least possible, even though allowing this conclusion by the trier of fact is contrary to the basis upon which the expert evidence was admissible. The only

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[828] *Aristorenas*, para. 75.
[829] *Aristorenas*, para. 79.

prohibition against this procedure is where the expert evidence is that the linkage is not even possible.

The dissent, in paragraph 33, omits paragraph 71 of the trial reasons, quotes paragraph 72 (which I have omitted), quotes paragraph 73 and paragraph 74 of the trial reasons. Paragraph. 74 of the *Aristorenas* trial reasons is:

> [74] In any event, and to the same effect, the law is clear that a tortfeasor takes their victims as they find them. Again, it was entirely foreseeable that an untreated infected wound would develop serious complications. This infected wound did develop serious complications. One of those serious complications has a name, necrotizing fasciitis. The plaintiff was required to establish on a balance of probabilities that the defendants' negligence would foreseeably result in a type of serious injury. However, the plaintiff was not required, particularly in a case such as this where the matter is not susceptible to scientific proof, to establish that the precise nature of the complications would be necrotizing fasciitis. To demand otherwise would prevent plaintiffs from obtaining relief where the negligence of another has created a serious injury, complications of which are rare and may be deadly.[830]

I will say only this much about this paragraph and the dissent's seeming approval of its contents. Foreseeability is not relevant to the question of whether something is a factual cause. Foreseeability might be relevant to whether something which is a factual cause is a legal factual cause – that is, the "proximate cause" issue – but that is not the context of the causation discussion in paragraph 74 of the trial reasons.

We have to assume that the dissenting judge held the evidence was sufficient to establish the factual cause linkage *on a probable cause basis*, because he cites (and was bound by) *Cottrelle v Gerrard*.[831] The dissenting judge held that there was sufficient evidence to support the trial judge's conclusion that on factual causation.[832] Recall that the trial judge explicitly held that the linkage was established using the *Snell v Farrell* "robust and pragmatic" inference approach (which is the but-for test), even though what the trial judge actually did seems to have been a conflation of *Snell*'s but-for test and *Athey*'s material contribution test.

Nonetheless, we do not know if the inference that was robustly and pragmatically torn from the facts was a "but-for" linkage or a material-contribution linkage. We do not know which test the dissenting judge thought was properly applicable test. We do not know if the dissenting judge thought there was a difference between the two tests. I suggest readers look at paragraphs 29 and 30 of the dissent and ask themselves whether they can glean from those paragraphs whether the test the dissent applies was but-for or material contribution. The first sentence in paragraph 29 of the dissent -"One of the circumstances in which the "but for" test is potentially unworkable is in medical

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[830] *Aristorenas*, 2004 CanLII 22088, para. 74.

[831] Actually, this view is more than assumption. It is mandated by paragraphs 44 and 45 of MacPherson J.'s reasons. I have quoted these paragraphs earlier.

[832] *Aristorenas*, paras. 44-45.

malpractice cases where scientific proof of causation is simply not attainable." may or may not have been, then, a correct statement of Ontario law on the meaning of unworkable: see *Cottrelle*.[833] However, the dissent does not assert in paragraph 30 that the but-for test was, in fact, unworkable on the facts. Nor does it explain why but-for was unworkable if that was the case. If but-for was not unworkable, then material contribution did not apply. In any event, having held that there was evidence from which the trial judge was entitled to come to the conclusion that he did, and given that the trial judge expressly purported to apply *Snell* (which is the but-for test) not *Athey*, where does that leave us?

Final Comments On Aristorenas

I recently (to the extent that almost 4 years ago still qualifies as recent) abused reams of (fortunately) recycled paper in producing a diatribe on problems in the Canadian law dealing with factual causation: "The Snell Inference and Material Contribution: Defining The Indefinable And Hunting The Causative Snark – A Not Excessively Subtle And Theoretical Examination Of Proof Of Factual Causation In Canadian Tort Law".[834] I recently co-authored another piece with Prof. Vaughan Black, of Dalhousie Law School: Cheifetz and Black, "Material Contribution and Quantum Uncertainty: *Hanke v. Resurfice Corp.*".[835] *Quantum Uncertainty* is a case comment on the Alberta Court of Appeal's decision in *Resurfice*. Vaughan Black has written a number of other recent, important, Canadian pieces on factual causation, but-for and material contribution, including "The Transformation of Causation in the Supreme Court: Dilution and 'Policyization'".[836] There is more Canadian and Commonwealth scholarship.

All of this material existed before the release of the *Aristorenas* decision. None of the material is referred to by any of the judges in *Aristorenas*. There is nothing in either set of reasons to indicate any of this material was considered. The only piece of non-judicial scholarship that any of the judges referred to, other than Klar's and Linden's tort texts, is a 2003 comparative-law article on causation, in a not-well known (at least in Canada) U.S. law journal, which looks at U.S. Canadian and British cases on factual causation.[837] It is worth mentioning in this context that most of the leading tort scholars in the US agree that the US version of the material contribution test – called the substantial factor test – has no doctrinal substance or validity whatsoever. I am forced to conclude that the majority judges either did not have any of the articles focused on Canadian law or, if they did, then they did not think them correct or worth mentioning. That is the majority judges' power and right. It does not make them right, though.

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[833] *Cottrelle*, at para. 30

[834] (2005) 30 Advocates' Quarterly 1.

[835] (2006) 43 Canadian Business Law Journal 155.

[836] in T. Archibald and M. Cochrane, eds., *Annual Review of Civil Litigation 2002* (Toronto, Carswell, 2003), p. 187.

[837] I wonder why the court's research lawyer(s) were not able to find anything more … Canadian … if they were able to find this piece.

Ontario Survey, Resumed

One thing that may be said about the comments on *Resurface* in the Court of Appeal reasons in *Barker v Montfort Hospital*[838] and *Rizzi v. Mavros*[839] is that these cases permit Ontario lawyers and judges to ignore everything said in *Resurface* other than the holding that but-for is the basic, general, primary test for causation in tort, on the basis that the Court of Appeal said that *Resurface* did not change anything about existing causation law. Ontario lawyers are *entitled*[840], for the moment, to take this position (and Ontario judges below the Court of Appeal are obliged to take this position) because that is what *Barker* and *Rizzi* state *Resurface* mean. That makes that view of *Resurface* Ontario law (until another Court of Appeal panel says something else, or the Supreme Court does, or the legislature changes the law), even if *Barker* and *Rizzi* are blatantly, patently, royally, wrong on that score. Whether that is a "good thing" I leave to others.

It may be that another panel of the Ontario Court of Appeal has recently hinted otherwise or, at least, that at least some judges of that Court doubt the *Barker* and *Rizzi* assertion. In *Misko v. John Doe*, the Court stated:

> I need not decide whether the plaintiff in this case must demonstrate causation based on the "but for" or "material contribution" test. That question is not material to the issues before us on this appeal. The trial judge will have to consider the impact of the recent decisions in *Hanke v. Resurface Corp*. (2007), 278 D.L.R. (4th) 643 (S.C.C.) and *Barker v. Montfort Hospital* (2007), 278 D.L.R. (4th) 215 (Ont. C.A.).[841]

In any event, *Barker v. Montfort Hospital* asserts:

> [51] Subsequent to the hearing of this appeal, the Supreme Court of Canada released its decision in *Resurface v. Hanke*, (2007) S.C.C. 7. As set out by the Chief Justice in her reasons at para. 20, this decision simply asserted "the general principles that emerge[d] from the cases." It did not alter the state of the law on causation. Rather it confirmed that "the basic test for determining causation remains the 'but for' test" (para. 21).[842]

I would quote Humpty Dumpty, here, but I do that later.

Consider this, on the question of whether the *Barker* majority is right that *Resurface* "did not alter the state of the law on causation". If *Resurface* "did not alter the state of the "law on causation", that means the *Athey v. Leonati* [1996] 3 S.C.R. 458 material-contribution test, as "explained" by subsequent case law applicable in Ontario,

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[838] 2007 ONCA 828, (leave to appeal refused, 2007 CanLII 41867 (SCC), October 4, 2007).
[839] 2007 ONCA 350.
[840] Obliged is a different question. In that respect, see, Question #2, infra, in Part V More Questions and Commentary, where I discuss the dictum of Krever J., as he then was, in *Woloszczuk v. Onyszczak* (1977), 14 O.R. (2d) 732 at 739, 74 D.L.R. (3d) 554 (H.C.J.).
[841] 2007 ONCA 660 at footnote 4.
[842] Barker v. Montfort, 2007 ONCA 828, at para. 51. None of the judges on the *Barker* panel were on the *Misko* panel. *Rizzi* is a decision of a single judge on a motion in an appeal.

still exists. So, Ontario lawyers and judges still have to figure out when but-for does not apply and material contribution does, using the *Athey* "unworkability" principle, which must now be understood to mean *Resurfice* "impossibility". In that, we have the Ontario Court of Appeals decisions in *Aristorenas v Comcare Health Services*[843] and Cottrelle v. Gerrard[844] which we, in Ontario (below the level of the Court of Appeal), have to take as gospel, for now, whatever that gospel is.[845]

On the other hand, maybe not. As indicated, it is at least open to suspect that the three members of the *Misko* panel had qualms about the accuracy of *Barker*'s assertion. What difference might this make? Later in this paper[846] I refer to the Court of Appeal's decision in *Guarantee Company of North America v. Mercedes-Benz Canada Inc.*[847] in which a panel of the Court questioned (admittedly expressly) the accuracy of a decision that another panel made less than 2 years earlier. However, the panel had not been asked to overrule the prior case so did not decide the issue. Not surprisingly, then, when the validity of the prior decision was challenged on a motion for judgment – where if the decision applied the judge would have to grant judgment against the party challenging the validity of the decision – the motion judge declined to apply the prior decision. He dismissed the motion on the basis the issue should be left for trial.[848]

On the "whatever that is" note, readers should compare *Cottrelle* and *Aristorenas* and decide, for themselves, if the latter is consistent with the former. Readers should also look at *Ortega v. 1005640 Ontario Inc*.[849] They could also compare *Cottrelle* and *Resurfice*, and ask themselves the same question. Those with absolutely nothing else to do might ask themselves why the facts of *Aristorenas* do not fall within the *Resurfice* version of material contribution. The astute lawyer with a deep enough pocket (his or her own, or the client's, or the right pot of gold at the end of the rainbow), might consider whether it is worth the risk of arguing that medical malpractice law on causation is, or should be if it is not, different from what the law is in other areas. That lawyer should read *Cottrellle* very carefully, and my "The Snell Inference and Material Contribution" (*Snark*), and Vaughan Black's *Policyization*, too, before attempting this.

While it is true that reasonable people may still differ on the issue of whether the Supreme Court did say something new about material contribution in *Resurfice*, and the Ont. C.A. has the last word on the Ontario law on the subject (so far), I suggest that the assertion that the Supreme Court did not say something new about material contribution in *Resurfice* is dead wrong. At the least, there is this.

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[843] 83 O.R. (3d) 282, 2006 CanLII 33850 (C.A.).
[844] (2003), 67 O.R. (3d) 737, 2003 CanLII 50091 (C.A.)
[845] This section contains a discussion of what Ontario law might be in light of *Resurfice*, and in light of *Aristorenas*, the last Ontario C.A. decision on the subject before *Resurfice*.
[846] Aat the text associated with footnotes 442-445 in the Jan 31/08 version of the paper.
[847] *GCNA v. Mercedes-Benz Canada Inc.*, 2006 CanLII 19485 (Ont. C.A.).
[848] See *Giustini v. Poppa*, 2007 CanLII 33983 at paras. 15-18 (ON S.C.J.).
[849] *Ortega v. 1005640 Ontario Inc*., 2004 CanLII 19221, 187 O.A.C. 281 (Ont. C.A.) affirming 2002 CarswellOnt 1347 (Ont. S.C.J.), leave to appeal refused 206 O.A.C. 400 (note) (SCC).

1. The *Resurfice* material-contribution test deals with contribution *to increased risk*. The *Athey* test deals with *contribution to the injury*. There is a difference. It is a difference known to Canadian law. It is a difference known to Ontario law. It is a difference specifically recognized in cases such as *Cottrelle*, where increase in risk was specifically rejected as a basis for finding that factual causation existed.

There is an enormous amount of scholarship out there in the legal firmament dealing with the difference. I will mention, just in passing, that the risk argument was rejected by the Supreme Court in *Snell v. Farrell*, *Laferrière v. Lawson*, and *St. Jean v Mercier* (none of which the Supreme Court chose to mention in *Resurfice,* for whatever reason – do we assume these cases have been overruled by implication?); and by the Ont. C.A. in *Cottrelle* (medical malpractice) and *Ortega* (not medical malpractice).

2. In *Resurfice*, McLachlin C.J. discusses a material-contribution test which is based on negligent conduct about which one can say ONLY that it contributed to the increased *risk of injury*. She does not discuss, as the Supreme Court did in *Athey*, negligent conduct which is found to have contributed *to the occurrence* of an injury.

3. *Cook v Lewis* has always been understood as a but-for case with the onus reversed. It has not been understood as a case asserting a different theory of factual causation. The Supreme Court was quite specific, as recently as February 2002, about the meaning and purpose of the rule in *Cook v Lewis*. It is *not* a causation rule. The Court held, in *St Jean v. Mercier*, at paragraph 118, that where the rule in *Cook* applies there is a "reversal of the burden of proof, but not on the issue of causation between fault and damages, but rather on the particular issue of linking the damage to the particular author of the delict." Four of the nine judges who decided *St-Jean v. Mercier* (McLachlin CJ, Bastarche, Binnie, and LeBel JJ) were also on *Resurfice* – three common law and one civil law judge, if that matters. The full text of paragraph 118 is:

> [118] The appellant cited art. 1480 C.C.Q. in his discussion of establishing the causal link. This article imposes solidary liability on defendants where they have jointly committed a wrong causing an injury or where each has committed a separate fault, one of which may have caused the injury. For this article to operate, it is necessary for the plaintiff to show an impossibility to determine the causal connection between the damage suffered and the specific culprit. The classic scenario is one where hunters simultaneously fire their guns, injuring the plaintiff. This was in fact the situation in cases such as *Labelle v. Charette*, [1960] Que. Q.B. 770, and *Massignani v. Veilleux*, [1987] R.R.A. 541 (C.A.), as well as the common-law case of *Cook v. Lewis*, [1951] S.C.R. 830, where this Court ruled that if the defendants' own wrongdoing prevents the plaintiff from making the necessary causal connection to the specific author of the wrong, liability is to be attributed collectively so as to avoid the injustice of leaving the victim with no recourse. (See also A. Mayrand, "L'énigme des fautes simultanées" (1958), 18 R. du B. 1, and Baudouin and Deslauriers, *supra*, at pp. 348 and 370-71, for the doctrinal discussion of the matter.) *It is in cases such as these that there is a true reversal of the burden of proof, but not on the issue of causation between fault and damages, but rather on the particular issue of linking the damage to the particular author of the delict*.[850]

[850] 2002 SCC 15, para. 118 (emphasis added).

The Court added, at paragraph 120:

> [120] There is no reason to apply this rule in favour of the appellant. It should only be applied in cases where there is a true impossibility to determine the author of the delict. There was no such impossibility here: either it was the car accident, or the respondent, or a combination of both in certain proportions.[851]

The rule that the Supreme Court is referring to in the first sentence is the reversal of the but-for onus, which is to "be applied in cases where there is a true impossibility to determine the author of the delict", that is, the wrong, the tort. Has anyone seen *Cook v Lewis* described as a material contribution case (in any judgment or other piece of scholarship), or described as a case that espouses a theory as to how the hunters' acts are positive proof of causation, before *Resurfice*?

4. There is more. Take my word for it.

In any event, in Ontario, *all* we have to worry about, for now, is the meaning of the *Athey* material-contribution test (whatever that means).. Feel sorry for counsel in BC. As matters now stand, they seem to have three tests for factual causation: (1) the but-for test; (2) the *Athey* material-contribution test; and (3) the *Resurfice* material-contribution test. I suppose that means more fees for lawyers and more work for judges. (And ink to spill for article writers.) Those, too, are good things, right?

Let us summarize what we have been told by *Barker* and *Rizzi* about *Resurfice*: Whatever it is that *Resurfice* said, it does not change anything. It merely confirmed the law was what it always had been. This is not quite Morden J.A.'s admonition in *Ontario Securities Commission v. Greymac Credit Corp.*: "In the absence of binding authority clearly on point it may reasonably be said that the law is what it ought to be."[852]

I suppose that means is that the Ontario Court of Appeal will not have any difficulty determining what to do with Ontario cases, decided after the release of the *Resurfice* reasons and applying the material-contribution test, which do not mention *Resurfice* and seem to have been decided by using the material-contribution test as explained by *Athey* rather than the *Resurfice* version. The cases either apply the law as it stood before *Resurfice*, correctly, or they do not. And, even if they do not, or the Court of Appeal changes its collective mind before the cases come up for appeal, well, an appeal is from the facts and the decision, not the reasons. There are at least 5 such cases as of mid-2007, three of which were tried before the release of the *Resurfice* reasons.[853]

Consider what the British Columbia Court of Appeal said soon after the release of *Resurfice*, in *Hutchings v. Dow*:

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[851] 2002 SCC 15, para. 120.

[852] (1986), 55 O.R. (2d) 673 at 695, 30 D.L.R. (4th) 1 (C.A.).

[853] *Fisher v. Atack*, 2007 CanLII 3482 (Ont. S.C.J.) (before; appeal now argued, decision under reserve); *Stranges v. Allstate Ins. Co. of Canada*, 2007 CanLII 10215 (Ont. S.C.J.) (before); *McKinnon v. Grand River Hospital*, 2007 CanLII 23492 (Ont. S.C.J.) (before); *Dogan v. Pakulski*, 2007 CanLII 17027 (Ont. S.C.J.); and *Veffer v. Feldman*, 2007 CanLII 15798 (Ont. S.C.J.), Leave to appeal refused Sept. 10, 2007 (Ont. Div. Ct., Carnwath J.). *Resurfice* is not mentioned in the leave reasons which relate to a different issue. None of these cases have been decided as of May, 2008, except as indicated.

> [19] In *Resurfice*, the Supreme Court of Canada took the opportunity (albeit in *obiter dicta*) to clarify the relationship between the "but for" test and the "material contribution" test with respect to causation. … [854]

As you have seen (or will see if you look at the B.C. jurisprudence) some B.C. judges have said that the *Resurfice* did far more than merely "clarify the relationship" between the tests. BC judges think that *Resurfice* says something, even if that something turns out to be only clarification of the relationship between the two tests, which might amount to, in *Barker* and *Rizzi* terms, doing nothing more than affirming that but-for is the default test.

The Court of Appeal in *Barker v. Montfort Hospital* was able to avoid having to write about the meaning of the *Resurfice* material-contribution test in any detail because it held that *Resurfice* did not apply. The Court wrote, in part:

> [53] In the present case, the respondents' have not shown that it was impossible to prove that the delay in carrying out the operation caused Ms. Barker's injury on a balance of probabilities. As I noted earlier, none of the experts was specifically asked to consider the pathology report on the removed portion of the bowel and other evidence to give an opinion on the impact of operating at 1:30 p.m. on April 6 rather than at 11:00 p.m. on April 5 (or within several hours thereafter) *nor were they asked whether such an opinion could be given*. That said, the evidence that was led and that generally addressed the point at which the bowel likely died was unfavourable to the respondents." … (emphasis added).
>
> [54] In my view, therefore, the material contribution test has no application to the present case. We are left, therefore, with the "but for" test. As noted above, no expert opined on causation based on an eight to fourteen hour negligent delay in operating. Assuming that a positive medical opinion could not have been obtained in this case, the "but for" test allows for the application of the robust and pragmatic approach: see *Snell v. Farrell*, *supra*, at para. 44. Under that approach the respondents nonetheless have to provide an evidentiary foundation for finding that there is a substantial connection between the injury and the defendant's conduct. As I have noted in the earlier portion of this decision, no such foundation was laid in the present case. There is a complete absence of medical or other evidence from which to infer that, but for the delay in operating, the section of the bowel would likely have been saved. [855]

The conclusion in the last sentence of the quotation from paragraph 53 has to be seen as the reason why the Court went on to hold, in paragraph 54, that the *Resurfice* material contribution test did not apply.

Now consider *Rizzi v. Mavros.* [856] *Rizzi* is the result of a motion to extend the time for filing a cross-appeal. Gillese JA agreed with *Barker v Montfort Hospital* that *Resurfice* did not change existing law, all it did was "clarify". As readers should remember, in *Resurfice*, McLachlin CJ penned a sentence which contains a phrase that is likely to outlive (for the wrong reasons) much of the rest of the court's jurisprudence.

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[854] 2007 BCCA 148 at para. 19.
[855] *Barker v Montfort Hospital*, at paras. 53, 54.
[856] 2007 ONCA 350.

That phrase is "Much judicial and academic ink has been spilled". It is time to spill some more of the electronic equivalent: pixels.

Let us consider the meaning of "clarify" - defined by the *Canadian Oxford Dictionary* (self-described as "the foremost authority on current Canadian English" - a p. 263: "1 … make or become clearer … 2 make transparent … purify…" In *Rizzi*, Gillese JA wrote:

> [19] …. I accept the explanation for the delay. *Although Resurfice did not change the law of causation, it did clarify the law.* The history of *Resurfice* demonstrates that there was confusion in this area following *Athey v. Leonati* – the trial judge applied the "but for" test but the Alberta Court of Appeal applied the "material contribution" test. If there were no confusion about the law of causation, it seems to me that the two levels of court would not have differed on which test applied. This court's decision in *Barker* reinforces my view.[857]

Some might suggest that it does not necessarily follow that the reason for the difference between the views of the law of the Alberta Q.B. and the Alberta C.A. was because of whatever confusion there was in the law – it is just as plausible that there was no real amount of valid confusion on the applicable issue, rather the Alberta Court of Appeal simply got it wrong – but that question is moot, now. One might suggest that one explanation for why the *Resurfice* reasons are so short is that the Supreme Court did not think there was much of a valid basis for the Alberta Court of Appeal's confusion. Still, if there was still good reason for confusion about the meaning and scope of the *Athey* material-contribution test eleven years after *Athey*, then we know who to blame for that, don't we?

The mantra that *Resurfice* did not change anything was repeated in Vescio v. Garfield.[858] The trial judge wrote: "The Supreme Court of Canada re-visited the law on causation and the tests applicable to its determination in *Resurfice Corp. v. Hanke*, [2007] S.C.J. No. 7. Chief Justice McLachlin confirmed that the law of causation has not changed; the "but for" test applies in all but special circumstances."[859] It is certainly worth pointing out the obvious. If *Resurfice* did not change existing Ontario law, we should be able to find current, valid, instances where a trial court held that fault and mere increase of risk that the harm would result from the fault (to less than a probability) was sufficient for a finding of causation and that decision was affirmed on appeal. However, what we find from the Ontario Court of Appeal before *Resurfice* is the explicit rejection and reversal, in *Cottrelle v. Gerrard*, of the trial judge's finding that increase in risk due to fault to a possibility still less that probability was sufficient for factual causation on an *Athey* material-contribution basis.[860] It is worth quoting portions of *Cottrelle*:

> [25] I agree with the appellant's submission that in an action for delayed medical diagnosis and treatment, a plaintiff must prove on a balance of probabilities that the delay

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[857] 2007 ONCA 350 at para. 660 (emphasis added).
[858] 2007 CanLII 24676 (ON S.C.J.).
[859] 2007 CanLII 24676 at para 273 (ON S.C.J.).
[860] *Cottrelle*, 67 O.R. (3d) 737, 2003 CanLII 50091 at paras. 25-38.

> caused or contributed to the unfavourable outcome. In other words, if, on a balance of probabilities, the plaintiff fails to prove that the unfavourable outcome would have been avoided with prompt diagnosis and treatment, then the plaintiff's claim must fail. It is not sufficient to prove that adequate diagnosis and treatment would have afforded a chance of avoiding the unfavourable outcome unless that chance surpasses the threshold of "more likely than not."[861]
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> [36] In my view, the respondent established no more than the loss of a less than 50% chance of salvaging her leg had the appellant not been negligent. Unfortunately for the respondent, under the current state of the law, loss of a chance is non-compensable in medical malpractice cases: see Laferrière v. Lawson, supra; St-Jean v. Mercier, 2002 SCC 15, [2002] 1 S.C.R. 491; Hotson v. East Berkshire Area Health Authority, [1987] A.C. 750 (H.L.). The trial judge did not explain the basis for her conclusion that "the loss of chance doctrine is not applicable to this case". In view of the evidence I have reviewed, and in view of the respondent's concession that there was no evidence to suggest that it was more than likely a better outcome would have followed had the appellant acted with care, the trial judge's finding reveals either a misapprehension as to the law or a palpable and overriding error on the facts.[862]
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> [37] The exclusion of recovery for the loss of a chance in medical malpractice cases has been criticized as being unduly rigid and harsh: see. Klar, supra at 403-405; John G. Fleming, "Probabilistic Causation in Tort Law" (1989) 68 Can. Bar Rev. 661; S.M. Waddams, "The Valuation of Chances" (1988) 30 Can. Bus. L.J. 30; S.M. Waddams, The Law of Damages, loose-leaf (Toronto: Canada Law Book, 2002) at 13.260-13.370; Salvatore Mirandola, "Lost Chances, Cause-in-Fact and Rationality in Medical Negligence" (1992) 50 U. T. Fac. L. Rev. 258. Recovery based upon the loss of a chance would require substantial reduction of the damages to reflect the value of the less than 50% chance that was lost. In any event, the authorities cited in para. 36 preclude us from considering such an award.[863]

The *Cottrelle* analysis is not limited to medical malpractice cases: see, *Ortega v 1005640 Ontario Inc*.[864] I mention *Ortega* just in case too-astute readers say "aha, but medical malpractice already had a rule that possibility was not enough in delayed treatment cases, so *Cottrelle* doesn't establish any general principle." It is also worth quoting from *Ortega*. In this passage, the reference to "diminished risk" means the proposition that there would have been less risk of injury if the doorman had been in place; that is, there was increased risk because he was not. The Court of Appeal wrote:

> [7] Causation is established where a plaintiff proves on a balance of probabilities that the defendant caused or contributed to the injury: *Snell v. Farrell*, [1990] 2 S.C.R. 311 and *Cottrelle v. Gerrard*, [2003] O.J. No. 4194 (C.A.).
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> [8] The trial judge found that this shooting was unprovoked and indiscriminate, in other words, that it was a random shooting and that nothing the nightclub might

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[861] *Cottrelle*, 2003 CanLII 50091, para. 25 (Ont. C.A.).
[862] *Cottrelle*, 2003 CanLII 50091, para. 36 (Ont. C.A.).
[863] *Cottrelle*, 2003 CanLII 50091, para. 37 (Ont. C.A.).
[864] 2004 CanLII 19221 (Ont. C.A.)

> reasonably have done would have prevented it. This finding is amply supported by the evidence. For example, the record discloses that the identity of the shooter was unknown, that no one knew whether the shooter had had any connection to the mall or the nightclub and that no one knew whether the shooter had any connection to the victim. Further, Detective Mendelson, a senior and experienced officer with the Toronto police force, testified that investigations of homicides at similar clubs showed that the presence of uniformed officers did not prevent murders from occurring.
>
> [9] Nonetheless, the appellants argue that the presence of uniformed guards outside of the front door creates an atmosphere that diminishes the risk of violence. Although there is no evidence specifically addressing this, it may be that the deterrent effect of a uniform can be taken as a given. *Nonetheless, to demonstrate causation the plaintiffs have to go beyond a diminished risk and demonstrate that in this case the failure to provide uniformed guards outside the front door of the club* (assuming that to be the standard of care) caused the killing.
>
> [10] *In other words, to find causation established, the evidence of reduced risk created by the presence of a uniform would have to be coupled with a factual inference drawn by the trial judge, namely, that the failure to provide uniforms in this case caused or contributed to the killing. That is, this failure made the killing more likely that not.*[865]

It is worth wondering how or why that was overlooked in both *Barker* and *Rizzi*.

Hill v. Victoria Hospital Corporation[866] is a medical malpractice action where the trial ended a few days before the release of *Resurfice*. *Resurfice* is mentioned but not *Barker v. Montfort or Rizzi v. Marcos*. There is no discussion of the meaning of the material-contribution test. *Resurfice* is referred to as the Supreme Court's "most recent pronouncement on causation" but is cited only for the proposition that but-for is the basic test for causation.[867] The trial judge's statement of the law is the *Athey* formulation, quoted from the Ont. C.A. 2006 decision in *Aristorenas v Comcare*.[868] The trial judge stated that but-for was the applicable test without explaining why;[869] however, the conclusion seems unassailable on the facts. Given that he had set out the *Athey* version of material contribution requirement – the unworkability of the but-for test – we have to assume he concluded that but-for was "workable" on the facts on the issue of whether the doctor's conduct caused the injury. There was no suggestion that there were gaps in the evidence or scientific issues. The trial judge found that the doctor was not negligent in the manner in which the doctor performed the operation, so this might be another reason why he spent very little time on causation. The trial judge had found that the doctor did not obtain informed consent. However, the trial judge also held that the reasonable patient in the plaintiff's position would have had the operation if properly informed. (The plaintiff denied she would have. The trial judge did not believe her.) Therefore, the failure to obtain informed consent was not causative and not actionable.

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865 2004 CanLII 19221, paras. 7-10 (emphasis added in para. 10).
866 2007 CanLII 27582, released July 16, 2007.
867 2007 CanLII 27582 at para 252.
868 2007 CanLII 27582 at para 251.
869 2007 CanLII 27582 at para 253.

The trial decision in *Berendsen v. Ontario*[870] is a good example of the confusion engendered by *Resurfice*. *Berendsen* has extensive, detailed, complex, scientific evidence which the trial judge analyzed in depth. The factual causation issue in *Berendsen* was decided on a but-for basis. The trial judge was satisfied that the evidence was sufficient to permit the conclusion that the defendant's misconduct was the only probable cause of the harm. The trial judge held that the evidence eliminated all other potential causes.[871] Nonetheless, even though the trial judge found for the plaintiff on a but-for basis, even though it was palpably, even dead-fish obviously, clear on the trial judge's description of the evidence and findings of fact that the but-for test was the applicable test, the trial judge must have felt compelled to set out her understanding of causation law in light of *Resurfice*. In doing so, the trial judge got the law wrong. The trial judge wrote:

> [274] Cause is established by proving on a balance of probabilities that had it not been for the negligent conduct of the defendant the losses to the plaintiffs would not have occurred. If it is probable the harm would not have occurred without the negligence of the defendant, the conclusion is that the defendant's negligence caused the loss, and the plaintiffs in the result are entitled to their damages. *If it is only possible the defendant's negligence caused loss and harm, the conclusion is that the loss was not caused by the defendant's negligence and the plaintiffs are then not entitled to damages.*[872]

The statement in the italicized sentence is wrong. It is contrary to *Resurfice*. A plaintiff can now succeed in tort, at least the tort of negligence even where it is only possible that the defendant's negligence caused the harm, in the circumstances set out in *Resurfice*. The trial judge went on to summarize the *Resurfice* requirements but did not correct the error. That error is, of course, meaningless since the trial judge found for the plaintiff on a more difficult standard; that of probability under but-for.

Let us digress for a moment into an *attempt* at humour.[873] I did not know that it is now Ontario jurisprudence that two wrongs make a right. (I am referring to *Barker* and *Rizzi*, here.) Indeed, there is explicit judicial authority that they do not; even Ontario Court of Appeal authority. In *Gu v. Tai Foong International Ltd*., the Court wrote:

> [v]iewed from one perspective, there is an element of "two wrongs do not make a right" in what transpired late in the trial. Arguably, Gu should not have been permitted to testify contrary to his pleadings … and the Lam Group should not have been permitted to argue defences it had not pleaded.[874]

There is also good Ontario law that recidivism does not help: the number of times an error is committed is irrelevant. In *R. v. J.R.R*., we find: "I have decided that the community cannot take another chance with Mr. J.R.R. Six wrongs do not make a

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[870] 2008 CanLII 1416 (Ont. S.C.J.).
[871] See 2008 CanLII 1416, paras. 284, 285 (Ont. S.C.J.).
[872] 2008 CanLII 1416, para. 274 (Ont. S.C.J.) (emphasis added).
[873] I am sure there is an appropriate Marx Brothers routine. Failing that, one can always fall back on the answer to their classic "viaduct" routine – *The Cocoanuts* (Paramount, 1929) – which is that the water is too deep for chickens. That answer is probably as valid as the current answers to some of the questions still outstanding in Canadian causation jurisprudence.
[874] [2003] O.J. No. 264 at para. 35 (C.A.).

right."[875] A little digging will turn up more usages of the adage by noted Ontario jurists, such as Farley J. in *National Trust Co. v. Furbacher* [876] and Lerner J. in *Jones, Gable & Co. v. Scott*.[877] The first reported usage I could find in Ontario case law comes from the pen of Falconbridge C.J.K.B in 1908 in *Loughead v. Collingwood Shipbuilding Co*.:

> [i]t would probably be held, in view of cases such as … [that] the fact of such insurance could not be taken into consideration by the jury. But, even if two wrongs could make a right … there would still be a substantial miscarriage of justice on the facts of the case.[878]

Remarkably, that was for the benefit of an insurer. Times have, clearly, changed.

Returning to the discussion of the use of "clarify" to describe what occurred in *Resurfice*, McLachlin C.J. did not seem to think that there was all that much confusion "in this area"; that is, the area of factual causation. It seems to me that it is a rather unusual use of "clarify" where what the second case says the first case said is literally the exact opposite of the plain meaning of the English words used in the first case.. On the other hand, the Ont. C.A. does have the example set by the Supreme Court of Canada in *R. v. Peda* and *R v. Binus*.[879]

On that note, some of us will recall this famous passage from a famous book - or at least parts of the passage and the book. I am going to quote from *Through The Looking Glass* by Lewis Carroll. (That probably will not surprise some of you.) The quotation comes from c. VI and begins with Humpty Dumpty speaking to, of course, Alice.

> There's glory for you!'
> `I don't know what you mean by "glory,"' Alice said.
> Humpty Dumpty smiled contemptuously. `Of course you don't — till I tell you. I meant "there's a nice knock-down argument for you!"'
> `But "glory" doesn't mean "a nice knock-down argument,"' Alice objected.
> `When _I_ use a word,' Humpty Dumpty said in rather a scornful tone, `it means just what I choose it to mean — neither more nor less.'
> `The question is,' said Alice, `whether you CAN make words mean so many different things.'
> `The question is,' said Humpty Dumpty, `which is to be master - - that's all.'

Regardless, in Ontario, we have now been told that *Resurfice* did not change causation law, only clarified it and we lawyers (and judges below the Court of Appeal) are required to accept that as the state of the law. There is a reason for that. I will not bore you with the Latin phrase. The English term is binding precedent. What this means is that we lawyers and the lower court judges, who are "little peckers" have to do what the Court of Appeal judges, who are "big peckers" say, until bigger peckers (the Supreme Court of Canada or the Ontario legislature) say otherwise. I am not worried about having described the judges as "peckers" because I am quoting from a court decision. Some you

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875 [1996] O.J. No. 3468 at para. 64 (Ont. S.C.J.).
876 [1995] O.J. No. 3566 at para. 7 (Ont. S.C.J.)
877 [1972] O.J. No. 940 at para. 10 (H.C.J.).
878 [1908] O.J. No. 101, 16 O.L.R. 64 (Div. Ct.).
879 *Peda v. The Queen*, [1969] S.C.R. 905; *R. v. Binus*, [1966] 4 C.C.C. 193.

might not believe me. Have ever lied to you? The case is *South Side Woodwork (1979) Ltd. V. RC Contracting Ltd*. [880] Master Funduk wrote:

> Any legal system which has a judicial appeals process inherently creates a pecking order for the judiciary regarding where judicial decisions stand on the legal ladder. I am bound by decisions of Queen's Bench judges, by decisions of the Alberta Court of Appeal and by decisions of the Supreme Court of Canada. Very simply, Masters in Chambers of a superior trial court occupy the bottom rung of the superior courts' judicial ladder. I do not overrule decisions of a judge of this Court. The judicial pecking order does not permit little peckers to overrule big peckers. It is the other way around.[881]

Masters are a category of judge. Lawyers occupy a rung even lower on the legal ladder than Masters.

I suppose it would have been nice if we had been told, more clearly, what the law was that was not changed but was only clarified. As I will show next, *Aristorenas,* if it means anything more than "no evidence is still not enough" muddies the waters even more. I have pointed out in *Snark* that there was no clarity at all to the law as it existed before *Resurfice*. I suggested that the meaningful content of the *Athey*-version of the material-contribution test was as ephemeral as lace and could fit into a small thimble. I will introduce another Carroll image. The *Resurfice* version of material contribution is no more substantial. It may be less. It has all of the substance of the Cheshire Cat's smile. More than a few noted names in the Canadian tort firmament expressed variations of the same mantra in articles dealing with the jurisprudence through *Athey*. More than a few have not decided to change their minds since *Resurfice*. (Actually, I am not aware of any who have, but then I have not spoken to them all.) I suppose it is possible that we are all wrong. On the other hand, it is just possible that some of us are right. It is just possible that there is a good reason for the spilling of all of that judicial and academic ink that the Supreme Court said it did not have to catalogue. Perhaps all that ink was spilled because the jurisprudence simply did not and still does not make sense. *Resurfice* has not helped.

The next Ontario decision touching on the *Resurfice*[882] material-contribution test thicket is *Irvine v. Smith*.[883] *Irvine* is clear evidence that some Ontario judges are sufficiently uncertain about what to say the *Resurfice* material-contribution test means, and what reasons they should give should they decide that it does not apply, that some will opt for the safe course of saying nothing more than that the but-for test is applicable because the facts do not justify not applying it. That is not at all surprising, given the unsettled state of Canadian jurisprudence since *Resurfice*. It is even less surprising, in Ontario, given that the startling declaration by the Ontario Court of Appeal in *Barker v. Montfort Hospital*,[884] by obiter, for no apparent reason, and seemingly without adequate

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[880] [1989] A.J. No. 111, 95 A.R. 161 (Alta. Q.B.)

[881] [1989] A.J. No. 111, 95 A.R. 161 at 166-67, para. 51-53 (Alta. Q.B., Master). The only change I have made to the quotation is to combine its sentences into one paragraph.

[882] *Resurfice Corp. v. Hanke*, 2007 SCC 7.]

[883] 2008 CanLII 5586 (Ont. S.C.J.), released in February 2008.

[884] *Barker v Montfort, supra*. See, also, *Rizzi v. Macros, supra*.

consideration, that *Resurfice* did not change existing Canadian tort law. Rather, it only clarified it. *Barker* is remarkably wrong, besides being inconsistent with any considered comments in any reported judgment from any other Canadian jurisdiction. The Court of Appeal may be retreated from *Barker* – if *Misko v. Doe* means what it seems to mean – however, until the Court of Appeal formally disavows it, *Barker*, remains the law of Ontario.

A brief recap of the facts of *Irvine* is all that is needed.[885] PI, a 19 year-old adult with no previous history of mental problems, began to have problems. He called his parents for help. Relatives who lived close enough to get to him were promptly sent to get him. They took him to their home. PI's father, TI, a family physician, arrived later that evening. TI's plan was to drive PI back to the family home the next morning. The Irvines lived in a different city. That never happened, hence the tragedy and the lawsuits. Within 12 hours, PI committed suicide by jumping into the path of the JS vehicle. TI's plan had been to drive home with PI the next morning.[886] PI's father, TI, and PI's older sister[887] decided to take turns watching over PI for the rest of the night. Unfortunately, at about 3:30 a.m. PI again "bolted" from the house. The family gave chase, unsuccessfully. This time, they did not find PI until it was too late. About 2 hours later and 4 to 5 kilometres away, PI was walking along a highway when he "jumped into the right side of a truck" driven by JS.[888] PI was killed.

The Irvine family sued JS. JS counterclaimed for his psychological trauma, alleging that it was the Irvine family's fault that PI was in position to jump into the JS vehicle as it drove by. The particular fault was one of omission. JS's alleged that TI "was negligent because he failed to take [PI] to hospital for a psychiatric assessment after PI bolted the first time. Had he done so, PI would not have been able to run away the second time and the accident would have been averted."[889] The only issue in the Irvine action against JS was whether he had been negligent in his manner of driving.

The trial judge dismissed both actions. She held that JS had not been negligent.[890] As to the JS claim, she held that none of PI's family, and in particular TI, owed an applicable duty of care to JS.[891] She also held that even if there was a duty, there was no negligence.[892] The trial judge held that PI would not have been involuntarily admitted to

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[885] The summary of the facts is taken from 2008 CanLII 5586 at paras. 1-10.

[886] The trial judge held that that plan was reasonable on the facts: 2008 CanLII 5586 at paras. 34, 49-50.That, ultimately, was why TI was not negligent.

[887] She was also a student at the university.

[888] 2008 CanLII 5586 at para. 9.

[889] 2008 CanLII 5586 at para. 10, 57. The applicable Ontario legislation is the *Mental Health Act*, R.S.O. 1990. c. M.7, s.17. A police officer was at the house during the evening. This was after PI wandered away the first time. The officer, after speaking to TI, PI, and family members, was satisfied that PI was not a danger to himself or the public and that he did not seem to be unable to take care of himself. Given that, the officer could not take PI into custody, involuntarily, for the purpose of taking him to a hospital so that a physician could decide if PI should be involuntarily committed under the applicable Ontario legislation.

[890] 2008 CanLII 5586 at paras. 62-70.

[891] 2008 CanLII 5586 at paras. 14-34.

[892] 2008 CanLII 5586 at paras. 35-53.

hospital if TI had taken him for assessment.[893] That is, she held that even if there was a duty, and there was negligence, that nothing that any of PI's family did or did not do amounted to for cause of JS's injuries.[894] The reason for that was here finding that even if PI had been taken to the hospital for assessment, he would not have been admitted involuntarily.

TI was the target defendant because he was a family physician.[895] JS did not allege that TI owed anyone a duty as a physician and that TI had breached that duty. Rather, JS alleged that TI's increased knowledge of psychiatric issues, because he was a physician, in the context of his status as parent which meant there was already an existing relationship between TI and PI, was the reason why he had a duty to JS and why TI breached that duty by not doing something more to prevent PI leaving the house the second time; in other words, not doing something which would have prevented PI from later that day jumping into the path of the JS vehicle. The trial judge wrote: "[JS] submits that [TI's] actions in the early morning of September 10, 1999 must be adjudged in view of his specialized knowledge as a medical doctor familiar with the symptoms of psychosis.[896] The trial judge accepted this argument. "I accept that the standard of care in this case is modified by the fact that Dr. Irvine had specialized knowledge and training. To say otherwise would be to ignore an underlying fact in this case, which is that Dr. Irvine is a physician. He has encountered patients exhibiting symptoms of psychosis during the course of his practice. He recognizes those signs and symptoms. As a result, I accept that he would bring a special knowledge to bear in making decisions as a father about the appropriate course of action to be followed."[897]

The significant aspect of Irvine has nothing to do with causation. It is the decision on the duty of care in the context of the parent-child relation where the child is an adult. The issue, put at its starkest was: is a parent, merely because of the parental relationship and the knowledge that gives the parent about the child, a rescuer? Does the status as parent, without more, create a positive duty to members of the public in respect of the actions of adult children? Does a parent, merely because of the parental relationship, owe a duty of care, in tort, to others who may be injured by the acts of the parent's adult, child. *Irvine* holds that the parent-child relationship "does not, without more, establish the degree of proximity required to give rise to a duty of care" on the parent to members of the public who might be injured by the fault of an adult child. A parent, without more, is not under a duty of care to members of the public who might be injured by the child's actions, unless the parent's "conduct implicates him or her in the creation or exacerbation of the risk. Short of active implication a parent is entitled to respect the autonomy of the adult child."[898] This principle applies even where the adult child is acting oddly and the

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[893] 2008 CanLII 5586 at paras. 51-53.
[894] 2008 CanLII 5586 at paras. 54-58.
[895] We can assume that he was also sued because it was assumed that he had money to pay any judgment, or it was tit-for tat. There is some indication in the reasons that JS would not have sued had the Irvines not sued him, first.
[896] 2008 CanLII 5586 at para. 11.
[897] 2008 CanLII 5586 at para. 40.
[898] Quoting with paraphrasing from *Childs v. Desormeaux*, [2006] 1 S.C.R. 643 at para 47, 2006 SCC 18

parent's special expertise (due to some factor other than the status of parent) means the parent might, even should, be able to foresee that the child might act in a way that might injure others. The trial judge relied on *Childs v. Desormeaux*[899] and *Nespolon v. Alford.*[900]

The rationale for the duty decision is captured in the paragraph that concludes the duty portion of the reasons.

> I find that there are sound policy reasons not to extend a duty of care in the circumstances of this case. *To impose a duty of care on [TI] in the circumstances of this case would be to require all parents to bring their adult children, who exhibit signs of psychosis and who have run away, to hospital for psychiatric assessment, even if that is against their adult child's will*. This is particularly so given that [TI] had planned a different course of action, which for reasons expressed below, was reasonable in the circumstances.[901]

The last sentence does not detract from the prior sentence. The trial judge's decision was that there was no duty of care. That was the primary finding. It cannot be considered obiter. The last sentence is a reference to an alternative finding which was that TI was not negligent even if there was a duty of care.

That brings us to what *Irvine* says about the meaning of the *Resurfice* material-contribution test. The answer is succinctly captured in one word: *nothing.* The trial judge applied the but-for test because she was satisfied she could use it to decide the causation issue one way or the other. She did not find it necessary to explain why that was so. We have to assume she thought it would be obvious enough. If her but-for analysis, and her choice of the key event is correct, was right. Her choice of the key event might not be.[902]

The trial judge dealt with causation in the JS action, even though she found no duty and no negligence. The main defendant was TI, PI's father. The causation analysis and conclusion is contained in two paragraphs.

> [57] As noted above, the plaintiffs' position is that TI should have taken his son to hospital where he would have been admitted as an involuntary patient. As a result, he would not have had an opportunity to run away a second time and the accident would have been avoided. The defendant submits that not only did TI not have an obligation to take his son to hospital, but Paul would not have been admitted in any event.
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> [58] Assuming that TI did take PI to the hospital, I am not persuaded on a balance of probabilities that the emergency doctor at St. Mary's Hospital would have admitted him as an involuntary patient. I prefer Dr. McCauley's evidence on this issue. I agree with him that in the circumstances, a doctor would suspect an episode of substance abuse and PI would have been sent home with his father. Moreover, given that PI's symptoms

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899 [2006] 1 S.C.R. 643, 2006 SCC 18, 266 D.L.R. (4th) 257.

900 (1998), 40 O.R. (3d) 355, 161 D.L.R. (4th) 646, 1998 CanLII 7127 (C.A.); leave to appeal to SCC dismissed January 21, 1999 (Court Docket No. 26862).

901 2008 CanLII 5586 at para. 34 (emphasis added).

902 See below, at text associated with note ____

> seemed to wax and wane and that he was lucid and coherent upon returning to the Chateauvert's after he first ran away, it strikes me as most unlikely that he would have been admitted to hospital.[903]

The trial judge held that the applicable test for causation was the but-for test. She quoted from *Resurfice*:

> 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'.[904]

The trial judge held but-for test applied. "The [*Resurfice*] court went on to determine in what circumstances that basic test might be modified to recognize a material contribution. It seems to me that the facts in this case would not justify a departure from the usual but for test."[905]

The trial judge did not identify what it was about the facts "that did not justify a departure from the usual but for test". She said nothing more about the material-contribution test." All that we know is that she decided the causation issue on the but-for basis. That tells us, in the broad sense, why the trial judge did not apply the material-contribution test, whatever she understood it to mean. She was following the direction of *Resurfice* which states that the material contribution test applies only where the criteria set out in *Resurfice* exist. The criteria did not exist. Once of the criteria is that it be impossible to apply the but-for test, for certain reasons to arrive at a valid answer as to whether the negligent conduct is or is not a probable cause. The trial judge, obviously, did not think it was impossible, since she applied what she applied a but-for test for analysis to conclude that the alleged misconduct of TI was not causative, even if it was negligent.[906]

As mentioned, JS had alleged that TI was negligent in not taking PI to the hospital. JS's position was that if TI had, PI would have been committed involuntarily. The defence position was that PI would not have been committed; therefore, even if TI should have taken PI to the hospital for assessment, the negligence was not causative of anything.[907] The trial judge had held that TI was not negligent in not taking PI to the hospital.[908] The trial judge also held that, even if PI had been taken to the hospital, he would not have been committed involuntarily. She preferred the Irvine evidence.[909]

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[903] 2008 CanLII 5586 at paras. 57-58.
[904] 2008 CanLII 5586 at para. 54, quoting *Resurfice*, at para. 23.
[905] 2008 CanLII 5586 at para. 55.
[906] 2008 CanLII 5586 at paras. 54-58.
[907] 2008 CanLII 5586 at paras. 30, 57-58
[908] 2008 CanLII 5586 at paras. 34-53.
[909] 2008 CanLII 5586 at paras. 50-53

Therefore, on a but-for basis, there was no causative negligence, even if there was negligence, because it would not have made a difference.[910]

It is an interesting (to some, maybe) but irrelevant point that the inquiry into would have happened on the hypothetical assessment was probably irrelevant. It could be relevant only if one assumes some sort of possibility that PI would, if released, have wandered back to the highway in time to jump into the path of the JS vehicle. In addition, it could only be relevant if we assume P would have stayed around for the assessment. He could not be compelled to. In addition, there is nothing in the reasons that indicates whether the mere fact of taking PI to the hospital would possibly, probably, almost certainly, or necessarily have prevented PI from wandering back to the highway in time to jump into the path of the JS vehicle. In other words, there is absolutely nothing in the reasons that tells us whether there was ever any way of making any sort of valid conclusion as to whether merely taking PI to the hospital would have made a difference, even assuming TI had that duty.

It is likely that the trial judge overlooked that twist because, even assuming that the results of the hypothetical assessment could have been relevant, the form in which she stated the causation question was wrong, The way the trial judge phrased it was: "The issue then becomes whether but for Dr. Irvine's alleged negligence and breach of standard of care, did Mr. Smith suffer nervous shock, mental distress and post-traumatic stress disorder."[911] That was not the correct question. Understanding why the trial judge stated the factual causation question incorrectly lies in accepting that the legal factual causation question is really two questions: (1) is there a factual cause at all[912] and (2) if there is, is at least one of the factual causes a legal factual cause. Asking the proper question directed at the key event(s) tells us whether those events are or are not but-for causes. But, we do not actually ask "was the event a but-for cause". We conduct and inquiry to determine whether the event was or was not a but-for cause on a probability (more likely than not) basis. Whether it was or was not is the conclusion we arrive at after analyzing the historical relationship between the event and the consequence. We ask, in essence, if the event was a factual cause; that is, a historical cause. We ask that question only after we are satisfied that the facts are such that the situation is one where it is meaningful to ask that question. Once we are satisfied that the event was a historical cause, we ask a second question. Was the event a legal factual cause.

In post-*Resurfice* terms, the combined question would be, put broadly: "assuming TI was negligent, was that negligence a cause of the of JS's nervous shock, mental distress and post-traumatic stress disorder?" That question combines two questions, so it more properly is: "assuming TI was negligent, (1) was that negligence a cause of the accident and (2) was the accident a cause of JS's nervous shock, mental distress and post-

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[910] 2008 CanLII 5586 at paras. 54-58

[911] 2008 CanLII 5586 at para. 56

[912] This is the empirical, historical, "question of science" issue. European legal terminology and philosophy calls this type of causation "natural causation" to distinguish the conclusion from "legal causation" or other forms non-natural or metaphysical analyses.

traumatic stress disorder?" The medical evidence had answered the second question in JS's favour. The trial judge accepted that the accident had caused JS some psychological injury.[913] That meant it was a factual cause. So, the only question the trial judge should have dealt with, on the but-for inquiry – the factual causation inquiry – was whether TI's conduct was a legal factual cause of the accident. Her answer to that was "no", and had to be no, because there was nothing TI could legally done to prevent PI from leaving the house.[914] What JS was asking the court to do was to find that TI's conduct was causative because there was a potential risk that PI might do something. However, TI had not created that risk. That is the same answer that a majority of the British Columbia Court of Appeal gave in *Mooney v. British Columbia (Attorney General)* when they held that there was nothing that the police could have legally done to prevent the assault on Ms. Mooney.[915]

Even worse for JS, if we assume that *Mooney* was mentioned, is the fact that in *Mooney* the police *were* found to have been negligent. However, police were still held not liable because their negligence was not causative. In *Mooney*, the most the police could have done was to have spoken to the perpetrator of the assault and told him to stay away from the plaintiff and her family. But they had no way of ensuring that he did, short of arresting him. In other words, there was nothing that they could have done to prevent him from committing the assault and no evidence that speaking to him would have made a difference. There was no evidence that he probably would not have acted as he had had he been spoken to. There was, of course, a possibility because anything is possible. But, at the time of *Mooney*, possibility was not enough. Indeed, up to the instant before the release of *Resurfice*, possibility less than probability was not enough. I have made that point before but it is worth recapitulating. The Ontario decisions are *Cottrelle v. Gerrard*[916] and *Aristorenas v. Comcare Health Services*.[917] The B.C.C.A. had reaffirmed

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[913] 2008 CanLII 5586 at para. 61/

[914] TI also did not have a duty to prevent PI from leaving the house. That is relevant to liability but not factual causation..

[915] *Mooney* at paras. 141-44 (Hall J.A.) and paras. 146, 191, 194 (Smith J.A.).

[916] (2003), 67 O.R. (3d) 737 at paras. 29-37, 2003 CanLII 50091, 233 D.L.R. (4th) 45 (C.A.), leave to appeal to S.C.C. refused, [2003] S.C.C.A. No. 549. Sharpe JA wrote, at para. 36: "In my view, the respondent established no more than the loss of a less than 50% chance of salvaging her leg had the appellant not been negligent. Unfortunately for the respondent, under the current state of the law, loss of a chance is non-compensable in medical malpractice cases: see *Laferrière v. Lawson, supra*; *St-Jean v. Mercier*, [2002] 1 S.C.R. 491; *Hotson v. East Berkshire Area Health Authority*, [1987] A.C. 750 (H.L.). The trial judge did not explain the basis for her conclusion that "the loss of chance doctrine is not applicable to this case". In view of the evidence I have reviewed, and in view of the respondent's concession that there was no evidence to suggest that it was more than likely a better outcome would have followed had the appellant acted with care, the trial judge's finding reveals either a misapprehension as to the law or a palpable and overriding error on the facts." He added, at para 37: "Recovery based upon the loss of a chance would require substantial reduction of the damages to reflect the value of the less than 50% chance that was lost. In any event, the authorities cited in para. 36 preclude us from considering such an award." Cottrelle was still being applied in Ontario, for exactly what it said – possibility was not enough in medical malpractice actions – as late as January 2007: see, for example, *Latin v. Hospital for Sick Children*, 2007 CanLII 34 at para. 128 (Ont. S.C.J.): "The recent decision of the Court of Appeal in *Aristorenas v. Comcare Health Services*, reviews and summarizes the law with respect to the determination of causation and clarifies the application of the two approaches — the "but for" test and the "material contribution" test.

the point in *Trinetti v. Hunter*[918] and the Manitoba Court of Appeal had signed on in *Weibe v. Canada (Attorney General)*.[919] The Supreme Court had been similarly explicit in *St-Jean v Mercier*[920] and *Laferrière v. Lawson,*[921] Quebec decisions which it said were applicable to the common law.[922]

In the end result, the trial judge's conclusion that TI's conduct was not a legal cause is probably correct. TI's conduct was part of the necessary background to what ultimately happened but nothing more. What the trial judge literally said, in *Irvine*, was that there was no factual cause because she had concluded that meant that PI would not have been admitted to the hospital. That, however, is significant only if there would still have been time, even after that decision was made, for PI to somehow get himself in the path of the JS vehicle. The trial judge never discussed that question of fact. However, it is impossible to do anything more than speculate as to what PI would have done had he gone to the hospital but not stayed for the assessment, bearing in mind he could not be compelled to stay.

What the trial judge likely meant by saying that TI's conduct did not satisfy the but-for test was that TI's conduct was not a "proximate cause"; that what happened was

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The Court (Macpherson J.A. dissenting), concludes that the "material contribution" test is applied to cases where multiple inputs have all harmed the plaintiff and is invoked to overcome "logical or structural difficulties in establishing 'but for' causation". Otherwise, the "but for" test is used as the standard test for establishing causation in most negligence cases. On either test, the plaintiff has the burden of proving on a balance of probabilities that the test is met." [internal footnotes omitted].

[917] 2006 CanLII 33850 at para. 60, 274 D.L.R. (4th) 304 (Ont. C.A.): the *Athey* material-contribution test "does not alter the requirement that the plaintiff must establish causation on a balance of probabilities."

[918] 2005 BCCA 549 at para. 13, 47 B.C.L.R. (4th) 290: "With respect to the "inference principle" of causation described by Lambert J.A. in *Haag v. Marshall, supra*, I would respectfully adopt the reasoning of Smith J.A. in *B.M. v. British Columbia (Attorney General)* (2004), 31 B.C.L.R. (4th) 61, 2004 BCCA 402 at para. 153, to the effect that it is "restricted to rare cases where it is clear that the defendant(s) controlled all possible physical agents of harm and it is impossible to identify scientifically the pathogenesis of the harm and, therefore, to attribute precise responsibility for the harm as between the tortious acts of several defendants or as between one defendant's tortious and non-tortious acts." These circumstances do not arise in this case for several reasons, including the fact no tortious act — a failure to take reasonable care — was proven.

[919] 2006 MBCA 159, [2007] 2 W.W.R. 598.

[920] [2002] 1 S.C.R. 491 at para. 116, 2002 SCC 15, 209 D.L.R. (4th) 513.

[921] [1991] 1 S.C.R. 541, at 605-08, 1991 CanLII 87, 78 D.L.R. (4th) 609.

[922] *Arndt v. Smith*, [1997] 2 S.C.R. 539, 148 D.L.R. (4th) 48, 1997 CanLII 360, at para. 43 per McLachlin, CJ, concurring: "This approach accords with the decision of this Court in *Laferrière v. Lawson*, [1991] 1 S.C.R. 541, which held (at p. 609) that causation "must be established on the balance of probabilities, taking into account all the evidence: factual, statistical and that which the judge is entitled to presume". It is consistent with the view there expressed that "[s]tatistical evidence may be helpful as indicative but is not determinative", and that "where statistical evidence does not indicate causation on the balance of probabilities, causation in law may nonetheless exist where evidence in the case supports such a finding". While *Laferrière* arose in the context of the civil law of Quebec, Gonthier J., speaking for a majority of the Court, made extensive reference to common law jurisdictions, suggesting that the principles discussed may be equally applicable in other provinces." McLachlin CJ.s wrote separate concurring reasons. The majority appears to have agreed with her views on this issue (para 30).. At the least, they did not express disagreement.

"too remote"; that PI jumping in the path of any vehicle, let alone the JS vehicle which was unknown and miles away in time and distance, was not within the ambit of the risk that defined what connections between conduct and consequence are legally relevant.[923] It seems probable that had the trial judge thought to consider whether PI, even after being released after the hypothetical assessment, would still have a window of opportunity to somehow bring about what ultimately had happened, under the *Snell* "robust and pragmatic" inference approach, she would have said that his TI's conduct was not a proximate cause. A proximate cause is a factual cause which is legal factual cause. All other factual causes are not proximate causes. Recall that the lack of foreseeability is also the reason the trial judge gave for holding that that TI did not have a *prima facie* duty of care. I suggest the trial judge would have used the same analysis to hold that TI's conduct was not proximate cause.

Resurfice could not have applied because TI was not negligent. Could it, if TI was negligent? It is difficult to see how. The underlying assumption in *Resurfice* is that it proof on the basis of probability could be made if all the required evidence existed. That could not be so in *Irvine*. It is impossible to say what PI would have done had he been taken to the hospital, even if he had not stayed for the assessment. It is impossible to say what PI would have done had he gone to the hospital but not stayed for the assessment, bearing in mind he could not be compelled to stay. There is no gap in the evidence. That has nothing to do with limits of science, unless we describe the fact that PI is dead and cannot be asked what he would have done a limits of science problem. What there is would be evidence that permitted nothing more than speculation. The most that one can say about what might have happened, had PI gone to the hospital but not stayed, is that anything is possible.

Resurfice, whatever else it means, cannot have been intended to apply in that sort of situation and permit a finding that allows the imposition of liability because of the possibility that PI might have wandered into the path of the JS vehicle, had he left before the assessment. This is at least because, as it turns out, we know that he was entitled to leave, therefore there was no negligence. We know, retrospectively, that he was entitled to leave (apart from the fact that he could not have been stopped from leaving before the assessment was complete and then only if the decision was that he should be involuntarily admitted) because we have the trial judges' conclusion on the probable results of the assessment, had it occurred. So, even if one could argue that TI was negligent in not taking PI to the hospital, he could not be negligent if PI left.

Does it make any difference if we assume that the assessment would have been that he should be admitted voluntarily? That decision would be moot, in the circumstances, if PI had already left unless there was time to send the police out to get him and bring him in before the accident ultimately happened, assuming that we assume

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[923] This is the issue canvassed in paras. 6-12 of *Resurfice*. Para. 6 of *Resurfice* begins: "Liability for negligence requires breach of a duty of care arising from a reasonably foreseeable risk of harm to one person, created by the act or omission of another". See, generally, Black & Cheifetz, "Looking Glass" (2007) 45 Alta. L. Rev. 241, at 242-44.

he would have wandered back to a place and time that he would be able to jump into the path of the JS vehicle. All of this "what-if" is simply too speculative too even invoke a *Resurfice*-like possibility analysis.[924]

The Ontario situation becomes progressively odder as more decisions are released in which the judges are asked to apply *Resurfice*. The first week of March, 2008 has two decisions: one from the Superior Court of Justice and one from the Court of Appeal. Both are odd. Timpano v. Alexander,[925] includes the assertion that, regardless of what the *Resurfice* material contribution test means, both it and the but-for text are subject to the *Snell* "robust and pragmatic" inference approach. The trial judge's words require the conclusion that the judge misunderstood *Resurfice*. The words clearly mean that the judge believed that the *Resurfice* material contribution-test test is a test that establishes the existence or non-existence of factual causation. The trial judge quoted the *Aristorenas* explanation of the material-contribution test and the rationale given, there, for the existence of the test and melded that with *Resurfice*.

> [36] Justice Rouleau in *Aristorenas v. ComCare Health Services*, 2006 Can.L1133850 (Ont. C.A.) concluded that "*the "material contribution" test is applied to cases that involve multiple inputs that all have harmed the plaintiff. The test is invoked because of the logical or structural difficulties in establishing "but for" causation, not because of practical difficulties in establishing the negligent act was part of a causal chain*." (at para.53). Chief Justice McLaughlin reiterated this use of the material contribution test in situations of uncertainty in establishing the ultimate or final cause or the possible actions of contributors given an act of negligence or omission. The latter test would also be applied if the "*but for*" test could not be used because of factors outside of the plaintiff's control, for example; the current limits of scientific knowledge in the face of a breach of a duty of care to the plaintiff. (Ref. *Resurfice Corp. v. Hanke* (2007) S.C.J. No.7 para. 25-28).[926]

The trial judge followed that with the conclusion that whatever the material-contribution test meant, it did not apply on the facts,[927] and then wrote:

> [38] Whatever the test of causation, a court is to take "*a robust and pragmatic*" approach to the analysis of the evidence advanced to show the causal connection between

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[924] If there is any form of analysis that could produce a liability finding assuming that TI had been found at fault, it would have to be something analogous to the analysis used the House of Lords in *Chester v .Afshar,* [2004] 4 All ER 587, [2004] UKHL 41, [2005] 1 AC 134, [2004] 3 WLR 927. That was decision to impose liability for policy reasons even though there was not and could not be the required evidence of causation. The House of Lords, by three to two majority, using a personal autonomy analysis, held that the interest of the public in seeing that physicians lived up to their duty to inform properly duty was so dominant consideration that it justified yet another departure from the rule that tort liability requires causation. The case is thoroughly discussed in J. Stapleton "Occam's Razor reveals an orthodox basis for *Chester v. Afshar*" (2006), 122 L.Q..R 426; and at SSRN. http://ssrn.com/abstract=1007597.

[925] 2008 CanLII 8270 (Ont. S.C.J.).

[926] *Timpano,* para. 36 (emphasis in original).

[927] *Timpano*, at para. 37: "In any event, the circumstances of this matter do not present the uncertainties referred to above that would evoke the use of the material contribution test."

conduct and injury. This approach was established by Sopinka J. in *Snell v. Farrell*. In *Athey* at (para. 16) Justice Major provided the following synopsis:

> In *Snell v. Farrell*, this court recently confirmed that the plaintiff must prove that the defendant's tortuous conduct caused or contributed to the plaintiff's injury. The causation test is not to be applied too rigidly. Causation need not be determined to scientific precision , as Lord Salmon stated in *Alphacell Ltd. v. Woodward*, and as was quoted by Sopinka J. "*it is essentially a practical question of fact which can best be answered by ordinary common sense. Although this burden of proof remains with the plaintiff in some circumstances an inference of causation may be drawn from evidence without positive scientific proof."* (as quoted by Rouleau J.A. in *Aristorenas v. ComCare Health* at paragraph 55).

> [39] It must be kept in mind; this approach does not reduce the civil evidentiary burden, but it can be used by a jurist in the weighing of evidence to draw inferences even in the absence of definitive scientific or medical conclusions. (Ibid para.55). Of course, for any inference to be drawn, there has to be factual basis. This approach to evidence to the extent that it may appear "*relaxed*" relative the rigid approaches in the past, is far removed from being a speculative exercise.[928]

There is this much that is clear about *Timpano*. For whatever reason, the trial judge did not refer to any of the British Columbia case-law. For whatever reason, the trial judge did not refer to any of the extra-judicial scholarship already in existence.[929] Whatever the trial judge understood about the *Resurfice* material contribution, it has nothing to do with what the case said. No more proof is needed than the trial judge's assertion that "whatever the test of causation, a court is to take '*a robust and pragmatic*' approach to the analysis of the evidence advanced to show the causal connection between conduct and injury."[930] What ever that approach, from *Snell,* to the process of finding factual causation – finding that cause-in-fact exists or does not exist – in situation where the premise is that the but-for test is applicable, it has nothing whatsoever to say about the manner of application of test which applies where proof of that causal connection is held to be impossible. The statement is, instead, an echo of the pre-*Resurfice* days when one could find cases that said the robust and pragmatic approach was applicable to both the but-for test and the *Athey* material-contribution test.[931]

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[928] *Timpano*, paras. 38-39 (all emphasis in original)

[929] There is no explanation in the reasons for the failure to mention any of the decisions from other jurisdictions, in particular British Columbia. It is simply implausible to assume that none of the trial judge nor the lawyers were aware that *Resurfice* has been considered by cases outside of Ontario.

[930] *Timpano*, para. 38 (emphasis in original). *Barker v. Montfort Hospital* is not mentioned. It is unlikely that the trial judge had *Aristorenas* without *Barker*.

[931] Unless the trial judge's intent was to say that the courts are to take robust and pragmatic approach to the decision as to whether the factual connection is impossible to establish. I put this speculation "below the footnote line because it is too implausible.

The next case is the Court of Appeal's decision in *Moore v. Wienecke*.[932] Moore was involved in two motor vehicle accidents four years apart. He sued over both. The actions were tried together. Moore's action was in respect of the earlier accident was dismissed. He was held to be entirely at fault. He succeeded on the second-accident accident. The injuries overlapped as did the damages. The award of damages was large enough that the insurer of the defendant in the second accident appealed. The appeal was dismissed. The following paragraphs set out, I believe, the Court of Appeal's explanation for why it affirmed the trial judgment.

> [25] The appellant contends that the trial judge applied the wrong legal test for determining causation in a case where there is more than one potential cause for the loss. The appellant submits that the trial judge applied the "material contribution" test for causation, a test that was significantly narrowed by the Supreme Court of Canada in its recent (admittedly, after the trial judgment in this case) decision in *Resurface Corp. v. Hanke*, [2007] 1 S.C.R. 333. In particular, the appellant relies on McLachlin C.J.'s statement of the law at para. 21: "[T]he basic test for causation remains the 'but for' test."
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> [26] I disagree. In my view, although the trial judge did refer to the 'material contribution' test, her reasons, read as a whole, are consistent with the leading cases dealing with causation in negligence cases, including *Resurface Corp., supra; Snell v. Farrell*, [1990] 2 S.C.R. 311; *Athey v. Leonati*, [1996] 3 S.C.R. 458; and *Walker Estate v. York Finch General Hospital*, [2001] 1 S.C.R. 647.
>
> [27] The trial judge gave careful, and separate, attention to the 2002 accident and the injuries and losses it caused. She carefully reviewed the testimony of a large number of medical witnesses and made conclusions based on their testimony that are consistent with a 'but for' analysis.
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> [30] In summary, I am of the view that the trial judge applied the appropriate legal principles for determining causation in a multiple accident/multiple injury case.[933]

The Court of Appeal reasons do note quote the trial judge's statement(s) of the applicable principles. Rather, what we have is the assertion that the trial judge's reasons "read as a whole, are consistent with the leading cases dealing with causation in negligence cases"[934] and the statement that the trial judge's conclusions "are consistent with a 'but-for' analysis."[935] That last statement could mean the analysis that led to the conclusions was not a but-for analysis but was something completely different.

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[932] 2008 ONCA 162, affirming for other reasons 2006 CanLII 1195 (Ont. S.C.J.) The reasons were written by MacPherson JA, the dissenting judge in *Aristorenas*. The "affirming for other reasons" is my description. I am not sure that the panel would agree. Obviously, they would not if they believe that the form and substance, not just the result, of the trial judge's legal analysis is consistent with current law.

[933] *Moore*, paras. 25-27, 30

[934] *Moore*, para. 26.

[935] *Moore*, para 27. They might have been consistent with the law as it stood in 2006. That, I suggest, is questionable but moot. They are not, as I have shown, consistent with the law since *Resurface*; unless, of course, we assume the law in Ontario has not changed.

When we go back to the trial reasons in *Moore v. Wienecke*[936] we find that the analysis of causation law, whatever it was, was not a but-for analysis. It was an *Athey*-era "material-contribution" analysis as understood by some Ontario trial judges and seemingly approved by some Ontario appellate judges.[937] We do not find any reference to *Snell*. What we find is reference to *Athey* and *Mizzi v Hopkins*.[938]. The trial judge was explicit enough in setting out the basis upon which she analyzed the causation issue.

> [148] In *Athey v. Leonati,* the Supreme Court of Canada sets out the method by which damages from overlapping injuries should be assessed. In such situations, the Court says that the traditional "but for" test may not be appropriate, and one should look, instead, at whether each accident materially contributed to the plaintiff's condition at the date of trial. Our Court of Appeal, in commenting on *Athey,* has described the governing principles concerning contributory causation.[939]

This analysis is many things, but it is not a but-for analysis. It is not an analysis that is any longer consistent with the law established by *Resurfice*. It is exactly what it seems to be: an *Athey*-era form of material contribution analysis. And, ultimately, that is exactly what the trial judge did. She held that the second accident materially contributed to the plaintiff's injuries and the resulting damages.[940]

Now let is return to what the Court of Appeal asserts the trial judge did. The Court did not say the trial judge used a but-for analysis. The Court wrote, in words I suggest were carefully chosen to mean exactly what the words seem to mean, and nothing more: "She carefully reviewed the testimony of a large number of medical witnesses and made conclusions based on their testimony that are consistent with a 'but for' analysis.'[941] What are we to take from the Court of Appeals assertion? Are we to understand that the judge trial judge's analysis of the law was wrong, in light of subsequent developments but her conclusion was right, so that there was no miscarriage of justice? After all, an appeal is from the result, not the reasons. How could the Court be certain enough that the trial judge would have arrived at the same results had she applied the law as it now is? There were, no doubt, some credibility conclusions in her decisions as to what evidence to accept, who to believe, and ultimately the weight to be given to the evidence. Bear in mind, too, that the "standard" for what was a material contribution was a contribution that was "more than a *de minimis*" contribution. Whatever "more than the *de minimis*" meant, it was not and could not be synonymous with *Snell*'s substantial connection if the *Athey* material-contribution test was different from the but-for test.[942]

Now, go back to the Court of Appeal's summary of why the trial judge was right in result. "In summary, I am of the view that the trial judge applied the appropriate legal

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936 2006 CanLII 1195 (Ont. S.C.J.)
937 *Moore*, trial reasons, para. 147-49.
938 (2003), 64 O.R. (3d) 365, 2003 CanLII 52145 (C.A.)
939 *Moore*, trial reasons, para. 148 (internal footnotes – the citations for *Athey* and *Mizzi* – omitted).
940 *Moore*, trial reasons, paras. 153-165
941 *Moore*, appellate reasons, para. 26.
942 Cheifetz, *Snark*.

principles for determining causation in a multiple accident/multiple injury case."[943] Does that meant the judge got to the right result, regardless of the law or to the right result applying the correct principles? If that latter, what principles? What is clear from the trial reasons is that the trial judge thought she was applying the law as mandated by *Athey* and the plain-meaning of what the judge wrote is that she applied an *Athey*-era material contribution analysis which is no longer good law.[944]

How can a test that was overruled still be "appropriate legal principles"? Those principles, whatever they were, might have been appropriate at the time. They are not, now, unless, of course, they are still the law. Is that what the Court meant?[945] Did the Court really mean to suggest that that the trial analysis should be understood to have been a but-for analysis? Or did the Court mean to say nothing more than the decision was a factually correct in the sense that it was either the correct analysis of the evidence or at least consistent with the evidence? It probably has to be the former because the latter should not have permitted the Court to affirm on what amounts to a no miscarriage of justice rationale, even though the Court did not express its conclusion that way. If all the Court meant by "the trial applied the appropriate legal principles"[946] was that the same result would have occurred under current principles, it would have been very easy to say that. Of course, that would have entailed the Court explaining what current principles are. It may well be that the Court decided that that was a path down which it did not want to go.

Monks v. ING Insurance Company of Canada[947] is a decision of the Ontario Court of Appeal on the causation requirement for entitlement to the payment of benefits under the Ontario motor vehicle accident *Statutory Accident Benefits* (SABs) regimes, given the wording of the statute and the intent of the legislation as determined by the Court. The formal *ratios* of the decision are: (1) both the but-for test and the ***Athey*** material-contribution test are available for the determination of factual causation under the SABs regime[948] but (2) the crumbling skull principle does not exist in SABs causation jurisprudence.[949] If *Monks* was understood to mean nothing more than that, it would be irrelevant to causation jurisprudence in general. There are aspects of the decision which would be accepted as wrong, without argument, if it were a tort case. For example, the Court ruled essentially ruled that the "restoration principle" is not the key to causation under the SABs regime when it held that the crumbling skull principle does not

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[943] *Moore*, appellate reasons, para. 30.
[944] Unless, of course, *Resurfice* did not change the law.
[945] Neither of *Barker* nor *Rizzi* are mentioned.
[946] *Moore*, para. 30
[947] 2008 ONCA 269
[948] 2008 ONCA 269 at paras. 91, 96. Para 96: "Accordingly, where – as here – a benefits claimant's impairment is shown on the "but for" or material contribution causation tests to have resulted from an accident in respect of which the claimant is insured, the insurer's liability for accident benefits is engaged in accordance with the provisions of the SABS."
[949] 2008 ONCA 269 at paras. 94-95

apply to the SABs regime under current statute.[950] It cannot be suggested that those comments were intended to apply to causation jurisprudence in tort

However, there are statements in the *Monks* reasons about *Resurfice* and causation, including another version of the "*Resurfice* did not change basic causation principles including the meaning of material-contribution",[951] which are seemingly unrelated to anything necessary for the interpretation of the requirements of the statutes or regulations establishing the SABs regime. Regardless of whether the Court intended these comments to be of general application, they are written as if they are of general application. Experience should tell us all that some lawyers or judges will understand them to be of general application, until the Court of Appeal says otherwise. To the extent these comments may have intended to apply to causation in tort, they are obiter and wrong.

Monks is a decision about the meaning of "cause" in the SABs regime where the insurer's obligation to pay the statutorily prescribed benefits is established by the phrases "shall pay an insured person who sustains an impairment as a result of an accident"[952] where accident is defined to mean "an incident in which the use or operation of an automobile directly causes an impairment or directly causes damage to any prescription eyewear, denture, hearing aid, prosthesis or other medical or dental device".[953] The triggering phrase for entitlement to benefits – the phrase that connects accident, injury, and benefits – does not, itself use any version of the word "cause". However, the ordinary (and purposive, if need be) meaning of the phrase "a result of an accident", not the least because of the use of "caused" in the definition of "accident", means that the entitlement phrase must be understood to amount to some version of "impairment caused by an accident". In any event, that was the commonly understood and established meaning and that meaning underlines the discussion of causation in *Monks*.[954]

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[950] 2008 ONCA 269 at paras 94-95. Para 94: "[T]here is no room for the crumbling skull theory in accident benefit cases." Para 95: "There is no indication in the SABS of a legislative intent that an insurer's liability for the accident benefits in issue in this case should be subject to discount for apportionment of causation due to an insured's pre-existing injuries caused by an unrelated accident."

[951] 2008 ONCA 269 at para 86.

[952] *Statutory Accidents Benefits Schedule – Accidents on or after November 1, 1996,* O. Reg. 403/96, ss. 4(1), 13(1), 14(1), under *the Insurance Act*, R.S.O. 1990 c. I. 8.

[953] *Statutory Accidents Benefits Schedule – Accidents on or after November 1, 1996,* O. Reg. 403/96, s. 2(1).

[954] *Monks*, 2008 ONCA 269, paras. 85-91. The cases are fully discussed in the trial decision, 2005 CanLII 21689: see paras 707-760, 789-812, 846-863. Regardless of one's views of the merits of the trial decision, the trial judge made it explicitly clear that his decision was not about causation in tort. The trial judge said it was essential to keep tort principles of causation and the principles of causation under the SABs regulation separate: 2005 CanLII 21689 at para 810-11. The trial judge ultimately ruled at paras. 862 and 863 that "directly caused" incorporates the *Athey* concept of material contribution; that is, the accident can directly cause impairment even if the accident is only one of the causes, at least so long as the accident makes a "significant or material contribution". "Such an interpretation of the phrase "directly causes" does not close the door on the possibility that there may be other contributing causes of the injury, as contemplated by the "material contribution" test for causation." (para 862) "Therefore, ING's arguments notwithstanding, I conclude that an impairment was "directly caused" by the use or operation of a motor vehicle, and that the accident made a significant or material contribution to the plaintiff's current condition

The Court should have made clear that its comments about *Resurfice* and causation jurisprudence, generally, were intended to refer only to the interpretation of the statute. It did not. Instead, the Court stated:

> [85] *Athey v. Leonati, supra* is the leading Canadian case on causation in tort law. In *Athey*, Major J. reiterated the following well-established principles:
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> (1) The general, but not conclusive, test for proof of causation is the "but for" test, which requires a plaintiff to show that his or her injury would not have occurred but for the negligence of the defendant (para. 14).
>
> (2) In certain circumstances, where the "but for" test is un-workable, causation may also be established where it is demonstrated that the defendant's negligence "materially contributed" to the occurrence of the tort victim's injury. It is not necessary for the plaintiff to establish that the defendant's negligence was the sole cause of the injury (paras. 15 and 17).
>
> (3) Liability will be imposed on a defendant for injuries caused or materially contributed to by his or her negligence. That liability is not reduced by the existence of other non-tortious contributing causes (paras. 22 and 23). [Citations omitted.]
>
> [86] More recently, in *Resurfice Corp. v. Hanke*, [2007] 1 S.C.R. 333, the Supreme Court of Canada clarified the exceptions to the "but for" causation test and the circumstances in which the material contribution test may be applied. I do not understand *Resurfice* to alter the basic causation principles that I have described."[955]

As such, unfortunately, the "basic causation principles" that the Court described, as still part of tort jurisprudence, seemingly includes the *Athey* material-contribution test,[956] as explained in *Athey*. This is because the Court of Appeal quoted the paragraphs from *Athey* containing both the references to the but-for test and the material contribution test.[957] This is understandable given that the Court was going to uphold the trial decision that the *Athey* material-contribution test forms part of SABs jurisprudence. However, paragraph 86 of *Monks*, on its face, cannot be understood as anything less than a comment about tort causation jurisprudence, generally, outside of the SABs context.

There might be no problem had the Court of Appeal had adequately clarified what it meant by stating that "clarified the exceptions to the "but for" causation test and the circum-stances in which the material contribution test may be applied. I do not understand Resurfice to alter the basic causation principles that I have described.".[958] For example, the Court might have outlined, for tort law, the meaning of the material-

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and to the deterioration or duration of her symptoms, in that it precipitated or reinforced the need for surgery. This conclusion does not negate or ignore that there were additional contributory causes to the plaintiff's condition, including pre-existing injuries and prior accidents." (para 863)

[955] *Monks*, 2008 ONCA 269, paras. 85-86.

[956] Which, according to the British Columbia Court of Appeal in *Sams v. Wilson* at para. 109, is not the not *Resurfice* material-contribution test. This is a point which most judges in British Columbia seem to have picked up very quickly.

[957] *Monks*, 2008 ONCA 269 at para. 95.

[958] *Monks*, 2008 ONCA 269 at para. 86.

contribution test referred to in the first sentence. Or, the Court could have made it clear that the "basic causation" principles it meant where only (1) the primacy of the but-for test and (2) that there is also second test called the material-contribution test (without stating what that test meant) which applies where the but-for test does not. However, it did not. Perhaps the Court of Appeal thought that plaintiffs' counsel would understand, from aspects of the decision such as the holding that the crumbling-skull doctrine did not apply to SABs jurisprudence,[959] that nothing said in the reasons was intended to apply to tort jurisprudence.[960]

It should be recalled that the Supreme Court had made it clear, just a few months earlier, that Ontario legislation dealing with personal injury claims based on injury sustained in incidents somehow involving motor vehicles is to be given a purposive interpretation,[961] so that what otherwise might be the ordinary meaning of words used in the statute is altered by the purpose of the statute, as that purpose is declared to be by the courts.[962]

In summary, then, for the SABs regime, the Court of Appeal held that, excluding the crumbling-skull doctrine which is not part of SABs jurisprudence, the basic causation law as established by *Athey* determines the meaning of the phrase "shall pay an insured person who sustains an impairment as a result of an accident" and the but-for test and the *Athey* material-contribution tests are the tests to be used, as appropriate, to determine whether the requisite connection exists between the accident and the impairment.[963] However, in outlining SABs jurisprudence, the Court of Appeal, seemingly went beyond merely commenting about the interpretation to be given to statutory provisions of the SABs regulation, when the Court commented on the relationship between *Athey* and *Resurfice*. I set that paragraph out, again:

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[959] *Monks,* 2008 ONCA 269 at paras. 95-96, quoted above.

[960] Even if that understanding would be at odds with para. 86.

[961] Seemingly to allow that Court to arrive an interpretation of the legislation which would give it room to dismiss the insured's action, where both a literal interpretation and an "ordinary-Canadian-English" interpretation would not.

[962] *Citadel General v. Vytlingam,* 2007 SCC 46 and *Lumbermens Mutual v. Herbison* 2007 SCC 47. The insured's claims were dismissed in both cases. Some might find it remarkable that the purposive interpretation approach was used to give the Court room to dismiss the cases, notwithstanding the plain English meaning of the words in the phrase "arising directly or indirectly from the use or operation of an automobile". Neither of *Vytlingam* nor *Herbison* are mentioned in *Monks* It is a given that the Court of Appeal was aware of these decisions. It is at least plausible that Monks does not refer to either case in order to avoid having to explain why the Court was not prepared to use a purpose reading of the SABs legislation to restrict the scope of the insured's entitlement, which is what ING argued it should do. However, the Court may have been referring to *Vytlingam* and *Herbison* by referring to legislative intent in para. 95: "There is no indication in the SABS of a legislative intent that an insurer's liability for the accident benefits in issue in this case should be subject to discount for apportionment of causation due to an insured's pre-existing injuries caused by an unrelated accident." Paragraph 95 reads like a pre-emptive attempt to prevent to "appeal-proof" the conclusion and to prevent reversal by the Supreme Court. It reads like an attempt to prevent what happened to the plaintiffs in Vytlingam and Herbison from happening in *Monks*. The Court of Appeal seems to have attempted to limit the room that the Supreme Court has to validly take a different position on the meaning of the legislation, should leave to appeal be sought and granted.

[963] *Monks*, 2008 ONCA 269, paras 91, 96.

> [86] More recently, in *Resurfice Corp. v. Hanke*, [2007] 1 S.C.R. 333, the Supreme Court of Canada clarified the exceptions to the "but for" causation test and the circumstances in which the material contribution test may be applied. I do not understand Resurfice to alter the basic causation principles that I have described.[964]

I suggest that better way to understand this passage (even if that means we do not read it literally, but give it a gloss) is that the comments are limited to the interpretation of the SABs regulation where the meaning of the material-contribution test for SABs remains *Athey*.[965] Otherwise, we would have to ask ourselves whether, based on *Resurfice*, the Court of Appeal intended to introduce causation based on mere possibility into SABs. We would have to ask whether the Court intended to convert the phrase "shall pay an insured who sustains an impairment as a result of an accident" into the phrase "shall pay an insured person who *possibly* sustains an impairment as a result of an accident, even if it cannot be shown that the person probably sustained an impairment". It is highly unlikely that the Court intended that in *Monks*;[966] however that is the result of *Monks* if the material-contribution test which is part of the SABs jurisprudence has the meaning given to that test in *Resurfice*.[967]

The Court of Appeal referred to the *Resurfice* material-contribution test in *Martin v. Glaze-Bloc Products Inc*.[968] The Court wrote:

> Appellant's counsel has carefully taken us through the crucial parts of the plaintiff's case and in particular the theory of causation posited by Dr. Forkert. The trial judge did not accept the plaintiff's theory of causation. There was a substantial body of expert evidence casting doubt on several of the five steps underlying Dr. Forkert's theory. It was therefore open to the trial judge to reject the plaintiff's theory. This was not a case where the exceptional approach set out in *Resurfice Corp. v. Hanke*, [2007] 1 S.C.R. 333, needed to be applied. Again, there was a substantial body of evidence accepted by the trial judge that showed there is no association between TCE and the severe neural tube defect that occurred in this case. Put another way, this is not a case where the limits of

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[964] *Monks*, 2008 ONCA 269, para. 86.

[965] If this is not plausible, then the comments, to the extent they say anything about tort jurisprudence other than that but-for is the primary test and a material-contribution test exists (with nothing said as to the meaning of that test) are wrong.

[966] There is no doubt that the portion of the bar that normally acts for insureds would approve of this result. However, it would be also be inconsistent with the approach taken by the Supreme Court in *Vytlingam* and *Herbison*.

[967] Subject to the dictum in *Quinn v. Leathem* about the error in law of using a prior case as precedent to determine a subsequent case merely because the cases are on "all fours" and the ratio of the prior case, if applied, determines the answer in the subsequent case. "[A] case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all." *Quinn v. Leathem*, [1901] A.C. 495 at 506 (H.L.). And, of course, in order to draw that conclusion, one would first have to conclude that the Ontario Court of Appeal accepts that the Resurfice material-contribution test is based on risk and possibility which is less than probability, something that that Court has yet (as of April 17, 2008) to concede in any published reasons.

[968] 2008 ONCA 377 affirming Court Docket No. 6478/87 (S.C.J., commenced at Ottawa), unreported. By coincidence, the trial reasons were released on February 8, 2007, the same day as the *Resurfice* reasons.

> scientific knowledge prevented the plaintiff from establishing causation on the normal but-for standard.[969]

In *Martin*, a baby was born with a skull and brain defect.[970] The plaintiff's theory was that the infant's father had been exposed to a chemical at work, that chemical damaged his father's sperm, and one of the damaged sperm fertilized the ovum.[971] The father had been exposed to the chemical. The plaintiff called two experts who testified that the exposure was a probable cause on the condition.[972] The defence called three experts who testified that the exposure was not the cause of the infant's condition.[973] The defence position was that the condition was probably caused by the mother not having a sufficient amount of folic acid in her system before conception and during the gestation of the infant.[974]

The trial judge held that there was a duty of care and that the employer was negligent.[975] However, the trial judge did not accept the plaintiff's causation theory or evidence. The trial judge preferred the defence evidence.[976] The trial judge held that the plaintiff had not shown that the father's exposure to TCE was a probable cause of the infant's condition or even that the exposure had the potential to cause that condition. As such, the action was dismissed.[977] The judge wrote:

> I am not satisfied on a balance of probabilities that the exposure to TCE caused or contributed to Tommy's encephalocele. It would, in my view, be sheer speculation and conjecture on my part to make such a finding. On the evidence before me, I am not even satisfied that exposure to TCE in this case had the potential to cause or contribute to Tommy'[s] encephalocele let alone that it actually caused or contributed to it.[978]

The Court of Appeal's references to *Resurfice* have to be understood in the context of these findings of fact. That is, there was never any form of "limits of scientific knowledge issue" according to either the plaintiff or the defendant. The plaintiff asserted the evidence was sufficient to establish causation on a probability basis. The defendant asserted that the evidence was not. If the explanation for the Court of Appeal's statement that "this is not a case where the limits of scientific knowledge prevented the plaintiff

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[969] 2008 ONCA 377 at para. 2. TCE is short for a chemical called trichloroethylene.

[970] A neural tube defect (NTD) called an encephalocele which, in Tommy Martin's case, meant that his skull did not close properly *in utero*. Tht allowed the brain to extrude out of the skull. Most of the brain was surgically removed at birth. *Martin v. Glaze-Bloc*, trial reasons, para. 1..

[971] *Martin v. Glaze-Bloc*, trial reasons, paras. 8, 9, 125.

[972] *Martin v. Glaze-Bloc*, trial reasons, paras. 30, 32, 45-52. The plaintiff's third expert testified that he was unable to say one way or the other whether there was a causal link: *Martin v. Glaze-Bloc*, trial reasons, paras. 17-20, 126.

[973] Summarized in *Martin v. Glaze-Bloc*, trial reasons, paras. 126-129.

[974] *Martin v. Glaze-Bloc*, trial reasons, paras. 95-99. Medical studies had shown that inadequate maternal folate acid deficiency is the major cause of neural tube defects in infants. There was evidence of studies showing a 70% reduction in the frequency of neural tube defects in children born to women given folic acid supplements as opposed to women who did not receive the supplement: para 95.

[975] *Martin v. Glaze-Bloc*, trial reasons, paras. 10-14.

[976] *Martin v. Glaze-Bloc*, trial reasons, paras. 125-129

[977] *Martin v. Glaze-Bloc*, trial reasons, paras. 131-32.

[978] *Martin v. Glaze-Bloc*, trial reasons, para. 131.

from establishing causation on the normal but-for standard"[979] is anything other than the fact that the plaintiff called expert evidence to the effect that the defendant's negligence was a probable cause, it does not appear in the appellate reasons.[980]

The causation test the trial judge formally applied was the but-for test as explained in *Snell*.[981] *Athey* is not mentioned in the trial reasons. The phrase "materially contributed" or any variation is not used. While the trial judge did not formally state that the plaintiff's evidence did not even show that the exposure to TCE had materially contributed to the infant's condition, this is necessarily what the trial judge's findings of fact mean. The trial judge wrote: "I am required to determine whether the plaintiffs have proven on the balance of probabilities that exposure to TCE caused or contributed to Tommy's encephalocele or, to put it in the language of *Snell*, in the circumstances of this case, is it open to me to draw the inference that Tommy's encephalocele was cased by exposure to TCE."[982] This conclusion also follows from the Court of Appeal's statements that there were no errors of law or palpable and overriding errors of fact or mixed fact and law.[983] The plaintiff seems to have argued that the trial judge's failure to apply the *Athey* material-contribution test as it was, was an error in law.[984] The plaintiff also argued that *Resurfice* had "clarified" *Athey* by establishing a "material contribution to the risk of harm" test which, obviously, the trial judge could not have considered; therefore, the merits of the decision had to be tested by applying *Resurfice*.[985] The Court of Appeal's statement that there were no errors of law[986] is a response to those arguments.

Martin v. Glaze-Bloc was a contest between the plaintiff's experts who said "yes, the exposure was a probable cause" and the defence experts who said "no, it was not." Had the trial judge accepted the plaintiff's expert evidence, the plaintiff would have succeeded. So, on the trial judge's findings of fact, which the Court of Appeal clearly accepted, the case was not merely one in which the *Resurfice* material contribution test was "not needed." The *Resurfice* material-contribution test could never have applied. Those findings preclude the application of the *Resurfice* material-contribution test because they preclude a finding that the negligence even had the potential to increase the risk of the infant's condition; that is, that there was even a possibility that the negligence was a cause of the infant's condition.

Martin v. Glaze-Bloc is relevant to the meaning of *Resurfice* only to the extent that it establishes that "the limits of scientific knowledge" criterion is not invoked by the judge's rejection of the plaintiff's but-for evidence. In that sense, it is consistent with the British Columbia Court of Appeal decisions in *Bohun v. Segal* and *B.S.A. v. DSB*. *Bohun*

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[979] 2008 ONCA 377 at para. 2

[980] The only possible source for this statement is the evidence of Dr. Hunter who testified that he was unable to say one way or the other whether there was a causal link: *Martin v. Glaze-Bloc*, trial reasons, paras. 17-20, 126.

[981] *Martin v. Glaze-Bloc*, trial reasons, paras. 119-24, 129.

[982] *Martin v. Glaze-Bloc*, trial reasons, para. 125.

[983] 2008 ONCA 377 at para. 1 (no errors of law), paras. 2- 3 (no palpable and overriding error).

[984] *Martin*, factum on appeal (on file with the author), paras. 61, 81-82.

[985] *Martin*, factum, para 83-85.

[986] 2008 ONCA 377 at para. 1.

and *B.S.A.* establish that judges cannot resort to *Resurfice* material-contribution in order to find for the plaintiff on causation if the plaintiff attempts and fails to prove causation on a but-for basis and fails because the court prefers the defence evidence over the plaintiff's evidence. *Bohun* states:

> Having failed to establish causation on the available "but for" test, the causation analysis ought to have come to an end. It was not open to the plaintiff to prove, or to the trial judge to consider, the material contribution test. As stated in *Resurfice*, it must be impossible to prove negligence using the "but for" analysis before resort can be made to the material contribution analysis. I do not read *Resurfice* to mean that, because a plaintiff fails to prove causation on the "but for" analysis, a plaintiff may then resort to the less stringent material contribution test. As this Court recently stated in *B.S.A. Investors Ltd. v. DSB* … where the reasons of the trial judge indicate that the plaintiff could not meet the burden of proving causation, then the plaintiff's action should be dismissed … .[987]

Martin v. Glaze-Bloc should not be understood to say anything more about *Resurfice*. The underlying facts do no support anything more. The Court of Appeal did not mention *Resurfice* other than in the second paragraph and there is nothing else in the Court's reasons relevant to causation jurisprudence.[988]

The most recently reported repetition of the mantra that all that *Resurfice* did was (1) affirm that the but-for test is the primary test for factual causation and (2) clarify the criteria which determine when the material-contribution test established by *Athey* applies is *Litwinenko v. Beaver Lumber Company*.[989] The reasons explicity assert that the *Resurfice* material-contribution test is an elaboration of the *Athey* test. The Divisional Court wrote: "In 2007, the Supreme Court in *Resurfice Corp. v. Hanke*, [2007] 1 S.C.R. 333, elaborated on the '*but for*' test and '*material contribution*' test in *Athey v. Leonati*."[990] *Litwenko* clearly asserts that the two examples in *Resufice* are examples of when the *Athey* material contribution test will apply.[991] The Court appears to have recognized that the *Athey* test was a test for factual causation.[992]

In any event, the Ontario profession still does not have a clear statement from the Ontario Court of Appeal dealing specifically with the meaning of the *Resurfice* material-contribution test. All we have is the implications of the broad assertion that *Resurfice* did not alter anything. Nonetheless, what is already abundantly clear is that a number of judges who work in British Columbia and Alberta have concluded *Resurfice* did change the law, at least on the issue of the meaning of material contribution. Somebody is wrong among the judges of B.C., Alberta, and Ontario. So far, it is judges in Ontario and

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[987] *Bohun v. Segal*, 2008 BCCA 23 at para. 53 (citations omitted).

[988] The Court stated that the trial judge had not committed an error of law and there was no palpable and overriding error of fact or mixed fact and law: 2008 ONCA 377 at para. 1.

[989] 2008 CanLII 26263 at paras. 83-87 (Ont. S.C.J, Div.Ct.) The reasons, at para 88, also contain the odd assertion that *Athey* "did not change the law of causation but rather established an alternative approach to establishing causation when the "but for" test is unworkable on the facts of a particular case."

[990] 2008 CanLII 26263 at para. 86 (emphasis in original).

[991] 2008 CanLII 26263 at paras. 86- 87.

[992] 2008 CanLII 26263 at para. 88.

Alberta. Whatever "unworkable" meant under *Athey*, the new term is "impossible", not "unworkable", and that term currently has the meanings given to it by the B.C. C.A. in *Jackson, B.S.A.*, *Seatle, Sam*, and *Bohun* (even if we cannot be entirely sure about those meanings). You would never know that from the reasons in *Barker v Montfort* and *Moore v. Wienecke*.

Alberta [993]

Ferguson v. Steel[994] is a medical malpractice action tried in March 2006 with reasons delivered in October 2007. The trial date is important as it necessarily means that the experts could not have been asked questions framed in terms of the Supreme Court's decision in *Resurfice*. There is no indication in the reasons that counsel were asked to make additional submissions after the release of *Resurfice*. The action was dismissed on both the basis that there was no negligence and no causation.[995]

It appears that the trial judge tried to cast her reasons within the frame work of *Resurfice*. The trial judge stated that the causation requirement was: "[t]he plaintiff must prove on a balance of probabilities that the defendant or defendants caused or contributed to the plaintiff's injury."[996] The trial judge then quoted paragraphs 20-28 of *Resurfice* introducing them this way: "The Supreme Court of Canada re-iterated the general principles of the test for causation in its recent decision in *Resurfice*".[997] The quotation of those paragraphs was the end of the discussion of the law. The facts relevant to the

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[993] Alberta lawyers should also review the disussion of *Fullowka et al v. Royal Oak Ventures Inc.*, 2008 NWTCA 4 reversing 2004 NWTSC 66, [2005] 5 W.W.R. 420 in the Northwest Territories part of this article. The NWT CA panel was composed of judges of the Alberta Court of Appeal.

In addition, Alberta lawyers might consider what *Resurfice* means to the interpretation of "cause" in of s. 4 of the *Maternal Tort Liability Act*, S.A. 2005, c. M-7.5: "A mother may be liable to her child for injuries suffered by her child on or after birth that were caused by the mother's use or operation of an automobile during her pregnancy if, at the time of that use or operation, the mother was insured under a contract of automobile insurance evidenced by a motor vehicle liability policy." Under what circumstances will it be or not be "impossible" for the infant to prove, on account of factors beyond its control, using the but-for test, that his or her injuries were caused by the mother's use or operation of the automobile? The legislation does not define "cause". When the time comes, will the first judge asked to define cause under the statute use a restrictive-instrumentalist approach such as the Supreme Court used in Citadel General Assurance Co. v. Vytlingam, 2007 SCC 46 and *Lumbermens Mutual Casualty Co. v. Herbison*, 2007 SCC 47? If so, what materials will be relevant to that inquiry? In *Marche v. Halifax Insurance Co.*, 2005 SCC 6 at para. 54, [2005] 1 S.C.R. 47, the Court, quoting from Driedger *Construction of Statutes* (2nd ed. 1983), at 87, and listing a number of decisions, repeated the mantra that: "Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament." Is it worth wondering why this mantra was not mentioned in either of *Vytlingham* or *Herbison*, particularly *Herbison*? The closest one comes to it is the homily that "[i]nsurance policies must be interpreted in a way that gives effect to the reasonable expectations of both insured *and* insurer." See, *Vytlingham*, para.4 (emphasis in original).

[994] 2007 ABQB 596.

[995] See, 2007 ABQB 596 at paras. 6, 467.

[996] 2007 ABQB 596 at para. 150.

[997] 2007 ABQB 596 at para. 153.

causation decision are later discussed, under the heading "Analysis – Causation" without any reference to the applicable law.[998]

The plaintiff hat attended at a Lethbridge, Alberta, hospital complaining of severe migraine headaches. The treatment she was given included a drug, DHE, then commonly used in western Canada for severe-enough migraine complaints, where not otherwise contra-indicated.[999] The trial judge summarized had summarized the facts and issues:

> [1] Sometime during the weekend of April 13 and 14, 2002, Joan Ferguson, the plaintiff, suffered a stroke while a patient at the Lethbridge Regional Hospital.[1000]
>
> [434] The Plaintiff submits she has established causation in one of two ways:
>
> 1. DHE caused Mrs. Ferguson's stroke or materially contributed to it;
>
> 2. The continued dosages of DHE on Saturday and Sunday after the onset of Mrs. Ferguson's stroke caused Mrs. Ferguson to suffer more damage then had she not received DHE.[1001]

The trial judge's conclusions of were that the evidence did not establish that the administration of the DHE was a causal factor on any type.

> [460] From the evidence of the experts' opinions [whose evidence the trial judge accepted[1002]], I have come to the following conclusions:

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[998] See, 2007 ABQB 596 at paras. 433-66.

[999] DHE is "dihydroergotamine". DHE was approved and commonly used, in Western Canada, for the treatment of migraine headaches in 2002. However, it had been supplanted by other, newer, drugs, at least in the practices of some physicians by the time of the trial: 2007 ABQB 596 at paras. 267- 313

[1000] 2007 ABQB 596 at para. 1

[1001] 2007 ABQB 596 at para. 434. The evidence seems to have been that that DHE supplanted by other, newer, drugs, at least in the practices of some physicians, at least for older patients such as the plaintiff: see, paras. 267- 313. It appears that, by the time of trial, the weight of the evidence was that DHE would not have been prescribed to the plaintiff had the incident occurred in 2006. However, as the trial judge pointed out, that was not the issue. Rather, it was whether it was contra-indicated in 2002 (paras. 267, 307). Some of the experts testified that DHE should not be prescribed to a persons with the type of migraine the plaintiff had (para. 295) but the relevant American and Canadian guidelines still permitted its use in 2002. There was evidence that DHE had the potential to cause a stoke because it was a "potent vasoconstrictor" (see, paras. 296, 297). However, there was no evidence of any published articles in 2002 linking strokes to the use of DHE (paras. 303-306). The trial judge preferred the evidence of the experts who opined that DHE was acceptable, in Western Canada, for use for patients such as the plaintiff, in 2002 (paras. 307, 302-313). The trial judge wrote, in para 307: "I find that in 2002, the state of medical knowledge available *did not conclusively suggest DHE was absolutely contraindicated* for patients suffering from a complex migraine or migraine with aura. Thus, I am not satisfied Drs. Edmeads, Selchen and Maser's opinions are not colored with vision afforded by hindsight." (emphasis added). Paras. 307 and 309 are, then, a judicial finding that there was at least a known risk that the administration of DHE created a possibility of a stroke.

[1002] I have added the words in square brackets because items 1 and 2 summarize the defence experts' evidence that the trial judge preferred. The plaintiff's experts testified to the contrary. The trial judge did not accept their evidence.

> 1. No expert testified that the DHE caused Mrs. Ferguson's stroke.
>
> 2. No expert testified that DHE materially contributed to Mrs. Ferguson's stroke.
>
> 3. No medical literature [published as of 2002] was tendered to establish DHE can cause or materially contribute to stroke.[1003]
>
> 4. The majority of the experts opined that arterial dissection caused Mrs. Ferguson's stroke.
>
> [461] Based on the above evidence and the conclusions I draw from it, I am unable to find the Plaintiff has established any causal connection between any of the alleged breaches and Mrs. Ferguson's stroke.
>
> [462] The plaintiff also submits that because she continued to receive DHE after the onset of her stroke I should "apply common sense" and find that because DHE has a vasoconstrictive effect its continued administration likely contributed to damage suffered by Mrs. Ferguson after she stroked.
>
> [463] The experts were divided on when Mrs. Ferguson's stroke took place but I accept its likely onset was sometime late on April 13. Having said that, I accept Dr. Forestell's evidence of his observations of Mrs. Ferguson's condition on April 14, which included two findings that were not consistent with a completed stroke.
>
> [464] I am unable to accede to the plaintiff's submission. Such a conclusion would be mere speculation based on the evidence before me including, the evidence of the vasoconstrictive effects of DHE which varies depending on whether veins or arteries are involved amongst other things and, the research that DHE does not effect cerebral blood flow.
>
> [466] In conclusion, I find the plaintiff has not established any of the alleged breaches caused or materially contributed to Mrs. Ferguson's stroke.[1004]

However, in rejecting the evidence that the fact of or the manner of the administration of DHE was negligent, the trial judge did so on the basis that the use was not contra-indicated in 2002. There was evidence that the situation might well have been different had the treatment occurred in 2006.[1005]

The trial judge's findings of fact as to the standard of care in 2002 included the recognition that the possibility of a stroke was known possibility from the use of DHE.[1006] However, the finding of no negligence – no breach of the standard of care –

[1003] I have added the words in square brackets. There was evidence of material published after 2002: see paras. 305-307.

[1004] 2007 ABQB 596 at paras. 460-66.

[1005] 2007 ABQB 596 at paras. 302-313.

[1006] 2007 ABQB 597, particularly at para. 307. "I find that in 2002, the state of medical knowledge available did not conclusively suggest DHE was absolutely contraindicated for patients suffering from a

would have made any discussion of *Resurfice* material-contribution *obiter*. Nonetheless, it would not have been out-of-the-ordinary for the trial judge to have said something like "perhaps I am wrong in deciding that there was no breach of the standard of care for the following reasons" and then discussed whether the known possibility that the use of DHE could cause strokes was sufficient to satisfy the first requirement of *Resurfice*: "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."[1007]

I suggest that defence counsel take a good look at *Tonizzo v. Moysa*[1008] and *Martin v. Capital Health Authority*.[1009]. Both cases involve allegations of medical malpractice. Both cases seem to disclose the recognition that causation under the *Resurfice* material-contribution test is risk-based and has changed the material-contribution test from whatever it was under *Athey*. *Tonizzo* states:

> [193] In certain exceptional cases, the "but for" test of causation does not apply. Such cases require that: (i) it be impossible for the plaintiff to prove that the defendant's negligence caused the plaintiff's injury using the "but for" test; and (ii) it be clear that the defendant breached a duty of care owed to the plaintiff, exposed the plaintiff to an unreasonable risk of injury, and the plaintiff suffered that form of injury: *Resurfice Corp*. at para. 25.
>
> [194] These requirements are not met in this case, as it was not impossible in principle, in the sense in which the Supreme Court of Canada uses the term "impossible," for Mr. Tonizzo to prove that Dr. Moysa's care caused his injury. Rather, Mr. Tonizzo's claim fails simply for lack of evidence of a causal connection. The absence of evidence (as opposed to the impossibility of obtaining evidence) is not a basis to apply this exceptional test of causation.[1010]

The trial judge's explanation of why the material-contribution test did not apply is also a good indication that the judge realized that *Resurfice* material-contribution test is not the *Athey* version. *Martin* states:

> [121] I do not propose to dwell on some of the other arguments counsel have developed, including alternative causation tests. Since *Hanke v. Resurfice*, (*supra*), in my view it is not necessary for me to review material-contribution tests or arguments addressed about increase in risk. In this "but for" situation those considerations need not be addressed.[1011]

A related issue which I will only mention is whether the nature of the informed consent cause of action means that but-for is the only test that could apply. That issue could have been dealt with in *Martin*, but was not. *Martin* also involved alleged medical

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complex migraine or migraine with aura. Thus, I am not satisfied Drs. Edmeads, Selchen and Maser's opinions are not colored with vision afforded by hindsight."

[1007] *Resufice*, at para. 25.

[1008] 2007 ABQB 245 at paras. 185 and 193-94.

[1009] 2007 ABQB 260 at para. 121.

[1010] *Tonizzo*, 2007 ABQB 245 at paras. 193-94.

[1011] *Martin*, 2007 ABQB 260 at para. 121.

malpractice. An operation had some adverse consequences. The plaintiff alleged inadequate disclosure of the risks so that there was not informed consent to the operation. The trial judge held that but-for is the applicable test for causation in informed consent cases, not material contribution. (see para. 108). *Tonizzo* is also a medical malpractice case where the allegation was negligence in the treatment provided. *Tonizzo* at least implies that the material-contribution test is not applicable to the issue of informed consent.

Lack of informed consent, however, is merely a label for a type of failure to warn cause of action. So, any general answer would have to be obtained by starting at the failure to warn level. As shown by actions such as *Bow Valley Huskey v. St. Johns Shipbuilding*, failure to warn causes of action may involve instances of duplicative causation. As such, Canadian causation jurisprudence will have to decide on the proper test for duplicative causation in order to decide whether one or the other or both of the legal causation tests are available in failure to warn cases.

The problems in the statement of the law – though not the result – in the most recent Alberta decision, Ferguson v. Steel[1012] might be explained by the fact that the case was tried in February and March 2006, with reasons released in early October 2007. The reasons do not suggest that additional argument occurred after the release of *Resurfice* in February 2008. *Ferguson* is a medical malpractice action. The plaintiff had a stroke while in the hospital. Ultimately, the trial judge dismissed the action on the basis that the plaintiff had failed to even prove that that the allegedly negligent medical treatment could cause a stroke. As to law, other than a quotation setting out paragraphs 20-25 of *Resurfice*,[1013] there is nothing in *Ferguson* that in any way refers to the material-contribution test in the *Resurfice*, or any other version of a causation-due-to-increased-risk theory. Despite referring to *Resurfice*, the trial judges' statement of what the plaintiff had to prove was pre-*Resurfice* in form. "The plaintiff must prove on a balance of probabilities that the defendant or defendants caused or contributed to the plaintiff's injury."[1014] It is not clear what the trial judge thought *Resurfice* meant.

It might be that the trial judge thought that *Resurfice* did nothing more than summarize the current law and remind the profession what it was. That possibility is suggested by the manner in which the trial judge introduced the quotation from *Resurfice*: "The Supreme Court of Canada re-iterated the general principles of the test for causation . . . in *Resurfice* . . . at paras. 20-25." When applying the law to the facts, the trial judge analyzed factual causation in purely *Athey* material-contribution terms; that is, as if the material-contribution test determined whether the alleged misconduct was, in fact, a factual cause. Ultimately, the trial judge rejected the plaintiffs' evidence and theory and held that there was no evidence that the doctors' or nurses' conduct "caused or materially

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[1012] 2007 ABQB 596.
[1013] 2007 ABQB 596 at para. 153.
[1014] 2007 ABQB 596 at para. 150.

contributed to" the plaintiff's stroke. As indicated, the trial judge also held that there was no evidence that the allegedly negligent conduct *could* cause a stroke.[1015]

Zazelenchuk v. Kumleben,[1016] is yet another contribution to the morass. It is more proof that some members of the profession have not yet realized that *Resurfice* material contribution is a conclusion that a finding of legal causation is to be *imposed*, even though the evidence goes no farther than possibility and does not permit a valid conclusion of probability. The only conclusion one can draw from the reasons, taken as a whole, is that the trial judge thought that the defendant's negligence was, in fact, *the* probable cause of the plaintiff's injury.[1017] For example, the judge wrote: "Counsel spent little time on this point in argument. Causation may not have been formally conceded, but close to it."[1018] The form of the subsequent causation analysis is wrong; however, it is difficult to blame the trial judge's error on the inadequacy of the analysis of the material-contribution test in *Resurfice*. Whatever else it is not, *Resurfice* is exquisitely clear on this much: material contribution is about possibility; about the imposition of a finding of causation based on possibility. It is not about a finding of factual causation based on probability, however one validly gets to that conclusion.

The better explanation seems to be no more than that the trial judge misunderstood *Resurfice* and assumed that the *Resurfice* material-contribution test is a restatement of the *Athey* material-contribution test, with the addition of some additional criteria which have to be satisfied before the test is applicable.[1019] Indeed, the trial judge's causation conclusion is quite literally out of the pre-*Resurfice*, *Athey*-universe: "There was a breach of the standard of care owed by Dr. Kumleben to Mr. Zazelenchuk, and that breach *caused or materially contributed* to the injury to Mr. Zazelenchuk's heart."[1020] It is extremely doubtful that the trial judge thought that doctor's negligence was nothing more than a possibility that had increased the risk of ACS to the extent that it, as a matter of fairness and justice, justified the imposition of liability on the doctor even though the evidence did not permit a valid conclusion that the doctor's negligence as at least *a probable cause*, *if not the probable cause*.

Z attended at a hospital on February 17, 2003, complaining of difficulty breathing and some other symptoms which could have been an indication of an ongoing or impending heart attack (Acute Coronary Syndrome). K, an emergency room physician, examined him, considered whether Z had ACS, decided that he did not, diagnosed anxiety, but still admitted Z for observation against the possibility of ACS. Because of that diagnosis, Z did not receive the treatment he would have received if the diagnosis had been ACS. At some point after admission and before evening of February 18, 2003,

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[1015] *Ferguson v. Steel*, 2007 ABQB 596. See, paras. 2, 6, 153, 443, 446, 460, 466, 467.
[1016] *Zazelenchuk v. Kumleben*, 2007 ABQB 650
[1017] So did the lawyers, apparently: *Zazelenchuck*, para. 146.
[1018] *Zazelenchuck*, para. 146.
[1019] I suggest that view is confirmed by the reasons for judgment in *Bowes v. Edmonton* (City), 2007 ABCA 347, released about two months after *Zazelenchuk* and written by the same judge.
[1020] *Zazelenchuck*, para. 150 (emphasis added).

Z had a massive heart attack. The heart attack did not kill Z but it caused a significant amount of damage to Z's heart. Z sued.

The trial judge found that K was negligent in not administering certain tests. The trial judge held that material-contribution was the applicable test.

> [146] Counsel spent little time on this point in argument. Causation may not have been formally conceded, but close to it.
>
> [147] There are some difficulties with proof of causation under the "but for" test in this case. Treatments called for at different steps of the ACLS algorithm, including Aspirin, Heparin and anti-thrombolytic therapy, are successful for most patients, but not all. It could be that Mr. Zazelenchuk, even if he had received any or all of these therapies, would have gone on to develop a myocardial infarct that would have caused permanent damage to his heart. Also, while the assessment tools of serial ECGs and cardiac markers will reveal the timing and seriousness of a blockage in a coronary artery in most cases, and thus the appropriateness of treatment by Heparin and/or anti-thrombolytic therapy, they will not do so in all cases, so it is difficult to know whether and when these treatments would have been applied to Mr. Zazelenchuk. However, it is clear that the standard of care required the immediate administration of Aspirin and this was not done. There was uncontradicted evidence from Dr. Schwartz that this step alone would have improved Mr. Zazelenchuk's chances of not developing a complete blockage of the artery with resulting tissue damage, sixfold. Without Aspirin, the risk that a partial blockage will develop into a full blockage is 12%, with Aspirin the risk is reduced to 2%. With Heparin in addition to Aspirin, the risk is reduced to 1%. If these therapies are not successful and the patient does go on to develop a full blockage, provided this is discovered and treated promptly with anti-thrombolytic therapy, this is 70% or 80% effective in opening up the blockage.
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> [148] This case is one in which the "material contribution" test of causation applies. As stated by the Supreme Court of Canada in *Resurfice Corp. v. Hanke*, 2007 SCC 7 (CanLII), [2007] 1 S.C.R. 333 at para. 25:
>
> > 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 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.
>
> [149] This is precisely the situation here. To the extent that it cannot be proven that Mr. Zazelenchuk would have been one of the majority of patients who can be successfully treated, this is due to factors that are outside his control. I have found that Dr. Kumleben breached a duty of care owed to Mr. Zazelenchuk, thereby exposing him to a risk that developing ACS would not be discovered and treated and would lead to permanent heart damage, and Mr. Zazelenchuk suffered precisely that injury. Dr. Kumleben's breach of

> the standard of care, even if one considers only the failure to administer Aspirin, materially contributed to Mr. Zazelenchuk's injury.
>
> [150] I have concluded that Dr. Kumleben is liable for Mr. Zazelenchuk's injury. There was a breach of the standard of care owed by Dr. Kumleben to Mr. Zazelenchuk, and that breach caused or materially contributed to the injury to Mr. Zazelenchuk's heart.

In short, the trial judge held that the doctor was negligent in failing to perform certain tests and, implicitly but necessarily, that that had the tests been done the situation would have been different. We need go no farther than the last sentence of paragraph 147: "If these therapies are not successful and the patient does go on to develop a full blockage, provided this is discovered and treated promptly with anti-thrombolytic therapy, this is 70% or 80% effective in opening up the blockage." That, if it is anything, is a clear statement that the trial judge thought that the doctor's conduct was a but-for cause. That, coupled with the trial judge's use of "caused or materially contributed" in paragraph 150, shows that the trial judge thought that the phrase "materially contributed" still means factual probable cause.

Nonetheless, the trial judge wrote: "To the extent that it cannot be proven that Mr. Zazelenchuk would have been one of the majority of patients who can be successfully treated, this is due to factors that are outside his control."[1021] Did the trial judge think it necessary for Z to eliminate every possibility? Factual causation, traditionally, before *Resurfice* was to be proven on a probability basis, not a certainty basis. *Resurfice* material contribution, where it applies, requires something less than probability. There is nothing in the reasons that explains why the trial judge concluded that it would have been impossible for the plaintiff to call some positive evidence from which the judge could have validly inferred that the failure to diagnosis and treat for ACS was a probable cause; in other words, to decide causation based on *Snell v Farrell*, that is, on but-for. Indeed, one can say that not only was it possible for the plaintiff to do so but the plaintiff did: the evidence that is summarized in paragraph 147. There is nothing in the reasons that indicates why it was not medically valid to infer from that evidence that existed that the failure to provide treatment on the basis that Z was suffering from ACS was a probable cause. There is nothing in the reasons that indicates the basis upon which the trial judge held that the result would have been different had the diagnosis been ACS and Z treated on that basis. However, that is the necessary conclusion we must make or the finding of causation and of liability is wrong. The statement that K's negligence "materially contributed to Mr. Zazelenchuk's injury" is a conclusion that the negligence was at least a probable cause, if not the probable cause, of the injury.

There is no indication that the trial judge understood that the use of the *Resurfice* material-contribution test leads to no more than a conclusion that the fault was *a possible cause* of the injury; that it does not lead to a conclusion that the fault was a probable cause. However, it is difficult to avoid the conclusion that the trial judge the failure to diagnosis ACS, and to treat Z as if he was suffering from ACS was the probable cause of

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[1021] *Zazelenchuk*, para. 149.

Z's heart attack and the resulting heart damage. It is difficult to understand, even if one accepts my argument that *Resurfice* is as poorly reasoned as I assert, why the trial judge did not use the *Snell* robust and pragmatic inference approach. Some unexplained difficulties with proof of causation under the but-for test would not be a sufficient basis to not apply *Snell* and to conclude that it was impossible, for factors beyond the plaintiff's control, to decide the causation issue using but-for.

It is clear in the reasons that the trial judge heard evidence and formed an opinion as to what would have happened on the counter-factual: what would have happened had the required tests been done: the evidence outlined in paragraph 147. I am going to quote, again, the five sentences that conclude that paragraph, again:

> However, it is clear that the standard of care required the immediate administration of Aspirin and this was not done. There was uncontradicted evidence from Dr. Schwartz that this step alone would have improved Mr. Zazelenchuk's chances of not developing a complete blockage of the artery with resulting tissue damage, sixfold. Without Aspirin, the risk that a partial blockage will develop into a full blockage is 12%, with Aspirin the risk is reduced to 2%. With Heparin in addition to Aspirin, the risk is reduced to 1%. If these therapies are not successful and the patient does go on to develop a full blockage, provided this is discovered and treated promptly with anti-thrombolytic therapy, this is 70% or 80% effective in opening up the blockage.[1022]

It is necessarily implicit in the trial judge's conclusion that the doctor was liable that the judge thought that, had the ACS diagnosis been made on admission, or appropriately soon thereafter, the treatment would have made a difference. Indeed, it seems almost explicit in what the trial judge wrote that the judge was satisfied, from the evidence that the doctor's negligence certainly made a difference or at least probably made a difference; that is, that the trial judge was satisfied (seemingly without hearing any evidence on the point since it is not mentioned) that had Z been treated as if he was suffering from ACS the result probably would have been different. That, of course, is a but-for analysis based on probability. It is not a *Resurfice*-material contribution analysis based on possibility due to increased risk.

The next contribution to the morass is the Alberta Court of Appeal's *Bowes v. Edmonton (City)*, 2007 ABCA 347.[1023] The majority reasons contain a series of incorrect, obiter, statements about causation in tort and *Resurfice*.[1024] The misunderstanding of tort

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[1022] *Zazelenchuk*, para. 147. Dr. Schwartz was a *defence* expert. He, according to the reasons, "was qualified to give evidence regarding the standard of care for general practitioners, as well as causation": para. 68.

[1023] 2007 ABCA 347, affirming ABQB 502, [2006] 4 W.W.R. 112.

[1024] The statements are obiter because the Court unanimously affirmed the decision dismissing the actions on the basis that the claims had prescribed, barred by the ultimate limitation period in the *Limitations Act*, R.S.A. 2000, c. L-12, s. 3(1)(b). However, the two of the three members of the panel disagreed with the third on the merits of some of the plaintiffs' claims, apart from the prescription isssue. Two members of the panel concluded that the negligence action, at least, would have succeeded but for the limitation period defence. The third held that the plaintiffs did not have any valid causes of action for a host of reasons, even from the fact that any cause of action they might have had prescribed. "The trial Reasons fact findings

causation law and *Resurfice* that appears in *Zazelenchuk* reappears in *Bowes*. The likely explanation is that the reasons were written by the judge (sitting *ad hoc* as a member of the appeal panel) who wrote the reasons in *Zazelenchuk*, and that the preparation of the reasons overlapped.[1025]

The facts of *Bowes* are simple enough. The plaintiffs owned houses on adjoining properties in Edmonton, on top of a river back, and near a river. A section of the river-bank next to the homes quickly collapsed and slid into the river-valley. That occurred on October 23, 1999. This was about 12 years after the construction of the last of the houses. The collapse destroyed one of the three houses. It made the two others too dangerous to live in and unsalvageable. The houses were demolished. The plaintiffs sued the City of Edmonton and others. By the time of the trial, the plaintiffs' actions had been dismissed against all defendants other than the city.[1026] The plaintiffs asserted a number of causes of action against the city. The trial judge held that the city was negligent on what amounted to a failure to warn basis. The failure was said to be the city's failure to adequately consider and disclose some information contained in a report (or disclose the report) it had about the problem with the river bank.[1027] All of the other causes of action were dismissed. However, the action against Edmonton failed because it had been commenced after the expiration of an applicable limitation period. It was barred by the ultimate limitation period under the Alberta limitation of actions legislation.[1028] The trial judge held that the limitation period had expired by the end of 1997. The actions were not commenced until 2000.[1029]

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make torts liability legally impossible. . . . Many rules of law bar this suit, or would require fact findings lacking here. Some of them would be impossible." (2007 ABCA 347 at para. 112).

[1025] The appeal in *Bowes* was heard about 3 weeks after the end of the *Zazelenchuk* trial. The appeal in Bowes was argued on September 6, 2007. The reasons were released on December 28, 2007. *Zazelenchuk* was tried in early June 2007 with reasons released on October 30, 2007.

[1026] 2007 ABCA 347, para. 1;.2007 ABCA 347, paras. 194-201.

[1027] The trial judge wrote at 2005 ABQB 502: "The City negligently failed to consider and disclose a geotechnical report which may have resulted in a denial of the Plaintiffs' application to develop and build or resulted in the Plaintiffs exercising other choices in relation to the development of their river bank properties." (para.1) And, at para. 127: "That does not mean that the City is a guarantor of the safety or suitability of a proposed development. It does not mean that the City is responsible for every potential latent defect, no matter how foreseeable. The City is obliged to conduct itself carefully in granting or refusing permits. In this case, it should have reviewed the materials in its possession bearing on the Plaintiffs' applications. It should have uncovered the 1977 Hardy report and disclosed it to the applicants. That report would have caused a careful municipality to require a more detailed geotechnical opinion which would justify ignoring the 1977 Hardy opinion. Even if a decision might have been made to allow the developments at the owners' risk, such a decision would require that the City disclose any information in its possession which might bear on that risk." (para. 127) "Here, the City failed in both respects and therefore breached its duty to be careful in issuing permits because it failed to consult and disclose the 1977 Hardy opinion." (para. 128)

[1028] 2005 ABQB 502.

[1029] 2007 ABCA 347, paras. 161, 207. Paras 1, 127 and 128 summarize the issues. "The claim of the Plaintiffs is time barred by the ultimate limitation contained in s. 3(1)(b) of the Limitations Act, RSA 2000 c. L-12." (para 1)

The Alberta Court of Appeal unanimously affirmed the portion of the trial decision dismissing the actions on the basis that the ultimate limitation period had expired and the action was barred.[1030]

The panel did not agree on the merits of the trial ruling that the City had been negligent. One of the three judges held that there was no factual and legal basis whatsoever for that ruling. The denunciation of the plaintiffs' case and the trial reasons is scathing. "[T]he plaintiffs or trial Reasons here seem to have invented a new way to make almost any defendant liable for any loss to everyone nearby, even if that defendant did not cause it and could not foresee it."[1031] "The trial Reasons fact findings make torts liability legally impossible. . . . Many rules of law bar this suit, or would require fact findings lacking here. Some of them would be impossible."[1032] The other two judges were affirmed the finding of negligence, holding that the trial judge had not committed either an error of law or a palpable and overriding error of fact or mixed fact and law.[1033]

Both sets of appellate reasons discuss causation and *Resurfice*. The judge who held that there was no basis in fact or law for the trial decision that the city had been negligent also held that causation had not been established on any basis whatsoever. He held that there was no evidence of what plaintiffs would have done had the city provided them additional warning or information that the trial judge held, in effect, the city should have provided.[1034] He event went to the extent of saying that the city's conduct "did not increase the risk. At worst, it did nothing."[1035] He stated the facts were more than sufficient to allow the use of but-for. He included the reminder, which we saw in the appellate reasons in *Bohun*, that the *Resurfice* "material contribution to risk test cannot be used just because use of the usual test and onus of proof would cause the plaintiff to fail."[1036]

The other members of the panel held that *Resurfice* was applicable because: (1) the trial judge's finding that the city had been negligent had to be affirmed since, in their view, the trial judge had not made any reversible errors in law or palpable and overriding error of fact or mixed fact and law;[1037] (2) on the evidence presented to the trial judge, it was open to him to have found that the collapse of the river bank and resulting damage to

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[1030] 2007 ABCA 347, paras. 178, 192, 207-208, 250.
[1031] 2007 ABCA 374, at para 3.
[1032] 2007 ABCA 347 at para. 112.
[1033] 2007 ABCA 347 at paras. 245, 211, 209-249.
[1034] 2007 ABCA 347 at paras. 66-67, 104. There was no evidence because the trial judge did not permit evidence on this issue. "The trial judge did not allow the Owners to answer questions at trial regarding what they would have done had they known about the report, ruling that this was a hypothetical question." (see 2007 ABCA 347, para. 233.) This ruling probably explains why the trial judge did not actually conclude that the city's negligence would have made a difference to the end result, in the sense that the trial judge did not specifically conclude that the plaintiffs probably would not have built or not been permitted to build. The trial judge went no farther than "may have": 2005 ABQB 502, para.1. The relevant part of para. 1 is quoted in its entirety earlier in this part.
[1035] 2007 ABCA 347 at para 101.
[1036] 2007 ABCA 347 at para. 101.
[1037] 2007 ABCA 374 at paras. 211, 220, 226, 230, 235, 244, 245, 249

adjacent buildings was within the ambit of risk that would be created by the city's breach of the relevant duty;[1038] and (3) it was impossible for the plaintiffs to establish causation using but-for because, some 15-20 years after the fact,[1039] it would be impossible for the plaintiffs to establish what they would or would not have done have done had the city made proper disclosure or even whether they would have been permitted to build, at all, regardless of their preferences.[1040] The concurring majority wrote:

> The impossibility in this case arises from two evidentiary problems: (1) the difficulty of establishing at this time what the Owners would have done if faced with the report and given the opportunity to build; and (2) uncertainty over whether additional geotechnical investigation would have recommended against building. The first evidentiary problem may not be outside the Owners' control, but the second certainly is. Thus the Owners have met the first criterion for the "material contribution" test to apply.[1041]

I will deal, first with the comments of the appellate judge who held that the but-for test was applicable and that the only problem was that the plaintiffs had failed to provide evidence that could (at least in the past) have been obtained. As well, he dealt with another obvious problem in the plaintiffs' actions.

The negligence claims were, at least in part, for "loss of a chance". That chance was the opportunity to reconsider whether to build in light of the additional information they alleged the city should have provided; or, the chance that the city would have decided not to allow the plaintiffs to build. The plaintiffs alleged that they lost the chance of reconsidering their decisions to build because the city had not given them additional information it should have. The second argument is also loss of chance argument unless put on the basis that the city would have had to refuse permission to build or else it would be negligent. There was certainly no evidence to support that argument. So, it was, in effect, that the city was negligent in allowing them to build at all because the city had granted that permission without adequate investigation, implicitly conceding, then, that that additional investigation might have resulted in the city still allowing them to build. A problem with the second argument, according to Côté J.A, was that it was contrary to the evidence. The evidence was that issuing the building permits was not negligent. Three of the problems with the first argument were: (1) there was no evidence as to what they plaintiffs would have done had they been given more data – not the least because the trial judge refused to allow them to be cross-examined on those issues; (2) the plaintiffs were aware of the risk of the bank slipping and had assumed that risk – the so-called extra data

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[1038] 2007 ABCA 347 at paras. 236-245. The majority ignored the evidence, recounted by Côté J.A, that showed that the plaintiffs had all of the information the city had – the real complaint was that the city should never have allowed them to build at all. Or, if they did not, it was one report the owners could have obtained with reasonable diligence because it was mentioned in what they had.

[1039] Houses built 1985-87, bank collapses Oct 1999, trial 2005.

[1040] 2007 ABCA 347 at paras. 231-245. The complete causation section is at paras. 227-245. However, paras. 240-245 do not contain a discussion of causation jurisprudence. They explain why the concurring majority concluded it was open to the trial judge to ignore the City's uncontradicted expert evidence and come to a contrary conclusion on a key issue of fact, even though there was nothing about the expert evidence that made it inherently implausible or suspect even if plausible.

[1041] 2007 ABCA 347 at para. 235.

was not relevant to the bank slippage issue as it affected them;[1042] and (3) in any event, the data that they claimed they had not been given was either in their possession or obtainable with due diligence.

I will quote extensively from the reasons of Côté J.A. because he set out exactly why the majority's literal, mechanical, application of Resurfice was wrong. Indeed, Côté J.A. understood, and set out, the necessary, precedential, consequences of the majority's analysis. "And what if instead the trial judge was using the "material contribution to the risk" test? It does not apply to most cases. It cannot be used just because use of the usual test and onus of proof would cause the plaintiff to fail; such a rule would make all defendants liable to all plaintiffs."[1043]

> [98] Did the trial Reasons wrongly adopt the "loss-of-a-chance" test for causation? The following part of the trial Reasons suggests that damages were assessed in terms of "loss of chance":
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> > It seems to me that this is really a case of loss of chance as the applicable head of damage. This case was presented, on the basis that had the City disclosed the Hardy report, the Plaintiffs may not have built or may not have been allowed to build. The notion of an award of damages for loss of chance is not without controversy. However, the parties' argument makes resolving that controversy unnecessary. (Reasons, para. 171; emphasis added)
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> [100] If that is what the Reasons meant, then it is plainly wrong in law. See the Alberta Court of Appeal in *Meyers v. Moscovitz (Stanley)* 2005 ABCA 114, 363 A.R. 262 (para. 32); and the Supreme Court of Canada in *Laferrière v. Lawson* [1991] 1 S.C.R. 541, 123 N.R. 325; and *St-Jean v. Mercier*, 2002 SCC 15, [2002] 1 S.C.R. 491, 282 N.R. 310 (para. 116).
>
> [101] And what if instead the trial judge was using the "material contribution to the risk" test? It does not apply to most cases. It cannot be used just because use of the usual test and onus of proof would cause the plaintiff to fail; such a rule would make all defendants liable to all plaintiffs. This is not a case where the defendant hid or housed the

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[1042] This is the crux of the dispute over the facts as between the members of the appellate panel. Côté J.A held that the trial judge misunderstood the 1997 Hardy report. He held that the trial judges view of the report had no basis whatsoever. He held that it was not open to the trial judge to ignore what was the report literally said and hold that it dealt with something that it did not discuss at all – the collapse of the river bank due to deep-earth movement. Côté J.A said the report should be read for what it said it was about: surface slippage affecting considerations such as roads. Côté J.A held the trial judge's view of the 1997 Hardy report was blatantly, palpably, necessarily (all of these are my adjectives) wrong. The other members of the panel disagreed with Côté J.A's view of the 1997 Hardy report. They held that it was open to the trial judge to conclude that the report's terminology was ambiguous and, therefore, on the evidence, conclude that it did alert the city to the need for more geotechnical studies of the sort that would be relevant to the safety of house construction in the area where the plaintiffs proposed to build. The problem, of course, was that the writer of the report was not called to testify as to what he meant. Neither the trial nor appellate reasons indicate whether the writer was still alive, or even whether there was other extrinsic, independent, evidence available as to the writer's intention to clarify the supposed ambiguity, if there was one at all.

[1043] 2007 ABCA 347 at para. 110.

> facts. The facts were deep inside the plaintiff's land. Though hard to find, they were harder for the defendant to find than for the plaintiff to find. And once again, the City is accused of mere nonfeasance. The City did not increase the risk; at worst it did nothing.[1044]
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> [102] It is true that causation after incomplete advice is troublesome, but I explain in Part D.8 how to handle that. It is not necessary to say proof of causation is impossible and to revert to "material contribution to the risk."[1045]

Côté J.A also wrote, in the paragraphs that make up Part D.8 of his reasons:

> [104] As noted in para. 67, there is no evidence what the plaintiffs would have done with fuller reports or warnings. They sought a building permit; would they have built with a permit and more warnings? Is this impossible to prove or decide?[1046]
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> [105] In my view, no. The Supreme Court of Canada has clearly stated the causation rules to follow when a physician failed to give full enough advice and disclosure before a risky operation or treatment. See the lengthy and clear review in *Arndt v. Smith* [1997] 2 S.C.R. 539, [1997] 8 W.W.R. 303, 213 N.R. 243. The law then imposes a modified objective test, bypassing the "hindsight and bitterness" of a subjective test (para. 3). One looks at a reasonable person in the plaintiff's particular circumstances and with any reasonable particular concerns which he or she had. Would such a reasonable person also have run the risk in question? (See paras. 6-17 of *Arndt*.)
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> [106] Where a plaintiff says that he relied upon advice or warnings of a professional in order to decide whether to undertake a certain risky course of action then being discussed, I can see no reason to choose any different test. Still less should one give up

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[1044] This has to be understood as a finding that the City was not negligent, as well as that there was no causation. The city had been held to have a duty so the mere fact of nonfeasance rather than misfeasance was not determinative of the lack of liability.

[1045] 2007 ABCA 347, paras. 98-102, per Côté JA.

[1046] The majority said it might be, at least on the issue of what the result would have been on whether the city would have issued building permits at all, had it done obtained additional geotechnical reports and then considered the issue of granting the permits. Did the majority consider this analogous to *Walker Estate* and the reason why the Supreme Court of Canada used *Walker Estate* as an example of a facts invoking the material-contribution test? Recall what the SCC wrote about Walker Estate in *Resurfice*, at para. 28.

> "A second situation requiring an exception to the "but for" test may be 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. For example, although there was no need to rely on the "material contribution" test in Walker Estate v. York Finch General Hospital, this Court indicated that it could be used 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. Once again, the impossibility of establishing causation and the element of injury-related risk created by the defendant are central."

Did the majority think that that the situation of additional geotechnical reports and additional consideration by the city based on those reports fell within the example of the situation "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"? We do not know because the majority did not say. Apart from that, the "particular person" referred to in *Resurfice* is some person other than the negligent defendant; that is, would be some person other than the city or its employees.

> and say that causation cannot be proved materialized or not. Second, for every possible risk from what the plaintiff did, see if the defendant warned against that risk. Third, even if he did warn against it, go a step further (as here): see if he gave all the information possible about the risk. If not, there is the negligence: failure to warn fully. Fourth, define causation in fact solely by the "but for" test. It will always be present, even if the foreseeable risk never occurred. What is the natural corollary of discovering <u>any</u> risk? A caution: "Don't do anything now: study further." If the plaintiff had done nothing, the different risk which did occur would have had no chance to occur. The bald "but-for" test is satisfied.[1047]

The balance of paragraph 106 commencing with "still less" relates back to paragraphs 76-78 where Côté JA explained why the trial judge had been wrong in his use of the but-for test, if it was the but-for test the trial judge had used. Côté JA explained that he trial judge had applied but-for in a fashion such that it necessarily produced answers that the plaintiffs would have done something different and that the trial judge treated those answers as a sufficient basis for holding that causation was established.[1048] Côté J.A. also explained why a plaintiff-favouring answer to the but-for test is not necessarily a sufficient answer for the causation inquiry.[1049] We have canvassed that issue before. It is the fact that there are an immeasurable number of events that must necessarily have occurred for some harm to occur. Nonetheless, these events are never within the scope of what might be legal causes.

As mentioned, the majority concurrence held the causation question was to be determined by the application of the *Resurfice* material contribution-test and that it applied to produce a finding that the city's negligence had caused the plaintiff's damages.[1050] There are a number of significant, startling, errors, in the concurrence. The first is, in effect, the equation of the *Athey* material-contribution test with the *Resurfice* material-contribution test, in conjunction with the assertion that the two criteria set out in *Resurfice* define when the material contribution test, as explained in *Athey*, applies. The second is the associated statement that the material-contribution test produces an inference of causation.

The majority seems to have believed that the *Resurfice* material-contribution test is the *Athey* version, with the parameters of the test better defined than was the case before *Resurfice*. The majority reasons state, in part:

> [227] Causation is established using one of two tests - the "but for" test or the "material contribution" test. In the "but for" test, the plaintiff bears the burden of showing that "but

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[1047] 2007 ABCA 347, paras. 104-106. (emphasis in original). The question that Côté JA raises in the first and second sentences is whether the but-for test is applicable, at all, to a cause of action based on failure to warn. His conclusion is that it is not. *Resurfice* does not say that it is not. Whether failure to warn cases necessarily fall within the *Walker Estate* example of an appropriate case for the material-contribution test is an issue that judges will have to wrestle with sooner rather than later. I have referred to this issue earlier in this part.

[1048] At 2007 ABC 347, para. 78. Côté JA called it the "bald but-for" test at para. 79.

[1049] 2007 ABCA 347 at para. 76-78.

[1050] 2007 ABCA 347 at paras 227-245.

> for" the negligent act or omission of the defendant, the injury would not have occurred. In the "material contribution" test, a court can infer causation where a plaintiff shows that the defendant's negligence "materially contributed" to the occurrence of the injury: *Athey v. Leonati,* [1996] 3 S.C.R. 458, 140 D.L.R. (4th) 235 at paras. 14-15.

As discussed, the suggestion that the *Resurfice* material-contribution test and the *Athey* material-contribution test (whatever it fully meant) are related is wrong. The *Athey* version was, at most, another way of saying but-for. It produced a finding of conduct that was a cause of the injury. The *Resurfice* test does not. The Supreme Court made that explicitly clear in paragraph 25 of *Resurfice*. "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 notions of fairness and justice to deny liability by applying a "but for" approach."

The majority compounded their error by asserting, again, that the *Resurfice* test "establishes causation" without clarifying what the majority meant by "establishes causation". If the majority meant "factual causation", they are wrong. If they meant only legal causation, they are right. I suggest the context points more to the former: factual causation. The majority wrote:

> [228] … [T]he City argued that in describing the Owners' damages in this way, the trial judge was effectively applying a "material increase in risk approach to causation", and that this was an error of law. Lewis Klar, *Tort Law*, 3d ed. (Toronto: Thomson Carswell, 2003) at 405, has observed that the notion of "loss of chance" and the "material contribution test" are two facets of the same problem. The "material increase in risk" approach establishes causation where the defendant materially increases the risk of injury and the injury occurs within the area of that risk.
>
> [229] Was it an error of law to apply the "material contribution" test of causation? The Supreme Court of Canada's decision in *Hanke v. Resurfice Corp*., 2007 SCC 7, 69 Alta. L.R. (4th) 1 [*Hanke*], which was released after the trial judgment, provides the most recent guidance on when each test of causation should be applied. The Court held that the basic causation test is the "but for" test, even in situations involving multi-cause injuries: *Hanke* at para. 21. For the "material contribution" test to apply, two criteria must be satisfied. First, it must be impossible for the plaintiff to prove that the defendant's negligence caused the injury using the "but for" test. This impossibility must be due to factors outside of the plaintiff's control. Second, the defendant must have breached a duty of care owed to the plaintiff, thus exposing the plaintiff to an unreasonable risk of injury, and the plaintiff must have suffered that form of injury. Put another way, the plaintiff's injury must fall within the ambit of risk created by the defendant's breach: *Hanke* at para. 25.

The first sentence of paragraph 229 also seems to describe the *Resurfice* material-contribution test as a test for factual causation. The majority then asserted that the facts of the case satisfied the requirements of the *Resurfice* material-contribution test "and causation was proven". "In my opinion, the two criteria for applying the "material

contribution" test are satisfied in this case, and causation was proven under that test."[1051] I suggest this clinches the argument that the majority treated the *Resurfice* material-contribution test as a test which produces a finding of factual causation, not a conclusion of law that permits the imposition of liability even though factual causation cannot be established.

The majority then proceeded to explain why the facts of the case satisfied the two Resurfice requirements. Before we look at that part of the case, recall that the majority's statement of the *Resurfice* requirement is not literally accurate. Just as in *Zazelenchuk*, the "impossibility" is stated without the proviso which may be a limiting clause or may just be an example.[1052] The complete sentence is: "The impossibility must be due to factors that are outside of the plaintiff's control; for example, current limits of scientific knowledge."[1053] Given that phrasing, it is, of course, possible that the Supreme Court did not intend the proviso to be a limiting clause; rather, just an example. However, neither *Bowes* nor *Zazelenchuk* discuss that issue. The absence of the proviso is important, because the factors that that the majority cites as the reason why the "impossibility" requirement was satisfied did not invoke a "limits of scientific knowledge" problem, unless the problem is that we do not have time travel, any other way to look into the past, or a way to communicate with the apparently deceased.

As I stated earlier, the summary of the majority's explanation for why they concluded that the impossibility requirement was met is contained in paragraph 235.

> [235] The Supreme Court of Canada in *Hanke* held that the impossibility of establishing causation using the "but for" test must be outside of the plaintiffs' control. The impossibility in this case arises from two evidentiary problems: (1) the difficulty of establishing at this time what the Owners would have done if faced with the report and given the opportunity to build; and (2) uncertainty over whether additional geotechnical investigation would have recommended against building. The first evidentiary problem may not be outside the Owners' control, but the second certainly is. Thus the Owners have met the first criterion for the "material contribution" test to apply.[1054]

In short, the plaintiffs' problem was that evidence that might once have existed no longer existed. If this is a limits of scientific knowledge problem, it is a problem in every case and it makes the *Resurfice* material-contribution test the default test.[1055] I suggest that, whatever else the Supreme Court intended by the statement of the impossibility requirement in *Resurfice*, it did not intend it to mean merely the loss of evidence over time, particularly evidence that was once available to the plaintiffs even if it was no longer available at the time of the trial.

[1051] 2007 ABCA 347, para. 230. The causation discussion is summarized in paras. 227-30.
[1052] Ross J. decided *Zazelenchuk*. She sat *ad hoc* as an appellate judge in *Bowes*.
[1053] *Resurfice*, para. 25. But, as have noted, the *Walker Estate* "example" does not contain a "limits of scientific knowledge" problem in the evidence.
[1054] 2007 ABCA 347 at para 235.
[1055] Invoking the obvious *Resurfic*e reminder that it is not.

The detail underpinning the summary in paragraph 235 appears in paragraphs 231-234. The majority discussed the fact that the negligence claim could also be characterized as one alleging failure to warn. They conceded that the but-for test was capable of applying to that claim. The majority stated, however, that the but-for test could not apply to the city's negligence which amounted to failing to obtain additional data (another geotechnical report) about the bank conditions and the risk of building homes in the area where the plaintiffs planned to build. The majority wrote:

> [231] The first criterion requires that it be impossible for the Owners to prove that, "but for" the City's failure to consult and disclose the 1977 Hardy report, they would not have suffered the loss of their homes: *Hanke* at para. 28.
>
> [232] If the City had considered the 1977 Hardy report, would the Owners nonetheless have been given the opportunity to build? If given the opportunity, would they have built despite the risk? They were clearly willing to accept some risk when they built their homes.
>
> [233] The trial judge did not allow the Owners to answer questions at trial regarding what they would have done had they known about the report, ruling that this was a hypothetical question. If this case were purely a "failure to warn" case, it would seem that the Owners' evidence on this point might have satisfied the "but for" test of causation, provided a subjective test of causation is applicable, as it is in the case of a manufacturers' breach of its duty to warn: *Hollis v. Dow Corning Corp.*, [1995] 4 S.C.R. 634, 129 D.L.R. (4) 609 at paras. 44-46. If a "modified objective" test applies, as in medical negligence cases, it would also be necessary to consider what a reasonable person in the Owners' position would have done: *Arndt v. Smith*, [1997] 2 S.C.R. 539, 148 D.L.R. (4th) 48 at paras. 2-17; approving *Reibl*. at 897-900.
>
> [234] However, this is not purely a "failure to warn" case. The trial judge also found that the City was negligent in failing to consider the Hardy report and in failing to obtain a further geotechnical opinion. It is possible the Owners would not even have been given the opportunity to build. If they were, they would have had the benefit of another geotechnical report, and it is unknown what that report would have recommended. It is possible that a subsequent geotechnical report would have recommended that building could proceed. The 1979 BBT report made this recommendation, as did Shelby Engineering Ltd., who were retained by the Bowes to provide a report on building their home. But these reports did not address the 1977 Hardy report. It is impossible to establish at this time what a subsequent geotechnical opinion addressing the 1977 Hardy report would have recommended. Thus it is impossible to determine whether, but for the City's negligence, building would have been permitted by the City and undertaken by the Owners.

As discussed, Côté J.A. did not consider that situation anything different from the usual problems faced in litigation where evidence may no longer be available (although here in fact they were).

Côté J.A wrote: "This is not a case where the defendant hid or housed the facts. The facts were deep inside the plaintiff's land. Though hard to find, they were harder for

the defendant to find than for the plaintiff to find."[1056] He added: "It is true that causation after incomplete advice is troublesome, but … It is not necessary to say proof of causation is impossible and to revert to 'material contribution to the risk'."[1057] As well, there is a comment he made in the context of his consideration of the limitation period issue that is equally applicable here. "The second aspect of the harm is that trying to find and test evidence about events decades old is usually roulette, not a serious exploration of the truth. After some years, a defendant cannot prove a proper defence, or even disprove the plaintiff's allegations."[1058]

The majority next considered whether the ambit of the risk test was met. The majority explained that requirement in a paraphrase of *Resurfice*.

> [236] Under the second criterion for using the "material contribution" test, it must be asked whether the City breached a duty of care owed to the Owners, exposing them to an unreasonable risk of loss, and whether the Owners suffered that loss. In other words, did the Owners' injuries fall within the ambit of the risk created by the City's breach?[1059]

The majority stated that that question was to be answered by deciding what was the risk that had been warned against in the 1997 Hardy report that the trial judge found the plaintiffs did not receive from the city, that was also the report that the trial judge held the city had not adequately considered. The plaintiffs argued that it was the risk of exactly what happened: the bank collapsing. The city argued it was not. The trial judge had found it was. On Côté J.A.'s view of the evidence, the trial judge had ignored uncontradicted, and plausible, lay and evidence (and likely misinterpreted the report) to come to that conclusion.[1060] The majority held that that the trial judge had not committed a reversible error in arriving at that conclusion.[1061] The majority answered the ambit of risk question in the first two sentences of paragraph 245, based on that conclusion of fact.

> [245] The factual finding that the 1977 Hardy report addressed the type of slide that in fact occurred supports the view that the Owners' injury fell within the ambit of the risk created by the City's breach. The Owners have therefore met the second criterion for the material contribution test, and have established causation under that test. The trial judge made no overriding or palpable error in determining that the Owners' losses were caused by the City's negligence.[1062]

[1056] 2007 ABCA 347 at para. 101.
[1057] 2007 ABCA 347 at para. 102.
[1058] 2007 ABCA 347 at para. 122.
[1059] 2007 ABCA 347 at para 236.
[1060] Côté JA held that this was sufficient error to allow appellate review: see 2007 ABCA 374, para. 97 – "In any event, a fact finding which satisfies a legal test without any evidence, or which is impossible for one acting judicially to make, on appeal can be held to be error in law. . . . So can failing to consider one of the legal factors which the law requires the court to consider …" (authorities omitted). See the additional discussion above.
[1061] 2007 ABCA 347, paras. 240-244 contain the majority's explanation of why the trial judge was entitled to ignore uncontradicted evidence and form his own conclusion
[1062] 2007 ABCA 347 at para 245.

The last sentence of paragraph 245 has nothing to do with the ambit of risk question. It is the majority's conclusion that the trial judge did not make a reversible error. It is also more evidence that the majority thought that the *Resurfice* material-contribution test produces a finding of factual causation.

It is not clear whether the majority realized that what they were doing was asking themselves, again, whether the city was negligent. The city could not have been negligent towards these plaintiffs, and liable to this plaintiffs on the basis of conclusions of law based on that finding, on the basis of a failure to consider the 1997 report, if the report did not warn of the risk of relevant bank slippage, or suggest that more investigation be done, because those failures were what the plaintiffs said the report meant and formed the basis of the plaintiffs' cause of action against the city. The majority had already held, earlier in their reasons, that the trial judge's decision that the city was negligent could not be reversed because he had not committed palpable or overriding error in holding that the report did deal with slippage (movement) of the bank in respect of issues relevant to the safety of constructing houses on the land on which the plaintiffs proposed to build. This is necessarily implicit in the content of the preceding section of their reasons titled "Standard of Care and Breach".[1063]

I conclude my discussion of *Bowes* with a number of comments. First, it is puzzling that *Bowes* does not mention any of the British Columbia appellate reasons considering *Resurfice*. These cases were already well-known (or should have been well-known) by the end of December 2007 when the Bowes reasons were released. Second, it is puzzling that *Bowes* did not mention any of the extra-judicial scholarship already in existence about *Resurfice*. While we can say that about the British Columbia decisions, too, the point remains that at least one of the authors of relevant material teaches at the University of Edmonton, Faculty of Law. The third is to remark that it is unusual that the impossibility requirement would be stated without the "limits of scientific knowledge" proviso, given the unusual facts of the case, and that none of the members of the *Bowes* panel thought to comment on why it was appropriate to state the requirement, and apply the requirement that way. Fourth is that the application of the impossibility requirement as it was done in *Bowes* is inconsistent with the interpretation it seems to be receiving in British Columbia, at least at the appellate level: that is, that the problem has to be one due to limits of scientific knowledge; a gap in the evidence due to science issues. There was nothing that amounts to a "limits of scientific knowledge" issue in *Bowes*. Associated with that is the first question: the absence of reference to the British Columbia cases. Fifth, and ironic, is the puzzle that the plaintiffs were allowed to argue for a test based on the absence of evidence when it might well have been that the gap made no difference.

[1063] 2007 ABCA 347 paras 223, 224. "In finding a breach of the duty of care based on the failure to consider and disclose the 1977 Hardy report, the trial judge implicitly accepted the Owners' view of its significance. In my view, he was entitled to do so." (para. 223). "In my view, it has not been demonstrated that the trial judge made any palpable and overriding error in finding that the 1977 Hardy report was not considered by the City when it issued permits to the Owners." In para. 224, the majority specifically disagreed with Justice Côté's finding (which they mentioned to start the paragraph) that "the trial judge made a palpable and overriding error in finding as a fact that the 1977 Hardy report was not considered by the City when the development and building permits were issued.

We will never know because the trial judge refused to permit the plaintiffs to be asked the counterfactual "what would you have done" questions.

The last point is this. Is there any case where evidence has been lost due to age, or avenues of investigation have closed down because of the passage of time, that would not satisfy the impossibility requirement of *Resurfice* if it was correctly applied in Bowes. At the least, why was it not relevant that, if there was missing data, it was data that once existed. It was also data that the plaintiffs could have obtained and submitted to experts for some opinion, even if the opinion had to be qualified on account of the passage of time. There are always going to be some gaps in every case but the perfect case. The perfect case does not exist. Based on Bowes, it seems that every case except the perfect or most obvious is a candidate for the *Resurfice* material-contribution test. That cannot be what *Resurfice* means. The British Columbia Court of Appeal has made that exquisitely clear in Bohun and B.S.A. A sentence from the appellate decision in *Bohun* is appropriate, here. "I do not read *Resurfice* to mean that, because a plaintiff fails to prove causation on the 'but for' analysis, a plaintiff may then resort to the less stringent material contribution test."[1064] The reason is made exquisitely clear by Côté J.A.: "And what if instead the trial judge was using the "material contribution to the risk" test? It does not apply to most cases. It cannot be used just because use of the usual test and onus of proof would cause the plaintiff to fail; such a rule would make all defendants liable to all plaintiffs."[1065]

If it was not merely that evidence was no longer available that once existed, or could not longer be obtained that could once have been, then is there anything about *Bowes* that could support an argument justifying resort to the material-contribution test? It would have to be the involvement of third persons in the decision making process – the experts who might have been consulted but were not. But, in Bowes, as I have mentioned, that third person would not have been someone other than the plaintiffs or Edmonton, unless the majority had in mind that one of the experts hypothetically possibly retained by the plaintiffs or Edmonton might be negligent. And, even if the possible error of additional experts is not the defining characteristic, we still have *Resurfice* applying to a swath of cases which are not exceptional: every case where there is expert evidence and the expert, or the plaintiffs, say they might have obtained more if they had more information and the plaintiffs say they do cannot say what they would have done if they had more information.

For the moment, one answer to the *Resurfice* "impossibility" requirement conundrum might be to remember that the facts of *Resurfice* did not satisfy the "impossibility" requirement and ask ourselves what is different about the facts of the case we are now considering, as lawyers or judges. As to *Bowes*, we could ask ourselves what was different about the essential elements of *Bowes*. The answer, I suggest, is nothing.

[1064] *Bohun* 2008 BCCA 23 at para. 53
[1065] 2007 ABCA 347 at para. 101.

Nattrass v. Weber[1066] is another example of a judge apparently misunderstanding and misapplying the *Resurfice* material-contribution test in a medical-malpractice action and finding that causation was established. The decision factual that the evidence established factual causation on the balance of probability may be correct; however, the legal analysis is wrong. *Nattrass*, like *Bowes* and *Zazelenchuk*, does not advance Alberta or Canadian jurisprudence.

The trial judge held that the negligence of a number of the physicians was a cause of the plaintiff's injury. However, the held that this was either on the basis of but-for (which seems to have been the trial judge's first choice) or material-contribution.[1067] If it was the latter, it seems to have been the *Athey* version of the material-contribution test, even though *Athey* is nowhere cited. The trial judge wrote, in part, twice: "If it cannot be said that 'but for' … [the negligence of the physicians] … Mr. Nattrass would not have suffered the injuries that he did, I find that this failure materially contributed to his injuries."[1068] The trial judge did not explain how it was that that both tests could apply to the facts; that is, how plaintiff could have the benefit of both the but-for test and the material-contribution test. Although *Athey* is not cited, the tenor of the reasons suggests that the trial judge thought that the *Resurfice* material-contribution test is nothing more than a restatement of the *Athey* material-contribution test, substituting the two *Resurfice* requirements[1069] for *Athey*'s "unworkable".

It is arguably the case that the trial judge's decision is ultimately a but-for decision on a probability basis, because the trial judge accepted the plaintiff's expert evidence rather than that of the defence and the plaintiff's expert evidence was that the negligence was the probable cause. However, that is not what the trial judge actually held and said. As indicated, the judge said that the negligence was a cause either because it was a but-for cause or it had materially contributed.[1070] The result is, on its face, an error of law that may result is a new trial, if the defendant appeals. Whether it will result in a new trial will depend on whether the appellate court is prepared to conclude that the reasons, properly understood, disclose that the trial judge made a but-for decision that is supportable on the evidence, so that there is no palpable and overriding error; or, the appellate court holds that while there was an error of law there is no miscarriage of justice as the decision is correct, on the evidence, when the law is applied properly.[1071]

[1066] 2008 ABQB 259.

[1067] The injury was the amputation of the right leg above the knee and the left leg at the hip: 2008 ABQB 259.

[1068] 2008 ABQB 259 at paras. 294 and 441. See, also, para. 384 which uses only "materially contributed".

[1069] That it is impossible for the plantiff, for reasons outside of the plaintiff's control, to establish factual causation using but-for and that that injury is within the forseeablem ambit of the the risk created by the negligence.

[1070] The trial judge did not explain how the same facts could satisfy either of the *Athey* version of the material-contribution test or the *Resurfice* version of the material-contribution test. The judge's quotation of para. 28 of *Resurfice* cannot and should be understood to mean that she was analogizing the facts of *Nattrass* to the result in *Walker Estate*, where Major J. held that both *Athey* material-contribution and the but-for test were applicable and produced a causation finding in favour of the plaintiff.

[1071] It was was probably a long trial even though the reasons show just one day for the trial. The reasons are 454 paragraphs long. The only issues were negligence and causation.

The discussion of causation jurisprudence is cursory.[1072] There is no indication that the trial judge was aware of the recent decisions of the British Columbia Court of appeal, or even the Alberta Court of Appeal's own *Bowes v Edmonton (City)*. We should assume that the portion of the reasons dealing with causation would have been different if the trial judge had been aware of *Sam v. Wilson* or *Bohun v Segal*. She appears to have thought that the *Resurfice* material-contribution is a test for cause-in-fact.[1073] We should assume that the trial judge would have realized otherwise, or would have explained why she was disagreeing with the statement in *Sam* that the *Resurfice* form of material contribution test "is not a test of causation at all: rather, it is a rule of law based on policy."[1074] In addition, we should assume that if the trial judge would have explained why a material-contribution test of any type was available to the plaintiff even if, on these facts, the plaintiff was unable to satisfy the but-for test, if she was aware of *Bohun v. Segal*. In *Bohun*, the British Columbia Court of Appeal stated that

> [h]aving failed to establish causation on the available "but for" test, the causation analysis ought to have come to an end. It was not open to the plaintiff to prove, or to the trial judge to consider, the material contribution test. As stated in Resurfice, it must be impossible to prove negligence using the "but for" analysis before resort can be made to the material contribution analysis. I do not read *Resurfice* to mean that, because a plaintiff fails to prove causation on the "but for" analysis, a plaintiff may then resort to the less stringent material contribution test.[1075]

The trial judge did not suggest that the facts of the case somehow triggered an exception analogous to *Walker Estate* so as to allow the plaintiff to make use of either test.

Instead, the trial judge first wrote, when discussing case law: "In order to establish causation, the plaintiff must prove that the defendant was the cause-in-fact of the injury and that the injury was foreseeable."[1076] The trial judge later wrote, when discussing the facts:

> The Plaintiffs must prove that the Defendants were the cause-in-fact of the injury. Second, the Plaintiffs must prove that the injury was foreseeable. The Plaintiffs bear the onus to prove that "but for" the negligence of the Defendants, the injury would not have occurred. The "but for" test recognizes that compensation for negligent conduct should only be made where a substantial connection exists between the injury and the Defendants' impugned conduct. It ensures that Defendants will not be held liable for injuries that may very well be due to factors unconnected to them and not anyone's fault. If it is impossible to prove what a particular person in the causal chain would have done

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[1072] 2008 ABQB 259 at paras. 186-191, 267.
[1073] 2008 ABQB 259 at paras. 187-88.
[1074] *Sam v. Wilson* at para. 109.
[1075] *Bohun v. Segal* at para 53.
[1076] 2008 ABQB 259 at para. 187. The judge cited a 2003 decision Alberta Court of Appeal

> had a Defendant not committed a negligent act or omission, the "material contribution" test may be applied, so long as the Defendant created an injury-related risk.[1077]

The trial judge accepted the plaintiff's crucial expert evidence that the negligence of the physicians was the probable cause and rejected the defence evidence.[1078] The trial judge never explained why it might be that the but-for test did not apply. The trial judge did not find that it was impossible for the plaintiff, for reasons outside of his control, to establish factual causation using the but-for test. The trial judge, of course, could not have done that without rejecting the plaintiff's expert evidence which she had accepted. The crux of the plaintiff's evidence was that the negligence in failing to monitor the platelet count so long as the plaintiff was on Heparin was the probable cause. In fact, the trial judge never explained or even discussed how it could be that, on the evidence the judge had accepted, it was or even might be impossible for the plaintiff, for reasons outside of his control on any basis whatsoever let alone current limits of scientific knowledge, to establish causation using the but-for test.[1079]

The judge wrote, in her summary of the facts and law:

> In my view, Dr. Harley and Dr. Weber were in breach of the appropriate standard of care, which required that platelet counts be monitored on July 7th and every two days thereafter while Mr. Nattrass remained on Heparin, whether unfractionated or LMW Heparin.
>
> Finally, I find, on a balance of probabilities, that regular monitoring of platelet counts would have resulted in the detection of thrombocytopenia prior to thrombosis and would have led to Mr. Nattrass being taken off Heparin and possibly being given another anticoagulant. On a balance of probabilities, I conclude that this, in turn, would have halted the fall in the platelet count and the catastrophic thrombotic event that led to amputation would not have occurred. I accept Dr. Carter's conclusions as being well supported by the evidence before me. If it cannot be said that "but for" the failure to monitor the platelet counts, Mr. Nattrass would not have suffered the injuries that he did, I find that this failure materially contributed to his injuries.[1080]

Given the evidence accepted by the trial judge, the conclusion of fact in the last paragraph is a but-for conclusion, notwithstanding the trial judge's attempt to "appeal-proof" her finding of factual causation by stating by asserting that the plaintiff established

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[1077] 2008 ABQB 259 at para. 267. The discussion after para. 267 does not explain why it might be impossible; nor is this done anywhere else in the reasons.

[1078] 2008 ABQB 259 at paras. 284-287, 379. The trial judge accepted the the evidence of Dr. Carter rather than that of Dr. Warkentin.

[1079] For whatever this is worth, it seems that that the trial judge thought the facts could fall within the second example, in *Resurfice*, of a situation where factual causation cannot be established under the but-for test. See 2008 ABQB 259 at paras. 189-90 where the trial judge quoted from paras. 25 and 28 of *Resurfice* and the concluding sentence of para. 267 which is quoted above. However, the trial judge did not explain how that example might apply. The trial judge did not even identify who the particular person or person might be whose hypothetical conduct was so uncertain.

[1080] 2008 ABQB 259 at para. 441-42 (emphasis added).

factual causation under both the but-for test and what amounted to the Athey material-contribution test.

O'Scolai v. Antrajenda[1081] is worse. The reasons, as written, are explicable only if the trial judge was not aware of, or forgot about, *Resurfice*. The trial judge did not mention *Resurfice*. The trial judge applied the pre-*Resurfice*, orthodox, *Athey* formulation and held that the "accident caused or materially contributed to" the injuries for which the judge awarded damages.[1082] The trial judge cited *Athey* for the propositions that:"a. The plaintiff must prove that the injury would not have occurred but for the defendant's negligent accident" and "b. An alternative formulation of this principle is that the plaintiff must prove that the defendant's negligence materially contributed to the injury".[1083]

Manitoba

In *Hawkins v. Mathieson*,[1084] the trial judge seems to have thought that some aspect of the *Athey* material-contribution test survived *Resurfice*, with *Resurfice* merely establishing the limits within which the *Athey* material-contribution test is applicable. *Athey* is cited as authority for the rule that but-for is the general test and "[o]nly when this test is unworkable will the courts consider whether the defendant's negligence materially contributed to the damage."[1085] That sentence is immediately followed by a reference to *Resurfice* which the court states "is a particularly important case for consideration as the test for causation was specifically referenced".[1086] The trial judge then quotes from *Resurfice* (from paras. 19, 21, 25) stating that the two general principles in paragraph 25 of *Resurfice* make it "crystal clear what the limits of the 'material contribution' test are."[1087] The trial judge held (without explicitly saying so) that the but-for test governed because the facts did not satisfy the *Resurfice* requirements for material contribution. In any event, the trial judge also held there was no negligence.[1088]

Michaud v. Brodsky[1089] is a but-for case. The trial judge quoted from and applied paragraphs 21 and 22 of *Resurfice*.[1090] However, as I will explain, the case could have triggered some judicial comment about material contribution. It did not. Brodsky was Michaud's lawyer. Michaud was charged with arson and other crimes. Michaud did not testify on his own behalf. Michaud was convicted. His appeal failed. Michaud then sued Brodsky alleging Brodsky was negligent in advising Michaud to not testify on his own behalf. The action was dismissed on the basis that Michaud had failed to adduce evidence that his testimony would probably have made a difference, even if Brodsky had been

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[1081] 2008 ABQB 257 (tried Jan.-Feb. 2008, reasons May 2008)
[1082] 2008 ABQB 257 at para. 89.
[1083] 2008 ABQB 257 at para. 54.
[1084] 2007 MBQB 163.
[1085] 2007 MBQB 163 at para. 26.
[1086] 2007 MBQB 163 at para. 26.
[1087] 2007 MBQB 163 at para. 26.
[1088] 2007 MBQB 163 at para. 25.
[1089] 2007 MBQB 239.
[1090] 2007 MBQB at para. 40.

negligent.[1091] The court did not decide whether Brodsky was or was negligent in advising Michaud to not testify. For present purposes, *Michaud* it is relevant because the judge specifically refused to equate the loss of a chance of a better result as causation issue: "the lost chance analysis is a method to assess damages in appropriate cases but is not an active element of causation. It only comes into play when the existence of any damage is an issue."[1092] However, one cannot tell from the reasons if the judge saw the argument (made in the British Columbia trial judgment in *Bohun v. Sennewald*[1093]) that loss of chance is a causation issue under the *Resurfice* version of material contribution.

The *Michaud* reasons do not refer to the trial reasons in *Bohun*. We should assume, then, that *Bohun* was not cited since the *Bohun* equation of material contribution and loss of chance is explicit Also, it seems likely that even if the judge in *Michaud* saw the argument, and considered it, the judge would have, necessarily, concluded that the *Resurfice* material-contribution test could not apply. The gap in the evidence was due to the plaintiff's failure to adduce evidence which might have been available on the issue of whether the plaintiff's testimony would probably have made a difference; or at least, to take the steps required to allow any conclusion as to whether the evidence was obtainable. What he plaintiff had actually failed to do was apply on appeal to adduce fresh evidence. The necessary implication in the use of the material contribution would be that had that been done there was at least some possibility that evidence might have made a difference. However, since the motion to introduce never occurred, nobody knows what could or would have happened at the appeal. As indicated, what the judge actually did was use this as the basis for holding that the plaintiff had not satisfied the but-for test. At best, the situation as to what might have happened was equally balanced; therefore the plaintiff lost on the onus of proof.[1094]

It could be argued that *Michaud* may (perhaps should) be analyzed as a decision-causation case, because the ultimate question involves asking what the appellate court would have done if it had the fresh evidence, what ever it was. Recall the argument that decision-causation cases are, by definition, not but-for cases. This is one view that could be taken of the *Resurfice* use of *Walker Estate*. *Michaud* may show that the argument that decision-causation cases are necessarily material-contribution cases is wrong. Assume that the evidence showed that the fresh evidence probably did exist and probably would have made a difference. If so, the plaintiff seems to have satisfied the but-for test. However, if the but-for test does not apply to decision-causation cases, then the plaintiff cannot satisfy a *Resurfice* material-contribution test requirement, so will fail to prove causation. This, of course, makes no sense. Therefore, the assumption that decision-causation cases must be dealt with under material contribution seems wrong.

We will assume, however, that *Michaud* was held to be a material contribution case. On this view, it seems that the judge would have had to conclude that the plaintiff could not use the *Resurfice* material-contribution test because it was the plaintiff's own

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[1091] 2007 MBQB at paras. 39-41.
[1092] 2007 MBQB at para. 31.
[1093] 2007 BCSC 269 at paras. 94-96, quoted earlier.
[1094] See 2007 MBQB at paras. 39-41.

conduct – the failure to apply to introduce fresh evidence at the appeal – which created the gap in the evidence, if it was assumed that a gap existed at all; that is, that fresh evidence could exist which might have made a difference. So, in this sense *Michaud* would be analogous to *B.S.A. Investors* where the gap in the evidence was also said to be due to nothing more than the plaintiff's own failure to introduce evidence which could have existed.

The problems in the statements on causation in *Preston v. Chow*[1095] should not be blamed entirely on *Resurfice*. However, those problems likely would not have occurred if the *Supreme Court* had done a better job of explaining the new material-contribution test, of explaining that it was not the *Athey* material-contribution test, and a better job of explaining why it used *Walker* Estate as an example of when the new material-contribution test applies. In addition, it appears from the reasons that the trial judge did not understand *Resurfice*'s explanation of the purpose and scope of the new material-contribution test. It appears that the trial judge thought that the *Resurfice* material-contribution test is a test that establishes the existence of factual causation. The trial judge relied on the *Resurfice* use of *Walker Estate* as an example of a situation triggering the application of the material-contribution test and concluded that situation in *Preston* fell within the *Resurfice* use of *Walker Estate* as an example of when the material-contribution test becomes applicable. It seems that the trial judge thought that the physician's negligence (a failure to take a proper history and, as a result, to refer the plaintiff to a specialist, or to at least consult with a specialist) was analogous to the negligent donor screening in *Walker Estate*.[1096] (para.174).

The trial judge made a series of conclusions that the physician's negligence probably caused the infant plaintiff's injury and series of conclusions that the damage probably would not have occurred had the doctor done what she was required to do. The adult plaintiff contracted herpes as a result of sexual intercourse during the latter part of her pregnancy. As a result of the family physician's negligence, the pregnancy was not handled as it would have been had there been a diagnosis of herpes or a significant enough concern that the mother had herpes, even if there had not been enough to make a diagnosis of herpes that the mother probably had herpes. There would have been an examination of the vulva after labour began and before the membranes ruptured in which the attending physician specifically looked for evidence of herpes. There was evidence, accepted by the trial judge, that evidence of herpes "likely would have been seen."[1097] If so, the baby would have been delivered by Caesarean section rather than vaginally. Even if the baby had been delivered vaginally, the child would have been given antiviral drugs thereafter.

This would probably have prevented the child from developing herpes encephalitis, as the child did soon after the birth.[1098] The trial judge was satisfied enough about the relationship between the physician's negligence and the consequences that the

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[1095] 2007 MBQB 318

[1096] See 2007 MBQB 318 at para. 174.

[1097] 2007 MBQB 318 at para. 171.

[1098] See 2007 MBQB 318 at paras. 171, 176-177, 182, 192 and 193.

trial judge wrote: "Steps could have been taken which probably would have either prevented the transmission of the infection to Calla or curtailed the devastating consequences of it. Nothing was done. I find that Dr. Chow was negligent in not seeing the flag and that negligence was the cause the plaintiffs' damage."[1099] The trial judge also wrote that "even if a caesarean would not have been performed, referral to a specialist would probably have protected Calla from the devastating effects of the disease."[1100]

All of these findings seem more than enough to have allowed the trial judge to have found that causation was established on an orthodox application of the but-for test, even without resort to the *Snell* robust and pragmatic inference where there is no positive expert evidence. The trial judge did not need to resort to that inference because the trial judge had positive expert evidence (which the trial judge accepted over the defendant's expert's evidence) that had the physician acted properly, the injury probably would not have occurred. Nonetheless, the trial judge concluded, for reasons that are not adequately explained, that the applicable test was the material-contribution test.

We cannot tell from the judge's reasons whether the trial judge understood the differences between the *Resurfice* material-contribution test and the *Athey* version. It may be that the trial judge did not realize that the *Resurfice* material-contribution test is not the *Athey* and *Walker Estate* material-contribution test. The trial judge stated that the facts of the case created "the type of situation where the 'but for' test for causation does not work well."[1101] After quoting paragraphs 23-25 of *Resurfice*, the trial judge quoted paragraph 88 from *Walker* Estate and provided a conclusion on causation that is pure *Athey* in form: "Applying the material contribution test in this case, I find that Dr. Chow's failure to suspect herpes and failure therefore to conduct a targeted examination at the time of delivery materially contributed to Calla being born by vaginal delivery instead of by caesarean section."[1102] While the trial judge's conclusion is, literally, only that the physician's negligence "materially contributed" – i.e., "was a cause of" – the vaginal birth, this has to be understood as a finding that the physician's negligence "materially contributed" to the child contracting herpes from the mother and developing herpes encephalitis as a result.

Preston does not advance our understanding of the *Resurfice* material-contribution. It is a misapplication of that test. If the reasons accurately set out the evidence, then the case was a straight-forward and not overly complicated but-for situation where the only correct conclusion was that a physician's negligence was a probable, factual cause of the plaintiff's injury. It appears that the trial judge thought that the *Resurfice* material-contribution test is a test that establishes the existence of factual causation and that it can be used where the but-for test "does not work well"[1103] as an alternative to the but-for test in those situation, so as to permit the court to conclude that

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[1099] 2007 MBQB 318 at para. 192.
[1100] 2007 MBQB 318 at para. 193.
[1101] 2007 MBQB 318 at para. 173.
[1102] 2007 MBQB 318 at paras. 173, 175.
[1103] 2007 MBQB 318 at para. 173.

the defendant's negligence probably caused the injury. That is not the *Resurfice* material-contribution test.

The next Manitoba case is *Hisco v. Stitz*.[1104] The less said about *Hisco*, the better. The trial judge purports to apply the *Resurfice* material-contribution test. However, whatever test it is that the judge applied, it was not the *Resurfice* test. It is probably the *Athey* version. At the least, *Hisco* appears to be yet another case where trial judge, at least (and in this case seemingly counsel[1105]) did not understand that the meaning of the *Resurfice* material-contribution test. It is another case where the trial judge clearly did not understand that the new material-contribution test is not a test under which factual causation is or is not established. One paragraph from the *Hisco* reasons, in which the trial judge seemly equates *Resurfice* "material contribution" with *Snell*'s substantial connection" is sufficient proof.

> [93] I would be inclined to conclude that this would be an appropriate case to apply the material contribution test as opposed to the but for test. There is no easily traceable causal chain from the accident to the plaintiff's leaving school. It is difficult to prove that she would have finished school but for the accident occurring. To do this, as the experts have tried to do, requires going back to her grade five and projecting a path that did not include the accident. In the end, however, it doesn't matter whether the but for test is applied or the easier test of material contribution. They both require that a connection be established between the wrongful conduct and the damage claimed. In the *Resurfice Corp*. case (*supra*, para. 81), the court speaks of the "but for" test and indicates that it 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 appears to me that the same condition would apply to the "material contribution" test or at least a connection that is more than de minimis*. MacInnes J. (as he then was) indicated that a contributing factor is material if it falls outside the *de minimis* range (*Purpur v. Parkinson*, 2003 MBQB 152 (CanLII), 2003 MBQB 152, para. 87). *One can quibble about the distinction between material contribution and substantial connection but the fact remains that there has to be some connection as a minimum starting point*.[1106]

The trial judge does not seem to have grasped that the connection, for the *Resurfice* material-contribution test, is the possibility that the fault caused the injury.

[1104] 2008 MBQB 45. There are also problems with the way the trial judge dealt with the distinction between damage (injury) and the damages that flow from the injury. For example, having to leave school earlier than one otherwise would have is not damage (injury). It is the consequence (the loss) resulting from injury. However, I think the better interpretation of the reasons is that, despite any ambiguity in what is written, the trial judge did not confuse causation of the injury with damages assessment. I believe this is clear enough from para. 108.

[1105] See 2008 MBQB 45 at paras. 84 and 89. I am assuming that the trial reasons accurately report counsels' arguments.

[1106] 2008 MBQB 45 at pars. 93 (emphasis added).

In *Matheson v. Pirani*[1107] the trial judge applied *Snell*'s robust and pragmatic approach to *Athey*'s material-contribution test to dismiss the action.[1108] The judge's statement of the law appears to have been what the parties agreed was the applicable law. *Resurfice* is not mentioned. It will be difficult for the plaintiffs to validly complain about the result of the case, assuming the trial judge got the facts right. The case was decided against the plaintiffs applying what the trial judge acknowledged was the easier to satisfy *Athey* material-contribution test.[1109] The case was a battle of experts all of whom appear to have testified in terms of what was or was not the probable cause. That may explain why *Resurfice* was not mentioned. A baby was born with damage to her spinal cord. One of the issues was the cause of that damage. The trial judge preferred the defence's expert evidence.[1110] The judge held that that the probable cause was a vertebral artery occlusion that "was the result of the peculiarities of the neonatal anatomy as they were affected by the physical forces that occurred during the birth" and not any negligence on the part of the obstetrician.[1111] The judge held that the evidence showed that there was no negligence[1112] by the physician that had either "caused or materially contributed to" the injury.[1113] As such, assuming the trial judge's recitation of the evidence was correct, the failure to acknowledge the existence of *Resurfice* is irrelevant to the result of *Matheson*.

In addition, again assuming the trial judge's recitation of the evidence is correct, the inaccurate, or at least unclear, description of the meaning of "legal causation" is also irrelevant to the result of the case for the same reason. The trial judge wrote:

> There are two aspects to causation – factual or medical causation and legal causation. Factual causation looks at the medical and other evidence and asks whether that evidence proves the allegation that the defendant caused the plaintiff's injuries. Legal causation involves the application of the law of causation to the evidence and asks whether the plaintiff has proven, on a balance of probabilities, that the plaintiff's injuries were caused by the defendant's tortious conduct after undertaking a "robust and pragmatic" analysis of that evidence. In many cases the result will be the same, but in some cases it may not.[1114]

The trial judge's definition of "legal causation" is now wrong in light of the *Resurfice* material-contribution test since "legal causation" can now be imposed, under that test, even where it is not possible to prove on the balance of probability that tortious conduct was even *a* cause of the injury. However, that test would never have applied to the facts of *Matheson* so the error does affect the result of the case.

[1107] 2008 MBQB 95.
[1108] *Ibid*., at paras. 16-24, 466-477.
[1109] *Ibid*., at para. 20.
[1110] *Ibid*., at paras. 470-74.
[1111] *Ibid*., at paras. 461, 472-73.
[1112] *Ibid*., at paras. 462-63.
[1113] *Ibid*., at para. 477.
[1114] *Ibid*., at para. 464.

Nova Scotia

Nova Scotia's first reported contribution to the morass is McNaughton v. Ward.[1115] *McNaughton* is another case where the judges discuss causation as if *Resurfice* did not exist; as if the Canadian law defining causation in tort is still the *Snell* and *Athey* structure. We must assume that the reasons would not have been written in the form they were if the judges were aware of *Resurfice*, even if the decision on the appeal would have been the same.[1116] This is the central "offending" paragraph.

> [102] While deciding the issue of causation may in some cases be difficult, it is not an especially complex exercise. At the end of the day the trier must decide on the evidence before it whether the plaintiff has proved that the defendant's tortious conduct caused or materially contributed to the plaintiff's injury. The causation test should not be applied too rigidly: *Snell v. Farrell* [1990] 2 S.C.R. 311. Causation need not be resolved with scientific precision: *Alphacell Ltd. v. Woodward*, [1972] 2 All E.R. 475. Causation is essentially a practical question of fact which can best be answered by ordinary common sense (per Sopinka, J. in *Snell*, *supra*, at page 328). Causation is established where the defendant's negligence "materially contributed" to the occurrence of the injury: *Myers v. Peel County Board of Education*, [1981] 2 S.C.R. 21. A contributing factor is material if it falls outside the *de minimis* range: *Athey, supra*; *R. v. Pinske* (1998), 30 B.C.L.R. (2d) 114 (BCCA) aff'd [1989] 2 S.C.R. 979.

McNaughton is an action for damages for injury allegedly sustained in car accident. The defendant admitted liability. The issue was damages. The alleged problem was chronic pain. The claim was for more than $1 million. The trial judge awarded $25,000. The Court of Appeal dismissed the plaintiff's appeal, accepting the trial judge's conclusions.

> [3] The case was heard by Chief Justice Joseph P. Kennedy who, after a 12 day trial, awarded the appellant total damages of $25,000. He concluded that while Ms. McNaughton did suffer a compensable soft tissue injury in the collision, the motor vehicle accident had neither caused nor materially contributed to the appellant's present condition. The judge determined that the injuries sustained in the motor vehicle accident were not disabling to any degree. Based on the medical and other evidence he chose to accept, Kennedy, C.J.S.C. considered it more likely that the appellant's continuing medical problems were brought on by a work related injury that arose some months after the motor vehicle collision. He was not persuaded that the workplace incident aggravated the injuries suffered in the motor vehicle accident.
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> [103] Unlike the situation in *Athey*, there is here no chain of causation, and no injury that was "aggravated" by the motor vehicle accident. The trial judge specifically rejected the appellant's theory that the workplace incident had somehow exacerbated or aggravated injuries sustained earlier from the collision. He said there was no evidence that persuaded him in that regard. In very clear and strong language the trial judge explained why in his opinion the collision did not cause or materially contribute to Ms.

[1115] 2007 NSCA 81, leave to appeal to SCC dismissed Dec. 21, 2007; docket no. 32280. The McNaughton appeal was argued in June 2007, judgment released July 4, 2007.

[1116] I am advised that all counsel were are aware of *Resurfice*. However, it was not mentioned in argument. It was not included in the parties' facta because they were filed before the release of *Resurfice*.

> McNaughton's current complaints. Accordingly - and applying the principles from Athey - he awarded the appellant $25,000.00 in general damages as compensation for the only loss caused or contributed to by the respondents' negligence.
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> [104] The trial judge's analysis and assessment were sound. There is no reason for us to intervene, or disturb the appellant's damage award.

That is certainly not a *Resurfice* explanation of the material-contribution test. For example, we do not find the "greater than *de minimis*" definition in *Resurfice*. In any event, by June 2007, of course, *Athey*'s explanation of material contribution was no longer the law in Canada on the meaning of the material-contribution test unless, of course, one accepts the current Ontario Court of Appeal position that *Resurfice* did not change causation law at all. Nonetheless, the question the Nova Scotia Court of Appeal should have answered was whether the trial decision was correct in terms of the law as it is stated in *Resurfice*. Given that law, and the findings of fact in the case, and applying *Housen*, it seems likely that the Court would have said the trial judge's decision was correct or, at the least, was not reversible. At the least the Court would have held that there was no palpable and overriding error in the trial judge's decision that the facts did not satisfy the but-for test, whose meaning was not changed by *Resurfice*.

As for the material-contribution test, the Court would then have concluded either: (1) that *Resurfice* had not changed the meaning of the test and the trial judge had not committed palpable and overriding error in concluding that the accident had not "materially contributed" to the injuries beyond what the trial judge found; or (2) that *Resurfice* established a new meaning for material contribution and the facts did not meet satisfy the new *Resurfice* requirements. So, in the end result, the decision seems correct on the facts, even though the statement of applicable law is wrong.

Regardless, what does a lawyer now say when asked to advise on Nova Scotia law on the meaning and scope of the of material-contribution test in Nova Scotia, at least until there is another Nova Scotia decision: *Resurfice* or *McNaughton* and *Athey*?

Miller v. Royal Bank of Canada[1117] is a Nova Scotia case which is probably explained by *McNaughton*'s use of *Athey* and failure to refer to *Resurfice*.[1118] Taken for what it literally asserts, *Miller* holds that *Resurfice* affirmed the *Athey* material-contribution test and the "unworkability" proposition defining when this version of the material-contribution test still applies. *Resurfice* is cited and quoted for the startling proposition[1119] that all of the "principles of causation" set out in *Athey*, including the *Athey* version of the material-contribution test, were simply "reiterated" in *Resurfice*.[1120] However, if *Miller* is not read literally, and the references to *Athey* and *Resurfice* limited

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[1117] 2008 NSSC 32.

[1118] Another explanation might be that Miller was tried in April and May, 2007, with final written submissions in June 2007. On the other hand, the reasons were released on February 2, 2008.

[1119] Startling unless the trial judge had been reading Ontario Court of Appeal reasons; however, they are not mentioned, either.

[1120] 2008 NSSC 32 at para. 123.

to the but-for test,[1121] the decision is unexceptional. Miller simply does not provide any direction as to the status of the *Resurfice* material-contribution test in Nova Scotia, beyond reiterating the admonitions in *Athey* and *Resurfice* that the but-for test is the primary, basic, default, test. This is the better reading of the *Miller* reasons since they neither nor quote any portion of *Resurfice* dealing with the material-contribution test.[1122]

The trial judge cited and quoted the *Athey* causation paragraphs, including the material-contribution paragraphs,[1123] as if the material-contribution test provision was still good law, and followed that by asserting that "[t]hese principles of causation were recently reiterated in *Resurfice*".[1124] However, that is the extent of any discussion in the case as to the meaning and scope of any version of that test. The trial judge then proceeded to analyze the facts without ever stating what test he was applying to determine factual causation. However, the better interpretation is that the trial judge applied what amounts the but-for test. That is because the trial judge did not use any version of "material contribution" as the verb signifying the connection between misconduct and injury. Instead, the trial judge used "but for" and "resulted.[1125]

The plaintiff had pre-existing problems. The defendant asserted that all or at least the significant portion of the post-accident complaints would have occurred in any event; that is, that the plaintiff was a "crumbling-skull" and not a "thin-skull" person.[1126] The trial judge disagreed.

> I am satisfied that the plaintiff's RSD is separate and distinct from her pre-existing medical conditions, and that but for her fall on the defendant's premises, the plaintiff would not be suffering from RSD in her right leg. This is not a case like Rice, where the plaintiff's physical pain cannot be attributed to the effects of the defendant's actions. The medical evidence is clear and convincing on this point. I am satisfied that the injuries of which the plaintiff complains are the result of falling at the bank, and are distinct from her pre-existing conditions.[1127]

Miller seems to be a case where the plaintiff would have obtained the same result before *Resurfice* as after, with the only difference being that the court would have probably used the *Athey* material-contribution test, not the but-for test. As I wrote in respect of British Columbia's *Dewitt v. Takacs*[1128] it is not rhetorical to ask what it means if we assume that *Miller* is correctly decided, now, and would have been correctly decided before *Resurfice* as an application of *Athey* material-contribution. One answer is self-evident. In practice, in many cases, notwithstanding the "but-for is unworkable", "materially contribute", and

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[1121] Probably what the trial judge intended,
[1122] 2008 NSSC 32 at para 123 where the trial judge then quoted only paras. 20-23 of *Resurfice*.
[1123] 2008 NSSC 32 at para. 122, quoting *Athey*, [1966] 3 S.C.R. 458, paras. 13-19. The trial judge quoted only this much of *Athey*, para. 15: "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. ...".
[1124] 2008 NSSC 32 at para. 123.
[1125] 2008 NSSC 32 at para 127.
[1126] 2008 NSSC 32 at para 124-26.
[1127] 2008 NSSC 32 at para. 127.
[1128] 2008 BCSC 314.

de minimis the *Athey* material-contribution test was the but-for test, just expressed in different words.

New Brunswick

New Brunswick's contribution is *Adams v. Borrel*.[1129] The relevant passages of *Resurface* are quoted but the judge does not discuss her understanding of the meaning of the material-contribution test. The judge merely stated that the but-for test governed because "[i]n the case at bar there was no evidence to justify the use of the 'material contribution' test".[1130]

Newfoundland & Labrador

There are two cases but no discussion of the meaning of the material contribution test. *Williams v. Thomas Development (1989) Corporation*[1131] holds there was no fault (negligence) at all. *Lane v. Alcock Enterprises*[1132] quotes only the paras. 21 and 22 of *Resurface* (but-for paragraphs) and is a but-for case.

Quebec

There is still only one reported case, to my knowledge. *Nolet c. Bosclair*.[1133] *Nolet* quotes from the French text of *Resurface*.

> [20] La question du critère à appliquer pour analyser le lien de causalité en matière de négligence a été traitée en profondeur dans la jurisprudence et dans la doctrine. Il n'est ni nécessaire ni utile de décrire les divers débats. Il suffit à ce stade d'énoncer simplement les principes généraux qui se dégagent de la jurisprudence.
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> [21] Premièrement, le critère fondamental de détermination du lien de causalité demeure le critère du « facteur déterminant ». Ce critère s'applique dans les cas de préjudice à causes multiples. Il incombe au demandeur d'établir qu'il n'aurait pas subi un préjudice, n'eût été l'acte de négligence ou l'omission par négligence de chacun des défendeurs. Une fois que le demandeur a établi ce fait, on peut alors répartir la négligence contributive en conformité avec la loi.
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> [22] Cette règle fondamentale n'a jamais été écartée et demeure le critère principal d'analyse du lien de causalité dans les actions pour négligence. Comme le juge Major l'a déclaré dans *Athey c. Leonati*, au par. 14, « [l]e critère général, quoique non décisif, en matière de causalité est celui du : "facteur déterminant" ("but for test"'), selon lequel le demandeur est tenu de prouver que le préjudice ne serait pas survenu sans la négligence du défendeur ». De même, comme je l'ai fait remarquer dans *Blackwater c. Plint*, au par. 78, « [p]our ce qui concerne le lien de causalité, la règle veut généralement que l'on se demande si, selon la prépondérance des probabilités, n'eût été les actes du défendeur, le demandeur aurait subi le préjudice ».

[1129] 2007 NBQB 102.
[1130] 2007 NBQB 102 at para. 142.
[1131] 2007 NLCA 54.
[1132] 2007 NLTD 157.
[1133] 2007 QCCS 4417.

> [23] Suivant le critère du « facteur déterminant », il ne convient d'indemniser la victime d'un comportement négligeant que s'il existe « un rapport important entre le préjudice subi et la conduite du défendeur ». Ainsi, le défendeur est assuré de ne pas être tenu responsable du préjudice subi par le demandeur « qui peut très bien découler de facteurs qui ne sont pas reliés au défendeur et qui ne résultent de la faute de personne » : *Snell c. Farrell*, p. 327, le juge Sopinka.[1134]

It appears that *Resurfice* has begun to affect Quebec civil law, at least in terminology. My understanding, based on advice received from at least one person qualified to comment on Québec law, is that *Nolet's* use of *Resurfice* is puzzling. It is, on its face, an approach new to Québec law.

The quoted sentence or sentence fragments that follow, sometimes paraphrased, come from written advice that I received. The puzzle stems from the judge's use of "*rapport important*" – *Snell*'s "substantial connection" – which is not a Quebec civil law term. The advice I received is that "[t]he concept of "*rapport important*" is not a principle that is used in Québec civil law to describe the causal test. An inquiry similar to the but-for test that is undertaken, but it includes no notion of "*rapport important*" or anything similar" such as material or significant contribution or connection. The but-for test as used in Québec civil law is "an application of the *causa sine qua non* theory which is one of the causal theories that are influential in Québec civil law." That law "does not differentiate between factual and legal causation." "It is inspired by many theories of causation, but does not declare any one to be the guiding principle." "The *causa sine qua non theory* is influential, but so is the adequate causation theory (should what happened have occurred in the normal course of events) and the reasonable foreseeability theory.

In any event, I was also told that the *result* in *Nolet* is consistent with an orthodox application of the *causa sine qua non* theory. This is because "[i]t It has always been recognized in civil law that the defendant's fault need only to have been a cause of the injury for the defendant to be held liable."[1135]

The Northwest Territories

The appellate reasons in *Fullowka v. Royal Oak Ventures Inc.*[1136] provide the profession with no useful help on either of the but-for or material-contribution tests. If they do anything, the reasons confuse the material-contribution situation more. The appellate reasons are entirely, and remarkably, wrong on the meaning of the *Resurfice* material-contribution test. The discussion of but-for is probably flawed, too. If it is not, it is unfortunately ambiguous. However, in the end result, the problems in the NWT Court

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[1134] 2007 QCCS 4417 at para. 79.

[1135] Correspondence with Professor Lara Khoury, on file. Prof. Khoury's *Uncertain Causation in Medical Liability* (Hart, 2007) is an excellent source of information about the Quebec law on causation.

[1136] *Fullowka v. Royal Oak Ventures Inc.*, 2008 NWTCA 4 reversing 2004 NWTSC 66, [2005] 5 W.W.R. 420. There were two actions. The trial decision found for the plaintffs. The NWTCA held there was no duty and no causation and dismissed the actions. The mine owner had appealed but settled before the appeal was heard. Some of the individual defendants either did not appeal or did but abandoned their appeals.

of Appeal's discussion of causation do not render the Court's decision to dismiss the actions wrong because the Court also decided that there were no applicable duties of care. The primary basis upon which the appeals were allowed was decision on duty of care.[1137]

"On September 18th, 1992, during a labour dispute at the Giant Mine in Yellowknife, a mine car carrying nine miners detonated a bomb deliberately set by a striking miner".[1138] *Fullowka* arises out of that explosion. The mine and the union were not able to agree on the terms of a new contract. In order to keep the mine open, the mine owner/operator hired a security company and replacement workers. Some union members crossed the picket line to return to work. The result of a violent strike. There was series of violent acts on mine property, carried out by strikers with the knowledge and participation of at least some local union officers.[1139] The culmination of the violence was an explosion in the mine that killed a number of miners. One of the union-member strikers planted a bomb. It detonated when a rail-car passed over it. The miners in the car were killed.[1140]

The families of the deceased miners, and one injured miner, sued.[1141] They sued the owner of the mine, the security company, the bomber, the union and its locals, union officers, union members who were not officers, and the government of the Northwest Territories.[1142] The plaintiffs succeed at trial.[1143] Their judgments were reversed on appeal.[1144]

In substance, the allegations against the mine owner/operator, the security company, the unions and their officers (other than those who were active participants in the violence), and the government, were that they were negligent in not preventing the violence and ultimately the bombing.[1145] The heart of the case against the owner and the

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[1137] See 2008 NWTCA 4 at para. 181. I do not discuss the duty of care issues in this article.

[1138] 2008 NWTCA 4 at para. 1.

[1139] A number of striking miners, including one local union officer were convicted of criminal offences relating to those events: 2008 NWTCA 4 at para. 8.

[1140] The mine had both manned and unmanned rail-cars. It appears that W, who designed and planted the bomb, did not intend that it be triggered by a manned rail-car but rather by an unmanned rail-car. Apparently W believed that the different shape of the manned rail-cars would allow them to pass over the bomb without triggering it.

[1141] The worker who was first on the scene after the explosion and discovered the bodies sued alleging psychiatric injury.

[1142] See 2008 NWTCA 4 at paras. 1-11 for the description of the identies of the parties. See paras. 1-28 for the recitation of the facts of the case and the trial findings.

[1143] 2004 NWTSC 66, [2005] 5 W.W.R. 420.

[1144] 2008 NWTCA 4. The mine owner/operator was not involved. It had settled after the trial and before the appeal: 2008 NWTCA 4, para. 9.

[1145] The NWT CA summarized the negligence allegation as failing to take reasonable steps that prevent the incident: for example, 2008 NWTCA 4 at paras. 24, 202. "Implicit in the trial judge's reasons is the assumption that the defendants were under a legal obligation to take reasonable steps to stop violence resulting from their operating the mine with replacement workers, because threats of violence and bodily injury had been made if the use of replacement workers continued, and those threats were actually being carried out. . . . This assumption that the appellants had a duty to take reasonable steps to prevent the violence threatened by the strikers is key to the trial judge's findings on duty, negligence and causation."

government was that they should have shut the mine down once events got out of hand – in the government's case, ordered it to be shut down - rather than allowing it to operate with replacement workers. In addition, the allegations against the unions, the union officials, and union members, were that they incited or at least acquiesced in the violence and, ultimately, the bombing. The government was sued because of its statutory role in the regulation of occupational health and safety at the mine.[1146]

The trial judge held the mine owner, the security company, the government, some of the union officials and union members, and the bomber, liable. He held there were applicable duties of care in tort. He held that some of the local union members and officials, and the local unions, were joint tortfeasors with the bomber. He held that all the rest of the defendants who were held liable were negligent in failing to act reasonably, in various ways, to prevent the incident. The trial judge held that the bombing was merely the final act in the labour violence up to that point, so it was foreseeable in the legal sense. He found that union was vicariously liable for the negligence of its officials as well as the intentional torts of its officials. He applied the *Athey* material-contribution test to find that the impugned conduct was a cause because it materially contributed to the occurrence of the explosion. Essentially, the trial judge found that the conduct of the defendants was a cause because their failure to act reasonably to prevent the escalating violence materially contributed to the end result: the bombing. He held that held that the bombing was a legally foreseeable consequence of the negligence.[1147]

The NWT Court of Appeal reversed the decision and dismissed the actions against the defendants whose appeals were still alive: the security company, the unions and some of the union members and officials, and the NWT government.[1148] The Court held that there no relevant duties of care which had been breached.[1149] It also held that the plaintiff's had not established that the conduct of these defendants was a factual cause, even though it acknowledged that it did not have to deal with causation given the finding that there was no duty of care.[1150]

The Court of Appeal held that the trial judge had applied the *Athey* material-contribution test.[1151] The plaintiffs argued that the evidence satisfied the but-for test,

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(para. 24) "Put another way, the trial judge should have considered whether Warren would have been diverted from his intended course of conduct if any of the appellants had acted reasonably." (para. 202)

[1146] 2008 NWTCA 4 at paras. 10-21, 167. The government had the power to shut down the mine. The crux of the case against the government was that the branches responsible for regulating mines and workers' safety had enough information to realize they should have shut down the mine to prevent further violence: see, for example, 2008 NWTCA 4 at paras. 17, 123.

[1147] 2008 NWTCA 4 at paras. 22-28, 182-191. The actions were dismissed against the individual national union officials.

[1148] 2008 NWTCA 4 at para. 208. As indicated, the mine owner had appealed but settled and some of the individual defendants either did not appeal or did but abandoned their appeals.

[1149] 2008 NWTCA 4 at paras. 98-102. See, also, paras. 122, 132, 168, 175, 180, 181.

[1150] 2008 NWTCA 4 at para. 181. The Court's stated rationale for dealing with causation was that "causation occupied a central part of the argument" on the appeal and that the Supreme Court had "recently reconsidered the lega principles governing the analysis of causation" in *Resurfice* (para. 181).

[1151] 2008 NWTCA 4 at paras. 27, 182-191.

regardless of what words the trial judge had used.[1152] The Court rejected this argument. The passages quoted from the trial reasons show that the panel was right. The plaintiffs' alternative argument was that the *Resurfice* material-contribution test was applicable "because it was impossible to prove what Warren would have done had the appellants [the other defendants] not committed those negligent acts or omissions".[1153] The Court rejected this argument, too.

Most of the Court of Appeal's discussion of causation law deals with the manner in which the trial judge ought to have applied the but-for test.[1154] The discussion of causation is cursory. That is probably because the Court had decided that there were no applicable duties of care. The Court held that the trial judge should have applied the but-for test rather than the *Athey* material-contribution test and that he failed to adequately explain his use of the material-contribution test.[1155] It then held that the plaintiffs had failed to adduce sufficient evidence to satisfy the but-for test.[1156] However, the court specifically declined to provide any examples of what sort of evidence was missing that could have satisfied the but-for test.[1157] The Court's discussion of the but-for test will be reviewed in more detail in subsequent paragraphs. There may be problems with what the Court said the but-for test means. There is also a good argument that the trial judge, in fact, intended to and thought he was making a decision on factual causation that amounts to a but-for, balance of probability decision, regardless of the label he used for the test.[1158] Next, even if one assumes what the Court said is correct, it is impossible to tell whether the Court applied the but-for test correctly to what it considered to be the relevant evidence, because it declined to review the evidence or even give an example or two.[1159] As a result, all there is are the Court's bald assertions that (1) the evidence was not enough to meet the plaintiffs' onus and (2) that it was possible for the plaintiffs to

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[1152] 2008 NWTCA 4 at para. 199.
[1153] 2008 NWTCA 4 at para. 199.
[1154] See 2008 NWTCA 4, paras. 181-206.
[1155] 2008 NWTCA 4 at para. 201. The Court also criticized the trial judge for failing to justify his use of the Athey material-contribution test; that is, for not explaining why the but-for test was "unworkable": see 2008 NWTCA 4 at para. 203.
[1156] 2008 NWTCA 4 at para. 201-03. The Court of Appeal held that the trial judge's explicit material-contribution analysis did not also amount to a but-for analysis: 2008 NWTCA 4 at paras. 202-03.
[1157] 2008 NWTCA 4, para 206: "Given our conclusions on duty of care, we will not attempt the task of reviewing the evidence, making findings of fact, and applying the test to those findings. Such a review by an appellate court would be problematic on this record given the volume of evidence and the unresolved issues of credibility."
[1158] See 2004 NWTSC 66 at para. 607: "If there is a breach of the standard of care, the Plaintiffs must prove on a balance of probabilities that the Defendants' alleged breaches caused the damage or loss. The Plaintiffs must establish that what was done or omitted to be done created the situation that resulted in the harm suffered by the Plaintiffs." While trite, it is worth repeating that an appeal is from the judgment, not the reasons for judgment. See, for example, *Polgrain Estate v. The Toronto East General Hospital*, 2008 ONCA 427 at para. 31: "An appeal is against the verdict, not the reasons for the verdict. The only part played by the reasons is that they may disclose an error in reasoning that taints the lawfulness of the verdict."
[1159] 2008 NWTCA 4, para 206.

have adduced the evidence which would have permitted the court to deal with the factual causation issue on a but-for basis.[1160]

I will first deal with the discussion of the *Resurfice* material-contribution test. The Court dealt with this test in a cursory fashion, undoubtedly because it concluded that the but-for test was the applicable test. The Court got the meaning of the material-contribution test wrong. What it probably got right was that the material-contribution test was not applicable.[1161] First, the *Resurfice* material-contribution test could not be applicable because the second requirement could never be satisfied; that is, the defendants had been found not to be at fault.[1162] Second, the Court was probably right that proof of factual-causation on a but-for basis was not impossible, in any relevant sense, in the type of case before the court.

Assuming fault, whether the material-contribution test was applicable would depend on the meaning of "impossible" in the first of the two *Resurfice* general requirements.[1163] The answer to that question might depend on what key evidence was or was not available, and why if evidence was not.[1164] If the answer to the "impossible" query is sufficiently provided by the fact that the plaintiffs argued the evidence was sufficient for but-for, then the answer is self-evident. There was no impossibility because it was open to the court to accept the plaintiffs' argument that the evidence was sufficient. This approach would seem to make sense where the factual question is a battle between experts with one side say "yes, probably" and the other side saying "no, not probably", if accepting the plaintiff's evidence means that the but-for test is satisfied. However, it seems questionable where the decision is not a matter of accepting expert opnion but one of drawing inferences from circumstantial or direct evidence. In that sort of case, it is ludicrous to hold that a plaintif has given up the material contribution-test alternative

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[1160] 2008 NWTCA 4 at para 201.

[1161] That is because the but-for causal question was straight-forward. Would proper conduct by the defendants probably have deterred Warren? Another way to ask that question is whether proper conduct the by defendants would probably have made a difference? If the evidence adduced at trial permitted the trial judge to validly provide a "yes" conclusion for that question then, regardless of how the trial judge described his conclusion, there was no palpable and overriding error and the Court of Appeal should not have overruled that part of the trial decision: ***Housen v. Nikolaisen***. At the least, if the Court was going to interfere, it should have at least provided something more than the assertion, in 2008 NWTCA 4 at para. 201, that the trial judge failed to make the required decisions of fact.

[1162] *Resurfice,* para. 25: "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."

[1163] *Resurfice,* para. 25: "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."

[1164] The NWT CA, then, must have concluded that the evidence did not support a finding of factual causation on the balance of probability. It must have also concluded that the evidence necessarily existed, or could have existed. This is the only valid meaning of: "In this case, it was not 'impossible' to establish on a balance of probabilities how *Warren* would have reacted had one or more of the appellants acted reasonably in the circumstances. It was possible to lead direct and circumstantial evidence sufficient to overcome the burden of proof concerning Warren's likely course of conduct." Howver, the NWT CA did not give any examples of what was missing. It specifically declined to: 2008 NWTCA 4, para. 206.

merely by arguing that the court should find the facts sufficient for but-for causation.[1165] For example, it might well be that the court accepts all of the plaintiff's evidence but fnds that it is stil not enough to meet the onus because there is still something which is missing and something is evidence which, given the court's reasons, is and always was outside of the plaintiff's control for some relevant reason. The sufficiency of the evidence question is beyond the scope of this article. "Probably" is guesswork on my part if the answer ultimately depends on what evidence was or was not available and why.

The Court of Appeal wrote:

> One significant purpose of tort law is to compensate victims for the negligent acts or omissions of defendants. But tort law does not concern itself with negligence in the abstract. *To found liability, the court must be satisfied on a balance of probabilities that the defendant's wrongful conduct caused the plaintiff's damage or loss.* As simple a proposition as this may first appear, it has nonetheless proved exceedingly difficult for courts to apply consistently.[1166]
>
> In exceptional circumstances, the "but for" test may be "unworkable", even though evidence supports the inference that the defendant's conduct *materially contributed* to the plaintiff's injury. If it is "impossible" for the plaintiff to prove, due to factors outside the plaintiff's control, that the defendant's negligence caused the plaintiff's injury on a "but for" basis, and it is clear that the defendant breached a duty of care owed to the plaintiff, thereby exposing the plaintiff to an unreasonable risk of the kind of injury suffered by the plaintiff, then liability may be imposed, according to basic notions of fairness and justice. For example, where the limits of science make it impossible to prove on a balance of probabilities that the defendant's negligence was a necessary cause of injury, it may be appropriate to resort to the more easily satisfied "material contribution" test. When interpreted in that way, the test significantly lowers the proof requirement for causation.[1167]
>
> We have concluded that it is possible in this case to apply the "but for" test and that it is therefore neither necessary nor appropriate to apply the "material contribution" test. The "but for" test can apply even in cases where the hypothetical question requires prediction of human reaction. In this case, it was not "impossible" to establish on a balance of probabilities how Warren would have reacted had one or more of the appellants acted reasonably in the circumstances. It was possible to lead direct and circumstantial evidence sufficient to overcome the burden of proof concerning Warren's likely course of conduct.[1168]

[1165] The plaintiff does not care which test applies so long as the liability that will result if the plaintiff succeeds is solidary rather than proportional.

[1166] 2008 NWTCA 4, para 192 (emphasis added).

[1167] 2008 NWTCA 4, para. 195 (emphasis in orginal, internal footnotes omitted).

[1168] 2008 NWTCA 4, para. 201 (internal footnotes omitted).

It is remarkable[1169] that, some sixteen months after *Resurfice*, the panel would claim, incorrectly, that the *Resurfice* material-contribution test is an alternative test for the existence of *factual causation* (that is, a refinement of the *Athey* test) with the two *Resurfice* requirements replacing the *Athey* undefined "unworkable" requirement.[1170] This is the necessary meaning of the Court's statements "*To found liability, the court must be satisfied on a balance of probabilities that the defendant's wrongful conduct caused the plaintiff's damage or loss*"[1171] and "In exceptional circumstances, the "but for" test may be "unworkable", even though evidence supports the inference that the defendant's conduct *materially contributed to the plaintiff's injury*" [1172]. If the only test for factual causation in Canadian tort-law is the but-for test, and but-for is "unworkable", how can there be a *valid* inference of factual causation? Putting it in the Court's terms, how can it be said, validly, that the "evidence supports the inference that the defendant's conduct *materially contributed to the plaintiff's injury*". It cannot.

Nothing in the reasons indicates that the panel realized that the *Resurfice* material-contribution test deals with tortious conduct that does nothing more than increase the risk of injury.[1173] Nothing in the reasons explains why the panel thought that the *Resurfice* material-contribution test relates to conduct that is a cause of injury. It cannot have been para. 25 of *Resurfice*, which is essentially quoted in the reasons.[1174] Indeed, there is nothing in the reasons that even suggests any of the members of the panel knew that there are post-*Resurfice* appellate cases that acknowledge at least that much about *Resurfice*. For example, the Court did not did not refer to *Sam v. Wilson* in discussing either the meaning of the *Resurfice* material contribution-test or the but-for test. However, it is extremely unlikely the panel was unaware of these cases. It is also extremely unlikely the panel was not aware of the British Columbia Court of Appeal decision in *Sam v. Wilson* where Smith J.A. wrote, in part:

> As McLachlin C.J.C. explained in *Resurfice Corp. v. Hanke*, at paras. 24-29, the "material contribution test" applies as an exception to the "but for" test of causation when it is impossible for the plaintiff to prove that the defendant's negligent conduct caused the plaintiff's injury using the "but for" test, where it is clear that the defendant breached a

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[1169] Remarkable for a number of reasons including the fact that the panel was composed of Alberta Court of Appeal judges who were certainly aware of the earlier Alberta Court of Appeal decision in *Bowes v. Edmonton* (City) and some or all of the British Columbia Court of Appeal decisions. However, none of the post-*Resurfice* decisions are mentioned other that *B.S.A. Investors v. DSB*. One explanation might be that, since the Court's comments on causation were intended to be *obiter*, the panel limited their comments to the minimum amount they thought was needed to explain their causation decision.

[1170] 2008 NWTCA 4 at paras. 195-197, even though the para. 195 contains a paraphrase of of para. 25 of *Resurfice*. The Court's use of "unworkable" in para. 195, and the assertion, in the same paragraph, that the *Resurfice* material-contribution test "significantly lowers the proof requirement for causation" is enough proof enough.

[1171] 2008 NWTCA 4 at para. 192 (emphasis added).

[1172] 2008 NWTCA 4 at para. 195 (emphasis added).

[1173] This is remarkable at least because the panel cited *B.S.A . Investors v. DSB*: see 2008 NWTCA 4, at footnotes 303, 308. We should assume the panel had the other, post-*Resurfice*, B.C. C.A. cases. The appeal was argued before the release of *Sam v. Wilson*. I am advised that the panel was not advised of *Sam* directly by counsel. The Court refused to accept addditional authorities from counsel after argument.

[1174] 2008 NWTCA 4 at para. 195.

> duty of care owed the plaintiff thereby exposing the plaintiff to an unreasonable risk of injury, and where the plaintiff's injury falls within the ambit of the risk.[1175]

Smith J.A. added, after referring back to his discussion of the law in *Mooney*[1176] that the *Resurfice* material-contribution test "*is not a test of causation at all*: rather, it is a rule of law based on policy."[1177]

The Court held that the material-contribution test did not apply because there was nothing about the facts of the case that made the but-for test "unworkable" or "impossible" to apply so as to produce a finding of causation in favour of the plaintiffs.[1178] It held that the central question of fact was whether the bomber "would have been diverted from his intended course of conduct if any of the [defendants] had acted reasonably"[1179] and that the but-for test "can apply even where the hypothetical question requires the prediction of human reaction".[1180] Therefore, "it was not "impossible" to establish on a balance of probabilities how Warren would have reacted had one or more of the appellants acted reasonably in the circumstances."[1181] Instead "[i]t was possible to lead direct and circumstantial evidence sufficient to overcome the burden of proof concerning Warren's likely course of conduct."[1182]

The Court's conclusion that the but-for test can be applicable "even where the hypothetical question requires the prediction of human reaction" is both correct in principle[1183] and necessary if the but-for test is to be the primary, default, test for factual causation.[1184] The Court did not undertake any analysis or principle to justify its assertions. It merely cited some appellate decisions where the but-for test had been applied to circumstances that required the court to make a predict of hypothetical human reaction in order to decide if the impugned conduct was or was not a but-for cause.[1185]

[1175] 2007 BCCA 622 at para. 109.

[1176] The NWT CA referred to *Mooney* in discussing whether the but-for test was "unworkable" and the meaning of "material contribution": 2008 NWTCA 4, para. 195-96, 201, footnotes 303-04, 308.

[1177] 2007 BCCA 622 at para. 109 (emphasis added).

[1178] 2008 NWTCA 4 at para. 201.

[1179] 2008 NWTCA 4 at para. 202.

[1180] 2008 NWTCA 4 at para. 201.

[1181] 2008 NWTCA 4 at para. 201.

[1182] 2008 NWTCA 4 at para. 201. A full discussion of the the merits of that decision are beyond the scope of this note. However, I say this much, in addition . There is at least a plausible argument that the trial thought he was making a decision on the balance of probability that proper conduct on the part of the defendants probably would have deterred Warren: see, for example, 2004 NWTSC 66 at paras. 607 and 1238. In addition, the Court accused the trial judge of failing "to ask whether each appellant's negligent act or omission was a cause of the respondents' harm." In fact, the trial judge did ask and answer that question for each of the defendants held liable. It was just that he used the phrase "material contribution" in his conclusion.

[1183] However, it is inconsistent with the meaning of "impossible" used by the majority of the Alberta Court of Appeal panel in *Bowes v Edmonton (City)*, 2007 ABCA 347 and 2007 ABCA 347 the trial judge in *Mainland Sawmills Ltd. v. USW Union Local - 1-3567*, 2007 BCSC 1433. The better conclusion is that those cases are wrong on this issue.

[1184] See Vaughan Black, "Decision Causation: Pandora's Tool-Box" Emerging Issues In Tort Law, eds. Jason Neyers, Erika Chamberlain and Stephen Pitel (Hart Publishing, London, 2007), 309-330.

[1185] 2008 NWTCA 4 at para. 201, footnote 308.

However, the panel did not explain why the facts of the case did not fall within the second example set out in *Resurfice* of a factual matrix that triggers the application of the material-contribution test. The Supreme Court had written:

> A second situation requiring an exception to the "but for" test may be 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. For example, although there was no need to rely on the "material contribution" test in *Walker Estate v. York Finch General Hospital*, this Court indicated that it could be used 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. Once again, the impossibility of establishing causation and the element of injury-related risk created by the defendant are central.[1186]

Rather, *Fullowka* cites *Walker Estate* (and other cases) for the proposition that "the 'but for' test is not rendered unworkable simply because the hypothetical inquiry involves another person's reaction to the conduct of the defendant as an element in the chain of causation."[1187]

The explanation is, necessarily, that the panel had concluded that, on the facts of the case, it was possible to prove on the balance of probability what Warren – the bomber, the particular person – would have done had the other defendants "not committed" their tortious acts or omissions. That, in fact, is exactly what the panel wrote: "We have concluded that it is possible in this case to apply the "but for" test … It was possible to lead direct and circumstantial evidence sufficient to overcome the burden of proof concerning Warren's likely course of conduct."[1188] It is, perhaps, poignant that it may very well be that the *only* reason that the Court was able to make this statement was that Warren had confessed to planting the bomb.[1189] It would be ironic if the *Resurfice* material-contribution test would have been available to the plaintiffs to establish legal causation against the primary defendants (those with money) had the identity of the person who set the bomb been unknown or, at least, could not be established on the balance of probability.[1190]

[1186] *Resurfice*, para. 28.

[1187] 2008 NWTCA 4 at para. 196, footnote 303. Professor Black explains why this statement is correct in *Decision Causation*. The panel did not mention that the use of but-for in *Walker Estate* almost seems an after-thought. The *Athey* material-contribution test was the primary basis for the finding of factual causation.

[1188] 2008 NWTCA 4 at para. 201. However, the panel's understanding of the meaning of the but-for test is wrong, if their understanding is what they wrote. See below.

[1189] Warren's initial confessions to the police (which he attempted to recant) was the only evidence that sufficiently established, at his murder trial, that he was the bomber: see, R v. Warren, [1998] N.W.T.R. 190, 117 C.C.C. (3d) 418 (C.A.). More than that, these reasons indicate that his confessions were the only evidence that the Crown had that connected him to the bombing. In *Fullowka*, he admitted that he had placed the bomb.

[1190] Compare *Mainland Sawmills Ltd. v. USW Union Local - 1-3567*, 2007 BCSC 1433 at para. 186: "Second, with few exceptions, the plaintiffs were not able to identify or link each of their injuries with the defendant who caused that specific injury. This is through no fault of their own. The very nature of the incident, including the number of people attending, made it impossible for a plaintiff to say definitively

I now move to the manner in which the Court of Appeal dealt with the but-for test. The Court held that the trial judge did not apply that test but, instead, applied the *Athey* material-contribution test.[1191] The Court held that the plaintiffs had not satisfied their onus under the but-for test to show that the conduct of the defendants was a probable cause.[1192] "It was possible [for the plaintiffs] to [have] lead direct and circumstantial evidence sufficient to overcome the burden of proof concerning Warren's likely course of conduct."[1193] In principle and in the abstract, the Court was probably correct that the necessary evidence could have been adduced, if it was not, to allow the valid deployment of the but-for test. This is because the identity and activities of the bomber and all of the other relevant players were known. In this sense, the Court of Appeal was correct that the case was analogous to *Walker Estate*, with Warren playing the part of the HIV positive blood-donor.

As indicated, there are problems in what the Court of Appeal said the but-for test means. There are also problems in the manner in which the Court applied its understanding of the but-for test. Six stand out immediately.[1194]

1. *Resurfice* provides what is almost a definition of but-for. The definition is not mentioned in *Fullowka*. McLachlin CJ wrote: "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."[1195] That *Fullowka* panel did not quote this sentence, which is the first sentence in para. 23 of *Resurfice*, nor did use the phrase "substantial connection" any where in the reasons. However, the panel cited paragraph 23 and paraphrased its second sentence in explaining the but-for test. The Court wrote: "The "but for" test ensures that a defendant will not be held liable for a plaintiff's injuries if they are due to factors unconnected to the defendant."[1196] I doubt that omission was an oversight. It is particularly unlikely to have been an oversight if the panel was aware of *Sam v. Wilson*. In *Sam*, Smith J.A. wrote: "'Material contribution', as that phrase was used in *Athey v. Leonati*, is synonymous with "substantial connection", as

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which defendant pushed or struck him. I find the principles expressed in Resurfice Corp. v. Hanke, [2007] 1 S.C.R. 333 at para. 27 regarding the exceptions to the 'but for' test of causation to be pertinent and analogous here".

[1191] 2008 NWTCA 4 at paras. 183-184. The Court stated that it arrived at this conclusion after a "a careful examination of his [the trial judge's] reasons and his causation analysis with respect to each defendant": see para. 183. There is a valid argument that the NWTCA was not careful enough. See below.

[1192] 2008 NWTCA 4 at paras. 192-206, particularly paras. 201-04.

[1193] 2008 NWTCA 4 at para. 201. Whether the Court was right that the plaintiffs did not is a separate question that I will not examine. The Court declined "the task of reviewing the evidence, making findings of fact, and applying the [but-for] test to those findings" (para. 206) so we do not know why the Court thought the evidence was not sufficient, even under the *Snell* robust and pragmatic, common sense, approach.

[1194] Whether there was sufficient evidence adduced is a different question. I deal with the merits, briefly, after my discussion of this issue.The merits question is whether the Court of Appeal was correct in asserting that the evidence was not sufficient for a but-for conclusion in the plaintiffs' favour, applying the Snell robust and pragmatic, common sense, approach.

[1195] *Resurfice* at para. 23 (emphasis added).

[1196] 2008 NWTCA 4 at para. 194.

that phrase was used by McLachlin C.J.C. … *Resurfice Corp. v. Hanke*. This causal yardstick should not be confused with the 'material contribution test'."[1197]

The Court of Appeal stated that "[t]he trial judge's brief comments on causation do not attempt to ascertain whether Warren would have set the blast that killed the miners if any of the appellants had acted differently. No attempt to conduct a 'but for' analysis is apparent from the reasons."[1198] If *Sam* is correct on the meaning of but-for after *Resurfice*,[1199] and the trial judge correctly applied *Athey*'s material-contribution "causal yardstick" to the facts, then it follows that the trial judge, in fact, applied the but-for test. The Court of Appeal did not suggest that the trial judge applied the *Athey* material-contribution test improperly. That means that the Court of Appeal was wrong in holding that the trial judge did not, in fact, make what amounted to a but-for conclusion. However, the Court declined to give examples of why the trial judge's decision was, in fact, not a but-for decision, so this is as far as we can go on this point. However, if *Sam* is wrong on this issue, then this criticism of the *Fullowka* reasoning vanishes.

2. The use of "necessary" and "contributing" is problematic. The Court wrote: "The 'but for' test requires the court to consider whether a defendant's conduct was a *necessary* cause of the harm, not merely a *contributing* cause.[1200] To say something is a contributing cause means that it was a necessary cause. An event cannot be a contributing factor in the totality of what makes up a "cause" unless it is a necessary part of that totality. Anything which is not necessary did not contribute. However, the Court's usage suggests the panel understands "contributing cause" to mean something that is not necessary at all. If that is the case, then the panel had and applied an idiosyncratic, and wrong, understanding of but-for.[1201]

3. The statement that the but-for test "requires the court to consider whether a defendant's conduct was a *necessary* cause of the harm, not merely a *contributing* cause" necessarily means that the but-for test cannot apply to overdetermined harm. As explained, harm is overdetermined where there are two or more independently (of one another other) sufficient causes for the harm. The problem for an orthodox use of but-for where the harm is overdetermined is that each actor is able to point out that the harm would have occurred even if the actor's misconduct had never occurred, allowing the actor to assert that the misconduct is not necessary. A literal application of the but-for test

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[1197] 2007 BCCA 622 at para. 109. *Sam* is a 2-1 majority decision. The disagreement was over the proper conclusion to be drawn from the facts, not the law. The majority held that the doctor's negligence was not a cause of the injury. The dissenting judge held that it was. So, it seems likely that he would have formally accepted the majority's definition if he had thought it necessary for his analysis.

[1198] 2008 NWTCA 4 at para 202.

[1199] I have suggested, above, that it is not. It may be that the *Fullowka* panel did not agree with Sam on this issue and chose to not mention it rather than to refer to it, disagree, and have to explain why. That explanation is consistent with the cursory nature of the causation analysis and the fact it was not necessary/.

[1200] 2008 NWTCA 4 at para. 202 (emphasis in original).

[1201] Amongst other problems, the panel's distinction between "necessary" and "contributing" means the orthodox explanation of but-for can never apply to the overdetermined fact situation: the situation where there are 2 or more independently sufficient causes. There is no suggestion in *Resurfice* that this conundrum is a condition which triggers the applicability of the material contribution test.

in the overdetermined-harm situation is that each person is able to say that that person's conduct is not necessary because the conduct of another person is sufficient to caused the harm. As discussed earlier, this is a traditional reason offered by theoreticians for the inadequacy of the but-for test.[1202] This problem is avoided if the court applies the but-for test to the conduct of that person in isolation from the conduct of others, in the sense that a "yes" answer in respect of one person's sufficient conduct is not negatived by a "yes" answer in respect of the conduct of another person.[1203]

Applying this accepted understanding of overdetermined harm to the *Fullowka* facts, the Court of Appeal's explanation of the but-for test requires that we conclude that it would have held that the but-for test did not apply if it had concluded that independently sufficient proper conduct of two or more of the defendants would probably have deterred Warren. Unless we conclude that, in that case, the Court of Appeal would have then gone on to find that legal factual causation existed, on some basis, we would have to conclude that the Court would again find that factual causation had not been established, in law, even though it was established in fact. We should conclude that the Court of Appeal would not have made that decision. As such, *reductio ad absurdum* requires that we conclude that there is problem with the Court's understanding of the meaning of the but-for test if the reasons are taken at face value.

4. There appears to be an error in principle in the Court of Appeal complaint that the trial judge erred by looking at the conduct of the defendants "collectively"[1204] or "cumulatively"[1205] rather than individually. The Court wrote that the trial judge erred because "[t]he proper application of the 'but for' test to determine causation requires a consideration of each appellant's negligent acts and omissions in isolation from those of the other appellants"[1206] and the trial judge did not do that. According to the Court, the trial judge "did not ask whether each appellant's negligent act or omission was a cause of the respondents' harm. Rather, he considered the conduct of the appellants collectively, concluding that the actions or inactions of all the appellants combined to contribute materially to Warren's criminal act." [1207]

The context of the quotations is as follows. The Court of Appeal wrote, first:

> The trial judge's brief comments on causation do not attempt to ascertain whether Warren would have set the blast that killed the miners if any of the appellants had acted differently. No attempt to conduct a "but for" analysis is apparent from the reasons. We

[1202] Above

[1203] It is not likely that this is what the panel meant by the sentence in 2008 NWTCA 4 at para. 205: "The proper application of the "but for" test to determine causation requires a consideration of each appellant's negligent acts and omissions in isolation from those of the other appellants." Rather, it is probable that the panel meant to say nothing more than that, in their view, the trial judge had not decided either (1) that the conduct of each of the appellants was a sufficient cause or (2) that the conduct of each of the appellants was a necessary part of a set of factors which taken together amounted to a cause. See discussion in item 4, below.

[1204] 2008 NWTCA 4 at paras. 202, 204.

[1205] 2008 NWTCA 4 at para. 202.

[1206] 2008 NWTCA 4 at para. 205

[1207] 2008 NWTCA 4 at para. 204.

> note that early in his reasons the trial judge comments on the role of the GNWT alone or together with the co-defendants. We do not view this passage as an attempt to apply the "but for" analysis to the GNWT or to any of the other co-defendants. It underscores the concern that the actions of each defendant were viewed cumulatively or collectively rather than individually in determining causation.[1208]

The, after stating that the trial judge erred in failing to explain why he had used the material-contribution test rather than the but-for test, the Court returned to the trial judge's alleged error in failing to deal with the conduct of each defendant indvidually.

> There is an additional problem with the trial judge's causation analysis. He did not ask whether each appellant's negligent act or omission was a cause of the respondents' harm. Rather, he considered the conduct of the appellants collectively, concluding that the actions or inactions of all the appellants combined to contribute materially to Warren's criminal act. …[1209]

> This was a fundamental error in approach. The proper application of the "but for" test to determine causation requires a consideration of each appellant's negligent acts and omissions in isolation from those of the other appellants.[1210]

On the face of the reasons, the Court appears to have taken the explanation as to why the but-for test can be said to fail in overdetermined situations and used it to hold that the trial judge erred in applying the but-for test. If the situation was of the overdetermined type – one where there were two or more independently (of each other) sufficient causes – then the trial judge would have been correct under orthodox analyses in applying a material contribution test rather than the but-for test.

As mentioned, the explanation of the overdetermined problem is usually used as a reason for holding that the conduct of each of the two or more persons is a factual cause, notwithstanding the presence of the conduct of another person. It is not used as a reason to allow each person to escape a finding that that that person's conduct was a cause. However, the Court of Appeal held that the trial judge should have applied the but-for test. The appellate reasons do not use the phrase "overdetermined harm" nor any other phrase which necessarily tells us that the Court had that concept in mind. Where does this leave us?

If these passages do not relate to overdetermined harm situations, then they must relate to the manner in which the trial judge determined the factual relevance of the conduct of each of those persons whose conduct was found to be a cause. However, the Court could not have meant that the trial judge was supposed to determine the relevance of the conduct of each of the defendants without regard to the evidence relating to the conduct of the other defendants. That would be impossible. The only way to determine if any one person's conduct is relevant to the end result is to look at that conduct in context. That, of course, is exactly what the trial judge did. Yet, the Court's literally wrote that the trial judge should have ignored context. That is literally the meaning of "requires a

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[1208] 2008 NWTCA 4 at para. 202 (internal footnote omitted).
[1209] 2008 NWTCA 4 at para. 204.
[1210] 2008 NWTCA 4 at paras. 204-05.

consideration of each appellant's negligent acts and omissions in isolation from those of the other appellants." That seems to send us back to the overdetermined harm explanation, but that cannot be correct for reasons indicated.

Tortious conduct can be a cause of harm where conduct is not sufficient of itself but, rather, is part of a set of factors that together amount to the cause. The other factors can be conditions (such as the need for oxygen where the tortious conduct amounts to setting a fire) or events such as the conduct of another person. The Court of Appeal was correct in stating that the trial judge has to look at the conduct of each defendant; however, that does not mean that the conduct of each defendant has to be, somehow, independently (meaning without regard to the conduct of the other defendants) sufficient. There would be factual cause if any combination of required reasonable conduct of one or more of the defendants would have probably have prevented the bombing.

So, it is probable that the panel meant to say nothing more than that, in their view, the trial judge had not decided either (1) that the conduct of each of the appellants was a sufficient cause or (2) that the conduct of each of the appellants was a necessary part of a set of factors which taken together amounted to a cause. If that was what the panel meant, it could easily have been said very clearly. Unfortunately, it was not. Nonetheless, it should be remembered that the Court explicitly stated that "[i] t was possible to lead direct and circumstantial evidence sufficient to overcome the burden of proof concerning Warren's likely course of conduct."[1211] The Court was not asserting, of course, that the required evidence existed or had ever existed. That is, the Court was not offering any opinion on the causation. It was merely stating that the circumstances of the action would have allowed a trier-of-fact to decide factual causation in the plaintiffs favor if they had adduced sufficient evidence.

However, if all the Court of Appeal meant to say was that one has to look at all of the evidence applicable to each defendant to decide if that defendant's conduct amounted to a cause, even if it was only in conjunction with the conduct of one or more of the other defendants, then that statement is trite. It adds nothing to our understanding of what it was, in particular, that the Court of Appeal thought was missing from the evidence and findings of fact relied on by the trial judge. That is, again, because the Court declined to undertake its own analysis of the facts. It contented itself with asserting that the trial judge's analysis was not adequate.[1212]

In summary, it is difficult to avoid the conclusion that the Court did not, in effect, make the mistake of concluding that the impugned conduct of each of the defendants had to be, somehow, independently sufficient rather than merely a part of a greater whole. Making the decision as to whether it did (or did not) would be easier if the Court had provided at least one example of why the trial evidence was not sufficient to allow as against any of the defendants.

[1211] 2008 NWTCA 4 at para. 201.
[1212] 2008 NWTCA 4 at paras. 202, 206.

5. An example might help indicate the problems that may exist in both the "necessary", "contributing", "individual" and "collective or cumulative" usages. Assume it takes 20 parts per thousand of some substance to contaminate water enough to kill a cow. 21 people each negligently spill 1/20th of the required amount into the stream upstream of the Jones' farm. Assume the potency of each part continues for long enough that dilution or waning potency is not relevant. Assume that each person has spilled the identical substance, so it is impossible to trace any of the parts to any particular person in any portion of the water. A Jones' cow drinks from the stream and dies. Examination of the cow's tissues shows that the cow was poisoned by the substance and eliminates every other cause except poisoning by the substance. Clearly the cow was killed by the combined conduct of at least 20 of the 21 polluters. That is a collective or cumulative assessment. However, is the conduct of any of the 21 a factual cause? If it is, then that is an individual assessment.

On the necessary or contributing issue, a defendant might argue that that no one person's conduct was necessary because there will always be at least 20 other polluters. Remember that it took only a total of 20 parts per thousand to kill the cow; that is, only the conduct of 20 of the 21. Assuming fault on the part of the *Fullowka* defendants, if we can say that proper actions by any of them, separately, or in any combination, would probably have prevent the bombing, then the *Fullowka* defendants are the equivalent of any 20 of the 21 polluters. Their conduct was cumulatively necessary and cumulatively sufficient.

Another example exists in *Fairchild*. One should not, of course, visit all of the ills of Canadian common law factual causation jurisprudence on *Resurfice*. However, it is difficult to ignore the suspicion that the causation analysis in *Fullowka* would have been better had the analysis in *Resurfice* been better. For example, any adequate discussion of *Fairchild*, in *Resurfice*, would almost certainly have resulted in a reference to Professor Stapleton's leading article, *Lords A'leaping*.[1213] That might have resulted in the NWT CA considering this passage, by analogy.

> The problem for the claimants did not lie in the orthodox material contribution doctrine but was anterior to it. Mesothelioma is indivisible in the sense that its gravity is not affected by the pattern of pre--or post--diagnosis exposure to asbestos, but no one yet knows whether the indivisible injury of mesothelioma is triggered when a critical amount of asbestos accumulates in the lungs (in which case each asbestos fibre would have played a necessary role in reaching the critical point at which mesothelioma was triggered) or whether it resulted from a single fibre triggering the cancer. This evidentiary gap meant that no one could tell if the tortious conduct of the defendant, let alone other exposures to asbestos, materially contributed to the claimant's total state at trial.[1214]

The relevance of the passage to *Fullowka* is its discussion of the mechanism of the injury. A conclusion that the mesothelioma was triggered by one by a single fibre would be the equivalen to the finding that proper conduct of any one of the defendants would probably

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[1213]

[1214] (2002) 10 Torts Law Journal 276 at 284-85.

have been sufficient to deter Warren. Similarly, a finding that Warren probably would have been deterred had two or more of the appellants acted properly, and that it would have taken the proper conduct at least two or more of the appellants to probably deter so that each failure was a ncessary part of the cause, is equivalent to the "critical amount of asbestos". The "criticial mass" description is another way of describing what the *Fullowka* court called "cumulative" cause.

6. The Court stated that the trial judge did not ask himself the right question. "[T]he trial judge should have considered whether Warren would have been diverted from his intended course of conduct if any of the appellants had acted reasonably."[1215] The Court probably meant "*likely or probably* would have been diverted" but if the panel required more certainty than that then the Court erred. Since they panel chose not to comment on the specific deficiencies in the evidence, all we have is the assertion that the evidence did not show that Warren probably would not have placed the bomb if the defendants had acted properly, there are no examples which might confirm what the Court actually meant.[1216]

I will now deal, briefly, with the merits of the Court of Appeal's conclusion that the evidence adduced at trial was not "sufficient to overcome the burden of proof concerning Warren's likely course of conduct."[1217] There seems to be basis for a valid argument that the Court was wrong, whether one puts this on the *Housen* basis that the trial judge did not commit palpable and overriding error in relation to any finding of fact or on the stricter but not required threshold that the trial judge did not make any errors of fact at all. I do not intend to review the trial judge's findings of fact against the evidence in detail. What I will do is point out problems in the reasons the Court of Appeal gave for denying the sufficiency of the evidence that the trial judge relied on in support of his conclusions. Since the Court of Appeal declined to give examples of why the evidence was not sufficient, all we have are those reasons.

As indicated, the Court of Appeal held that the trial judge did not apply that test but, instead, wrongly applied the *Athey* material-contribution test.[1218] The Court stated that it arrived at this conclusion after "a careful examination of his [the trial judge's] reasons and his causation analysis with respect to each defendant".[1219] There is a valid argument that the Court was not careful enough. First, it did not refer to para. 607 of the trial reasons. I will quote the salient sentences, again: "If there is a breach of the standard of care, the Plaintiffs must prove *on a balance of probabilities* that the Defendants' alleged breaches caused the damage or loss. The Plaintiffs must establish that what was done or omitted to be done created the situation that resulted in the harm suffered by the

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[1215] 2008 NWTCA 4 at para. 202.

[1216] Compare this to the trial finding in *Mooney*, accepted by the British Columbia Court of Appeal, that there was nothing that the police could have done which probably would have made a difference.

[1217] 2008 NWTCA 4 at para. 201.

[1218] 2008 NWTCA 4 at paras. 183-184. The Court did not say the *Athey* material-contribution test, but the only version of the material-contribution test that existed in Canada as of the trial in 2004 was the *Athey* version, whatever it meant.

[1219] 2008 NWTCA 4 at para. 183.

Plaintiffs." (emphasis added) The paragraph continues with references to remoteness but that does not detract from the substance of the first two sentences.

Curiously, in setting out what it took to be the trial judge's understanding of the requirements for proof of factual causation, the Court quoted from para. 609 of the trial reasons, but did not refer back to para. 607 which sets the context for para. 607. The Court wrote: "In discussing the general law on causation, the trial judge reviewed some of the leading authorities and said, "where tortious conduct causes or materially contributes to a plaintiff's injury, the defendant will be liable to the plaintiff".[1220] Quoted that way, that is out of context, both the context of the sentence in which it appears and the paragraph in which the sentence appears. The full text of the sentence and paragraph are: "It is trite to say that, where tortious conduct causes or materially contributes to a plaintiff's injury, the defendant will be liable to the plaintiff. 'The legal or ultimate burden remains with the plaintiff', as Sopinka, J. noted in *Snell*, *supra*, 'but in the absence of evidence to the contrary adduced by the defendant, an inference of causation may be drawn'."[1221] The context shows that the excerpt quoted by the Court is nothing more than a general, and for that matter, accurate statement of the law as it was understood by most common law trial and appellate judges in Canada in 2004. It is even consistent with what the Supreme Court of Canada was writing, then. As such, particularly in light of para. 607 of the trial reasons, the Court of Appeal seems to have been wrong in seeing error in that excerpted quotation. In short, particularly in light of para. 607 of the trial reasons, the excerpt from para. 609 quoted in para. 182 of the appeal reasons is not evidence of an error in the trial judge's understanding of the applicable law nor is it evidence that the trial judge applied a standard of proof less than the balance of probability in his determination that the conduct of the defendants held liable materially contributed to Warren's planting of the bomb.

Next, the Court of Appeal stated that "[t]his was not a case where … [the trial judge took] robust and pragmatic view of causation that did in reality, if not in words, utilize the "but for" test.[1222] This was in response to the plaintiffs' argument that that was what the trial judge had, in fact, done. It was also, no doubt, in response to the trial judge's statement that this was what he had done. "I have drawn adverse inferences against the Defendants herein for their failure to call certain witnesses and it is, in part, as a result of the same that I draw an inference of causation against those Defendants. This is but a portion of the evidence that supports appropriate causation herein, as I take a 'robust and pragmatic approach to the . . . facts': Sopinka J. *Snell* . . . Sopinka J. was there referring to where "some evidence to the contrary is adduced by the defendant", as was the case here." [1223] It is significant that the trial judge nowhere suggested that the burden of proof on the plaintiffs was somehow lessened or relaxed by his use of what he described as the material- contribution test.

[1220] 2008 NWTCA 4 at para. 182.
[1221] 2004 NWTSC 66 at para. 609.
[1222] 2008 NWTCA 4 at para. 184.
[1223] 2004 NWTSC 66 at para. 613.

In addition, at least in respect of the NWT government, the trial judge did and found exactly what the Court of Appeal claimed he did not. He wrote: "In the case of the GNWT Defendants, had they discharged their statutory obligations, as illustrated in more detail below, alone or together with discharge of their co-Defendants' obligations, Warren would have been deterred.[1224] The Court of Appeal's handling of this finding is unusual. It is not referred to in the body of the reasons. Instead, it is buried in a footnote.[1225] In the body of the its reasons, the Court of Appeal claimed the passage should not be understood to mean what its plain English meaning is. The Court wrote:

> The trial judge's brief comments on causation do not attempt to ascertain whether Warren would have set the blast that killed the miners if any of the appellants had acted differently. No attempt to conduct a "but for" analysis is apparent from the reasons. We note that early in his reasons the trial judge comments on the role of the GNWT alone or together with the co-defendants.[309] We do not view this passage as an attempt to apply the "but for" analysis to the GNWT or to any of the other co-defendants. It underscores the concern that the actions of each defendant were viewed cumulatively or collectively rather than individually in determining causation. Moreover, this comment, if taken as a finding of "but for" causation, would conflict with the trial judge's subsequent, specific finding that the GNWT's negligence "materially contributed" to the deaths of the nine miners.[310] The "but for" test requires the court to consider whether a defendant's conduct was a *necessary* cause of the harm, not merely a *contributing* cause. Put another way, the trial judge should have considered whether Warren would have been diverted from his intended course of conduct if any of the appellants had acted reasonably.[1226]

I have already dealt with much of this paragraph and explained why it contains errors of law: see items 2-5 above.

There may be one more error. The problem is the Court's statement: "Moreover, this comment, if taken as a finding of 'but for' causation, would conflict with the trial judge's subsequent, specific finding that the GNWT's negligence 'materially contributed' to the deaths of the nine miners." What did the court mean by "would conflict with"? Did the Court of Appeal mean to say that the same facts cannot satisfy both the material-contribution and but-for tests? That seems to be the point of the next sentence: "The "but for" test requires the court to consider whether a defendant's conduct was a *necessary* cause of the harm, not merely a *contributing* cause." The statement that both tests cannot apply to the same facts is certainly true about the *Resurfice* material-contribution test. However, it was not true about the *Athey* material-contribution test. At the time of the trial in 2004, there was no *necessary* conflict. The Supreme Court had held in *Walker*

[1224] 2004 NWTSC 66 at para. 663.

[1225] 2008 NWTCA 4, para. 202, footnote 309.

[1226] 2008 NWTCA 4, para. 202 (emphasis in original). Footnote 309 quotes part of para. 663 of the trial reasons: "I do not accept that the only evidence to support a causative link was provided by Warren. In the case of the GNWT Defendants, had they discharged their statutory obligations, as illustrated in more detail below, alone or together with discharge of their co-Defendants' obligations, Warren would have been deterred." Footnote 310 "Trial Reasons para. 841".

Estate[1227] that Canadian tort law did contemplate that there could be some situations where the facts satisfied both the but-for test and the material-contribution test.

As such, the trial judge could have been right, although he ought to have explained why the *Walker Estate* principle applied. It should be recalled that both the but-for test and the *Athey* material-contribution test identify conduct that is a cause of injury. The Court of Appeal's "conflict" statement makes sense only if the Court was comparing a but-for finding to a finding under the *Resurfice* material-contribution test. But, of course, the trial judge did not use that test as the trial was in 2004. So, it was not open to the Court of Appeal to conclude that there was a conflict in the trial judge's findings of fact, and a reversal error, merely from fact that the trial judge found that both the but-for and *Athey*-material contribution tests applied. However, that seems to be what the Court did.

Finally, the Court of Appeal did not refer to the trial judge's causation findings in the O'Neil action. The trial judge wrote: "O'Neil was required to establish on a balance of probabilities that the Court could draw the appropriate inference of negligence against the Defendants from the circumstances recited herein. In weighing the circumstantial evidence with the direct evidence, I am satisfied on a balance of probabilities that a *prima facie* case of negligence against the Defendants, as circumscribed herein, is made out. I further find that the Defendants did not in law totally negate the evidence of O'Neil. See *Fontaine*, *supra*. Thus, O'Neil succeeds to the extent indicated later herein."[1228] The "extent … later" relates to O'Neil's damages.

Other Provinces, Territories & Canadian Federal Law

No reported cases, yet.

Other Countries: The United Kingdom, Australia, the U.S.A.

It seems that unlikely that Canadian judges will get much help from the jurisprudence of the United Kingdom, Australia or the U.S.A. in the development of the meaning of the new Canadian material-contribution test. I suggest there are straight-forward reasons why, in each case.[1229]

For United Kingdom jurisprudence, the explanation is that the Supreme Court of Canada's decision in *Resurfice* not to refer to *Fairchild* and *Barker* and not to declare that the application of the Canadian version of the material-contribution test is subject to some or all of the conditions established by *Fairchild* must have been intentional.[1230]

[1227] [2001] 1 S.C.R. 647, 2001 SCC 23.

[1228] 2004 NWTSC 66 at para. 1238.

[1229] Australian and United Kingdom law is discussed in more detail in *Snark*.

[1230] The Supreme Court also chose to not refer to the Ontario Court of Appeal decisions in *Cottrelle v. Gerrard* and *Aristorenas v. Comcare*, both of which left it open for Ontario jurisprudence to adopt a version of the *Fairchild* increased-risk based material-contribution test, with at least some of the restrictions declared in *Fairchild*. Whatever the *Resurfice* material-contribution test is, it is not the test

Given that, I do not see how it is open to Canadian counsel to argue that the Canadian version of material contribution is *necessarily* limited by any of the restrictions listed in *Fairchild*. Instead, what counsel seeking to limit *Resurfice* material-contribution will have to do is argue that a particular limitation is or is not necessary for the logical development of the Canadian version of material contribution, in light of Canadian conditions. In that form of argument, the *Fairchild* restrictions may or may not be relevant considerations, but they cannot be anything more than that. In effect, the Supreme Court has forced the Canadian public, and the Canadian jurisprudence system, to incur the time, expense, and hardship of developing the Canadian version of the material-contribution test from what is almost a blank slate, guided only by two very general principles. It is worth asking why.

For Australian jurisprudence, the explanation is that Australian common law formally rejected any version of the *Fairchild* or *Resurfice* material-contribution test – indeed, any version of any separate test other than but-for – at least two decades ago, and has again rejected the *Fairchild* version since *Fairchild* was decided.[1231] Australian common law, officially, denies that judges are permitted to declare causation to exist in the absence of evidence held to be sufficient to allow a conclusion, whether stated to be based on deduction or inference, that the impugned conduct is a factual cause of the harm that materialized. Increased risk is merely another factor to be taken into account in the analytical process.[1232] *Ellis, Executor of the Estate of Paul Steven Cotton v. The State of South Australia*[1233] states:

> [673] In Australia the tendency, rather than expanding the legal concept of causation as was done in *Fairchild* (*supra*), is to allow a finding of causation to be made in situations of elevated risk where there is no evidence to displace or reject that inference – a course which maintains the significance of the obligation of the plaintiff to discharge the onus of proof of causation.

And,

> [676] There can never be any departure from the fundamental obligation of the plaintiff to prove, on the balance of probabilities, that the alleged negligence, breaches of statutory duty or breach of contract did cause the injury or loss of which she complains while

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described in *Cottrelle* and *Aristorenas*. The same comments apply to the version of the material-contribution test referred to in *Mooney v. B.C. A-G*.

[1231] For example, *Bendix Mintex Pty Ltd v Barnes* (1997) 42 NSWLR 307; *Chappel v Hart* (1998) 195 CLR 232; *Naxakis v Western General Hospital,* [1999] HCA 22, 197 C.L.R. 269; *Seltsam Pty Limited v. McGuiness*, [2000] NSWCA 29 at paras. 118-20, 49 NSWLR 262; *Rufo v Hosking* [2004] NSWCA 391; *Ellis, Executor of the Estate of Paul Steven Cotton v. The State of South Australia & Ors* [2006] WASC 270 at paras. 673-76, 683-86; *Hannell v. Amaca Pty Ltd*, [2006] WASC 310 at para. 293-96, reversed [2007] WASCA 158, leave to appeal refused Oct. 31, 2007, HCA Bulletin No. 10. The reasons in both of *Ellis* and *Hannell* are an exhaustive review of the Australian jurisprudence. The appellate reasons in *Hannell* contains an extensive discussion of the legal difference between cases presenting multiple sufficient cumulative causes rather than alternative causes: see paras. 387-97, 412-421.

[1232] As a result of the *Ipp Committee* report, some of the Australian states and territories have enacted legislation dealing with the proof of factual causation. So, my comments should be understood as dealing with the law outside of whatever has been wrought by statute.

[1233] [2006] WASC 270 (citations omitted).

> acknowledging always that proof of causation does not require that the breach of duty should be the sole cause of the loss of damage so long as it makes a material contribution to that end.

The overarching principle in Australia is that factual causation is a question to be answered by the application of "ordinary common sense".[1234] It is a matter of ordinary common sense because factual causation "is not susceptible of reduction to a satisfactory formula".[1235] The High Court of Australia stated in *Bennett v Minister for Community Welfare*:

> In the realm of negligence, causation is essentially a question of fact, to be resolved as a matter of common sense. In resolving that question, the 'but for' test, applied as a negative criterion of causation, has an important role to play but it is not a comprehensive and exclusive test of causation; value judgments and policy considerations necessarily intrude.[1236]

The Australian approach seems to be based on a distinction between the ultimate risk of non-persuasion – the ultimate onus of proof – which always remains with the plaintiff and a shifting "tactical evidentiary onus" triggered by evidence adduced by the plaintiff which, if not met, *may but does require* the trier of fact to draw an inference against the wrongdoer.[1237] Putting this more bluntly, it seems that, in practice, Australian law allows a judge to find that, in some cases, there is no practical difference between conduct materially increasing risk and conduct causing harm. In other cases, Australian law suggests the fact that the conduct materially increased the risk is merely one of the factors the trier of fact must take into account. It is not supposed to be enough of itself. Mason J. wrote in *Bendix Mintex Pty Limited v Barnes*: "[t]he law does not equate the situation where the defendant had materially increased the risk of injury with one where he had materially contributed to the injury.' I respectfully agree. Only parliament or the High Court may change this."[1238] Neither has, yet.[1239]

The result is that, in Australia, in some cases, material increase in risk *may be but is not necessarily enough* for the trier of fact to form the valid legal conclusion that the faulty conduct was a factual cause.[1240] Mason J. wrote in *Bendix Mintex*:[1241]

[1234] *March v. Stramare (E. & M.H) Pty*, [1991] H.C.A. 12, 191 C.L.R. 506 at para. 13 (H.C.A.) and *Bennett v Minister for Community Welfare* (1992) 176 CLR 408 at 412 – 413 (HCA). Most recently, *Roads and Traffic Authority v. Royal*, [2008] HCA 19 at paras. 140-44.

[1235] *March v. Stramare*, at para. 19. See also *Fitzgerald v. Penn*, [1954] HCA 74, 91 C.L.R. 268 at pp. 277-78 (H.C.A.). And see the Ipp Committee, *Review of the Law of Negligence Final Report (2002)*, at pp. 108-19, paras. 7.25-7.51.

[1236] (1992) 176 CLR 408 at 412 – 413 (HCA) (footnotes omitted),

[1237] Don't shoot the messenger. I am just explaining what is there. *Freidin v St Laurent* [2007] VSCA 16, leave to appeal refused [2007] HCATrans 251 (25 May 2007) indicates that the jury must be told that they do not have to draw the inference. I wonder how useful that sort of instruction will be in a complicated case.

[1238] (1997), 42 NSWLR 307 at 311.

[1239] See, most recently, *Roads and Traffic Authority v. Royal*, [2008] HCA 19 at paras. 94, 143-44. Some scholars have argued that *Chappel v Hart* has to amount to that change.

[1240] Readers may decide, for themselves, whether that means that, in some cases, nothing is enough.

It is sufficient for a plaintiff to establish that his or her injuries were `caused or materially contributed to' by the defendant's wrongful conduct: *March v E & MH Stramare Pty Ltd* (1991) 171 CLR 506 at 514. The basal principle does not change when the plaintiff sues more than one defendant. The test must be satisfied as against each defendant from whom the plaintiff seeks a verdict before such a verdict will be entered. Hope JA summed-up the principle in *Kilgannon v Sharpe Bros Pty Ltd (1986)* 4 NSWLR 600 at 628 when he said that cases such as *Nesterczuk v Mortimore* (1965) 115 CLR 140 and *Host v Bassett* (1983) 57 ALJR 681; 48 ALR 404:

> "... require a plaintiff to be able to point, on a balance of probabilities, to the particular defendant or defendants who was or were negligent; it is not enough that he can say that one of them must have been and all of them may have been negligent."

The law might, and in some jurisdictions does, distinguish between proof of unreasonable want of care and causation of damage. But it does not do so in Australia, on my understanding.[1242]

. . .

In *Pibworth v Bevan M Roberts Pty Ltd* (1994) 176 LSJS 39 (otherwise unreported, Supreme Court of South Australia, Full Court, 15 April 1994) the Full Court of the Supreme Court of South Australia followed *Wilsher v Essex Area Health Authority* and adopted the summary of what the case stands for offered by Andrew Grubb in a case note (`Causation and Medical Negligence') in [1988] Cam LJ 350. That summary states, as its third proposition (at 350-351): `The law does not equate the situation where the defendant had materially increased the risk of injury with one where he had materially contributed to the injury.' I respectfully agree. Only parliament or the High Court may change this.

The difficulties which these principles place in the way of a plaintiff can be very considerable. To say that they are the logical outcome of a legal system that requires proof of fault before damages flow against a particular defendant does not remove a lingering sense of injustice, particularly in the case of multiple defendants where each has been shown to have negligently exposed a plaintiff to a risk of injury. Nevertheless our law remains wedded to the principle that if the risk does not come home in a way that is causally linked to the particular defendant's negligence, then it is the plaintiff who must bear the loss: see *Rhesa Shipping Co SA v Edmunds, The `Popi M'* [1985] 2 Lloyd's Rep 1 at 5.[1243]

Whether Australia's path in practice amounts to *fiat*, to legal fiction, rather than valid inference, is an open question. Whether Australia's path is benign is another question that needs to be considered.

[1241] 42 NSWLR 307 at 311-18. See, also, TC v State of New South Wales, [2000] NSWSC 292.
[1242] 42 NSWLR 307 at 311.
[1243] 42 NSWLR 307 at 316-17.

I suggest it is not. Australia does not lack for case law. It has a surfeit. As a result, Australia's jurisprudence is a thicket of thorns at least equalling the Canadian morass.[1244] *TC (by his Tutor Sabatino) v State of New South Wales*[1245] contains this passage, quoted from *Seltsam Pty Ltd. v. McGuinness*:

> [119] There is a tension between the suggestion that any increased risk is sufficient to constitute a 'material contribution', and the clear line of authority that a mere possibility is not sufficient to establish causation for legal purposes. The latter is too well established to be qualified by the former. The reconciliation between the two kinds of references is to be found in the fact that, as in *Chappel v Hart* [1998] HCA 55; (1998) 195 CLR 232 and in the cases that suggest the former, the actual risk had materialised. The 'possibility' or 'risk' that X might cause Y had in fact eventuated, not in the sense that X had happened and Y had also happened, but that it was undisputed that Y had happened *because* of X.[1246]

The implication in this passage that it is the mere fact that the risk (Y) materialized after the event (X) that is sufficient to allow the conclusion that allowed the conclusion that Y happened because of X. That implication is wrong as a matter of fact and science. Whether it is valid as a matter of law is policy, not science.

The classic Monty Python comedy sketch known as the "Candid Photography" or "Nudge Nudge" in the "How To Recognize Different Types Of Trees From Quite A Long Way Away" episode contains the line: "A nod's as good as a wink to a blind bat!" That seems to nicely summarize the Australian approach.[1247] A nicer way to put it is to borrow Professor Black's description, in *Policyization*, of the post-*Walker Estate*, pre-*Resurfice* situation in Canada, merely substituting "Australian" for "Canadian", removing the reference to *Walker Estate*. "It is not an unfair description of Canadian law post-*Walker* to say that whenever causation on the but-for standard is seriously disputed and is at all complex or cloudy, a court may resort to the material contribution test."[1248]

[1244] The "Pythonesque" - perhaps a better description is "Kafkaesque" – nature of the Australian jurisprudence is captured in the juristic dance outlined in the appellate reasons in *Hannell v. Amaca Pty Ltd*, [2007] WASCA 158, especially the discussion of the legal difference between cases presenting multiple sufficient cumulative causes rather than alternative causes: see paras. 387-97, 412-421. Consider, for example, para. 419:

> [419] The trial Judge went further than permitted by the *Bennett* test by placing an onus on the appellant to exclude any possibility that asbestos fibres from the specific exposures caused or contributed to the disease. That is to place a legal onus on the appellant to discharge a standard of proof that equals or exceeds the criminal standard. However, it produces no error if, as the trial Judge in effect found, the two sources of exposure are multiple alternative causes because in that situation a *prima facie* case based on the *Bennett* test **cannot be rebutted in any event**. (bold emphasis added: DC)

In other words, it is legal to use a shift of a tactical evidentiary burden to create what is called a *prima facie* case, even though it is conceded that the *prima facie* case is not rebuttable by any evidence that could ever be available to the defendant. That is not a *prima facie* case. That is strict [absolute?] liability upon proof of fault. Alternatively, it is the Australian equivalent of the presumption in *Hollis v. Dow Corning*.

[1245] [2001] NSWCA 380 at para. 70.

[1246] [2000] NSWCA 29 at para. 119, 49 NSWLR 262 at 278-280

[1247] I'd have mentioned the Philosophers' sketch, but I have friends in Australia who I hope to visit soon enough.

[1248] Policyization at 204.

The rationale for this, also borrowing from *Policyization*, is that the material contribution test is not an independent test justified on its own grounds but is "an evidentiary response to an evidentiary problem" deployed as the "best resort because it is the closest approximation of the but-for test under the circumstances."[1249]

Resurfice, in providing merely two general principles said to be the bedrock of the new Canadian material-contribution test, and in my view without adequate consideration of those general principles, may have sent Canada down a path with consequences similar to those in Australia, while exacerbating the problem by at least creating a separate test for legal causation justified on its own grounds.[1250] Whether Canada should enter into what amounts to a "there be dragons" world is something that our judiciary should think long and hard about, before taking us any farther down that path than we have already begun to journey.

The United States has a version of a material-contribution test called the substantial-factor test. However, it is an analogue to *Athey* material-contribution. It is a test for conduct that will or will not be held to be an factual cause of the harm on a probability standard. It is not, and was never supposed to be, a test for causation based on-increased risk rather than cause. In any event, it seems likely that this test will fall out of favour in the United States. The American Law Institute has recommended that it be abandoned.[1251]

IV. Other Tribunals

Problems in the jurisprudence will affect more than just claims in actions before the courts. Other judicial or quasi-judicial tribunals deal with causation questions. Examples include tribunals that determine entitlement to payment for employment-related injuries under workers' compensation legislation and, using Ontario terminology, tribunals that determine entitlement to payment of Statutory Accident Benefits under the provisions of automobile insurance policies where people are injured in motor vehicle accidents.

The meaning of causation under the applicable statutes is a question of statutory interpretation so the jurisprudence need not be the same as that in common law actions. The statutory regimes that govern tribunals such as the WSIAT and those that determine SABs entitlement (including the courts where an appeal is taken to the court) permit the tribunals to develop their own jurisprudence. That jurisprudence may be the same as the common law but it need not be: *Graham v. Worker's Compensation Board*,[1252] *WCAT-*

[1249] Policyization at 206.

[1250] At least, because, as indicated, *Resurfice* does not necessarily bury the *Athey* version of the material-contribution test.

[1251] *Restatement (Third) of Torts: Liability for Physical Harm* (Proposed Final Draft No. 1, 2005), c. 5. See above. See, also, *Snark* at 98-100.

[1252] 2007 NWTSC 54 at para. 99.

2008-00773 (Re),[1253] and, in effect, *Monks v. ING Ins. Co. of Canada*.[1254] In practice, in the causation area, the statutory jurisprudence borrows heavily from common law principles.

In Ontario, for example, the law before *Resurfice* was that the Ontario Workplace Safety and Insurance Appeals Tribunal (the WSIAT) "applie[d] common law principles developed by the courts in similar cases and, in particular, as enumerated in *Snell v. Farrell* and reviewed in *Athey v. Leonati*".[1255] A similar approach was and still seems to be the general rule under British Columbia workers' compensation jurisprudence.[1256] Ontario WSIAT law after *Resurfice* has now added *Resurfice* to the litany: "With respect to the issue of causation, when asked to determine issues of causation the Tribunal applies common law principles developed by the courts in similar cases, in particular, those enumerated in *Snell v. Farrell*, reviewed in *Athey v. Leonati* (i.e. significant contribution test, thin skull doctrine, crumbling skull principle, and intervening cause principle) and recently re-affirmed in *Resurfice Corp. v. Hanke*."[1257] Similarly, the law developed under *Resurfice, Athey,* and *Snell* applies to determine causation issues relevant to entitlement to Statutory Accident Benefits (SABs) payable under the Ontario *Insurance Act*, to people injured in motor vehicle accidents.[1258]

For the moment, Ontario now has a difference in the causation jurisprudence applied by the WSIAT and that applicable to SABs claims, as that law is applied to SAB claims by the courts. The contradiction could not be more explicit. In *Monks v. ING*, the Supreme Court of Justice (in 2005) and the Court of Appeal (in 2008) held that the

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[1253] 2008 CanLII 18356 (B.C. W.C.A.T.) The panel stated: "I agree with the … analysis … in WCAT Decision #2006-00841 that the "thin skull rule" *per se* is not established by section 5.1(1) of the [Workers Compensation] Act. I find that the principle of "contributing cause" as discussed in *Athey* may not be applied to the adjudication of claims for a mental stress injury. … [A]ny aggravating event must first be of sufficient magnitude to have caused the mental stress injury in its own right within the context of the legislative and policy criteria, even if it should at the same time incidentally aggravate a pre−existing psychological condition."

[1254] *Monks v. ING Insurance Co. of Canada*, 2005 CanLII 21689 at paras. 846, 859 and 867 affirmed (Ont. S.C.J.) affirmed 2008 ONCA 269 [*Monks*]. See 2008 ONCA 269 at paras 94-95 and 2005 CanLII 21689 at paras. 852 (Ont. S.C.J.) holding that the crumbling-skull principle is not part of the meaning of "cause" in SABs claims.

[1255] Decision No. 1303/06, 2007 ONWSIAT 1429, at para. 66-71.

[1256] See, for example, *WCAT-2008-00929 (Re)*, 2008 CanLII 18511 (B.C. W.C.A.T.) and *WCAT-2008-00773 (Re)*, 2008 CanLII 18356 (B.C. W.C.A.T.).

[1257] Decision No. 1471/07, 2007 ONWSIAT 2556, at para. 32 (footnotes omitted) (decision released Oct. 12, 2007). The tribunal did not explain what it understood *Resurfice* to mean on either but-for or material contribution.

[1258] *Monks v. ING Insurance Co. of Canada*, 2005 CanLII 21689 at paras. 846, 859 and 867 affirmed (Ont. S.C.J.) affirmed 2008 ONCA 269. Similarly, *Saskatchewan Government Insurance v. Steinhauer*, 2006 SKCA 1 at para. 11 (CanLII), Saskatchewan: *John Schmidt v. Sask. Gov't Ins.*, 2007 SKAIA 88 at para. 73 (CanLII).

crumbling-skull principle does not apply to SABs claims arising out of motor vehicle accidents.[1259] It does in Ontario workers' compensation claim jurisprudence.

As indicated, in *Monks v. ING*,[1260] the Ontario Court of Appeal held that the crumbling-skull principle is *not* part of SABs causation jurisprudence. The court wrote:

> At trial, ING argued that this was "a classic, unequivocal case of a crumbling skull Plaintiff" and, therefore, that ING need only pay "for those expenses for those injuries caused by our accident, being a cervical strain", which expenses had already been paid. The trial judge rejected this argument, holding at para. 852: "[T]here is no room for the crumbling skull theory in accident benefit cases."
>
> I agree. There is no indication in the SABS of a legislative intent that an insurer's liability for the accident benefits in issue in this case should be subject to discount for apportionment of causation due to an insured's pre-existing injuries caused by an unrelated accident. The SABS simply states, in clear and unambiguous language, that an insurer "shall pay an insured person who sustains an impairment as a result of an accident" medical, rehabilitation and attendant care benefits (ss. 14(1), 15(1) and 16(1)).[1261]

The provisions in the SABs legislation connecting the accident and the injury are a combination of the wording in the benefits granting sections and the definition of accident. The statute states that the insurer "shall pay [the prescribed benefits to] an insured person who sustains an impairment as a result of an accident"[1262] and defines accident to mean "an incident in which the use or operation of an automobile *directly causes* an impairment or *directly causes* damage to any prescription eyewear, denture, hearing aid, prosthesis or other medical or dental device".[1263]

There is no discussion in the Court of Appeal or trial reasons of the rationale for the assertion that the crumbling-skull principle is not part of SABs jurisprudence. There is only the assertion. Neither set of reason explains how it could be, in principle, that an injury which was not at all caused by the accident – because that is what the crumbling-skull principle means if applies to any post-accident complaint – could be caused in fact, by the accident, or just "caused" in law under the statutory meaning of "directly causes" if that is somehow a unique meaning. The Court of Appeal explicitly acknowledged that this is what crumbling-skull means.[1264] In addition, the trial judge had accepted evidence which was that that the subsequent accident *was* a but-for cause of *Monks* complaints.

[1259] There is an SAB arbitration decision, *Johnson v. AXA Insurance*, FSCO A04-002670, released February 8, 2008 which holds otherwise. Johnson does not mention either level of *Monks*. *Johnson* is discussed in more detail below.

[1260] 2008 ONCA 269

[1261] 2008 ONCA 269 at paras. 94-95.

[1262] *Statutory Accident Benefits Schedule - Accidents On Or After November 1, 1996*, O. Reg. 403/96, ss. 14(1), 15(1) and 16(1) (words in square brackets added).

[1263] O.Reg 403/96, s. 2(1) (emphasis added).

[1264] 2008 ONCA 269 at para. 97: "There was no finding by the trial judge that the incomplete quadriplegia to which Ms. Monks eventually succumbed would have occurred at some point without the third accident, which would have engaged the crumbling skull principle."

The Court of Appeal explicitly affirmed this part of the trial decision, too.[1265] The assertion about the meaning of the statute is technically *obiter* because the trial judge expressly found that the prior problems were not a cause of the impairment, and the Court of Appeal specifically accepted that conclusion. However, the Court of Appeal's statement is an assertion of law whose precedential value will have to be considered in subsequent decisions.[1266]

The crumbling-skull principle *is* part of WSIAT jurisprudence. In Decision No. 1471/07,[1267] the WSIAT ruled:

> In cases where non-compensable pre-existing factors may have rendered a worker more susceptible to injury, the Tribunal has consistently adopted the "thin skull" or "frail spirit" doctrine/rule. This rule provides that a worker is to be taken as they were found at the time of the injury or accident – frailties and all. Thus, the existence of a pre-existing condition will not preclude entitlement to benefits, providing that the accident/work in question was still a significant contributing factor to the injury or subsequent disability.
>
> However, if a pre-existing condition is so large of a causal factor in the subsequent disability that it overwhelms the significance of the accident, then a trier of fact might conclude that the accident, compensable or not, was not a significant contributing factor to the subsequent disability. In such a case, the disability or condition would not be compensable. This type of analysis is known as the "crumbling skull principle".[1268]

The provision in the worker's compensation legislation connecting the accident and the injury is: "A worker who sustains a personal injury by accident arising out of and in the course of his or her employment is entitled to benefits under the insurance plan."[1269]

How accurate was the tribunals' understanding, even before *Resurfice*? Consider this WSIAT statement of its jurisprudence, taken from Decision No. 302/07,[1270] a decision from a hearing held just before *Resurfice*:

> [49] In reaching our conclusion, the Panel notes that the test for a causal relationship is that of significant or material contribution. The Panel has considered the test of causation.
>
> [50] The Supreme Court of Canada confirmed that causation is established where there is a "material contribution" to the injury. A plaintiff or worker is not required to show that the defendant's negligence or the work was the sole cause of the injury. It is sufficient to establish that it was a cause. The development of the "significant

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[1265] 2008 ONCA 269 at paras. 92, 96-97.

a[1266] See the discussion below on precedent nd *R. v. Henry*, 2005 SCC 76 at paras. 53-57, [2005] 3 S.C.R. 609 in the paragraphs preceding Part VI, Class Actions.

[1267] 2007 ONWSIAT 2556.

[1268] 2007 ONWSIAT 2556 at paras. 34-35.

[1269] The *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c. 16, Sch. A, s. 13(1).

[1270] 2007 ONWSIAT 1783, released in July 2007.

contributing factor" formulation is entirely consistent with the principles set out by the Supreme Court of Canada. Indeed, this test was developed based upon the same line of authority as was cited in the *Athey* decision. The meaning of the "significant contribution" test was explained by a Panel of this Tribunal as follows in *Decision No. 915* (1987) 7 W.C.A.T.R. 1 at 134:

> The Accidental Injury Need Only be One of the Significant Contributing Factors
>
> It is a first principle of personal injury, civil litigation law that a defendant's negligence does not need to be the *sole* cause of the damages claimed. It is equally well established in Workers' Compensation law that for compensation entitlement to arise, the disability does not have to result solely from the accidental injury. In its decisions to date as to the meaning of *results from*, the Appeals Tribunal has taken the view that a disability may be said to have *resulted from* an injury if the injury made a *significant contribution* to the development of the disability. The panel agrees with that interpretation.
>
> This is almost exactly the same place the Courts have reached in the modern development of the civil litigation concept of *cause* in personal injury cases. The definition of cause in the Courts has had a long and checkered history but there is general acceptance of the proposition that consequential damages will be found to have been *caused* by a defendant's negligence if the negligence made a "*material contribution*" to the damage.
>
> This proposition was stated by the English House of Lords in 1972 in a case called *McGhee* v. *National Coal Bd.*, [1972] 3 All E.R. 1008…and has been accepted by the Ontario Court of Appeal and the Supreme Court of Canada. See for example *Cotic* v. *Gray* (1981), 33 O.R. (2d) 356…
>
> This panel is, therefore, satisfied that a disability must be seen to have *resulted from* the compensable injury (and, therefore, to be compensable) if the injury made a *significant contribution* to the development of the disability. This is a principle which arises naturally from the plain meaning of the words "results from" and which is at least not more embracing than the Courts' concept of causation. It accords with the proposition that the workers' protection for consequences of injuries was not intended to be reduced by the conversion from the common law to the statutory system. It is, of course, the principle followed in previous decisions of this Tribunal.

[51] As was explained by the Panel in *Decision No. 915*, the "significant contribution" language embodies the common law principle of material contribution and the principle that the injury need only be one of the causal factors in the disability.

Does it matter to the validity of the tribunal's decisions that the tribunal's "understanding" of the common law was wrong before and is wrong, now? Not necessarily. It depends on how that misunderstanding affects (if at all) the result of the hearing. The obligation of the panel is to apply, properly, the applicable law, whatever that law is. However, what does it mean if the tribunal believes it is applying the common

law as it was and still is when, even if that belief was once correct, it now longer is? Is that a reviewable error? Would the tribunal decisions have been the same had the panel members understood that what they thought the law was is not the law? See, Ontario WSIAT Decisions No. 794/05R[1271] and Decision No. 361/07.[1272] *Resurfice* was not mentioned in any these decisions. The discussion of the law is pure *Snell-Athey*. *Resurfice* is mentioned in *Graham*, at the paragraph cited, for the proposition upon which *Resurfice* was decided: "the basic and primary test for determining causation is the "but for" test and this applies as well to multiple cause injuries". And, as indicated, a late 2007 WSIAT decision, Decision No. 1471/07, stated that *Resurfice* is part of WSIAT jurisprudence.[1273] However, there is no mention or discussion of *Resurfice* material-contribution in that WSIAT decision. The reference to *Resurfice* is either neutral or the WSIAT missed the meaning of the *Resurfice* material-contribution test.[1274] In any event, the issue in Decision No. 1471/07 was not whether the worker was entitled to benefits even in the absence of proof of factual causation on the balance or probability and the WSIAT found that the employment was a probable factual cause of the injuries.[1275]

The Ontario Insurance Act provides that disputes between insurer and insured may be decided via arbitration.[1276] There is, now, one reported arbitration decision mentioning *Resurfice* in the Financial Services Commission of Ontario database: *Johnson v Axa Insurance*.[1277] The case was argued before *Resurfice*. Plaintiff's counsel argued that the applicable causation test was material-contribution as explained in *Athey*. The arbitrator agreed that that the applicable test was material-contribution as explained in *Athey*. "Although the focus of the inquiry here may be somewhat different than in *Athey*, the basic principles, it seems to me, are the same. In my view, and in keeping with *Athey*, it is sufficient for Mr. Johnston to establish, on a balance of probabilities, that his accident-related impairments caused or materially contributed to his post-accident losses from self-employment."[1278] The arbitrator also held that the crumbling-skull principle *does* apply. The reasons continue:

> If he is able to do so, then, subject to it being established that some or all of his losses would have resulted in any event of the accident, he may recover all losses to which his impairments materially contributed. It is not enough that there may have been other causes contributing to the losses. This is consistent with *Athey*. However, to the extent that it is established, on a balance of probabilities, that market forces or some other cause would have resulted in some or all of the losses sustained by CDI and ICE, *even if the*

[1271] 2007 ONWSIAT 1146 (CanLII).
[1272] 2007 ONWSIAT 1501 (CanLII).
[1273] Decision No. 1471/07, 2007 ONWSIAT 2556.
[1274] 2007 ONWSIAT 2556 at para. 32: "the Tribunal applies common law principles … recently re-affirmed in *Resurfice Corp. v. Hanke*".
[1275] 2007 ONWSIAT 2556 at para. 50: "Having considered all of the documentary evidence … the Panel is persuaded that, on a balance of probabilities, the worker's duties were either the cause or a significant factor in the aggravation of the worker's pre-existing bilateral Achilles tendonitis.
[1276] R.S.O. 1990, c. I.8, ss. 279-284.
[1277] FSCO A04-002670, released February 8, 2008. The FSCO site advises that the deision is under appeal.
[1278] *Ibid*., at p. 45. The arbitrator held that the plaintiff had met that onus: see p. 54

> *accident had not happened*, then, to that extent, an adjustment for those other causes must be made. This too, in my view, is consistent with *Athey*.[1279]

He did not, of course, have the benefit of the Court of Appeal decision in *Monks*. If the trial decision was mentioned by counsel, the arbitrator chose to not mention that.

It seems likely that the appeal will touch on, at least, the arbitrator's understanding of the meaning of material contribution. The arbitrator wrote: "With respect to the case law on what constitutes 'material contribution', it seems clear that the accident need not be the more significant of two contributing factors. In fact, it has been found that an accident materially contributed to an applicant's impairments where the impact of the accident was put at '10 to 20 percent at the most'."[1280] The arbitrator's use of *Resurfice* amounted to a him holding that Resurfice affirmed that Athey material-contribution test, only substituting "impossible" for the plaintiff to prove causation using but-for for *Athey*'s "unworkable". The arbitrator wrote:

> Following the conclusion of the hearing in this matter, the Supreme Court of Canada issued its decision in *Resurfice Corp. v. Hanke*, [2007] S.C.J. No. 7. In *Resurfice*, the Court expressed its concern that Athey has been misinterpreted or in any event misapplied in subsequent cases. The Court reiterated that the "but for" test remains the usual test for legal causation. The "material contribution" test was never intended to replace the "but for" test. Athey had simply clarified that a determination based on "material contribution" would be appropriate where it would be impossible to prove the cause of a plaintiff's injuries using the "but for" test. I did not ask for post-hearing submissions on the impact, if any, of the Resurfice decision on the parties' positions. It is clear, in my view, that it would be impossible, on the facts of this case, to use the "but for" test to determine the cause of Mr. Johnston's losses from self-employment. In my view, the "material contribution" test is the only reasonable basis upon which causation may be determined.[1281]

The arbitrator did not explain why it was impossible to use but-for or even why but-for would have been unworkable. In the result, the arbitrator's understanding of *Resurfice*-material contribution is wrong but that error played no part in the decision in favour of the plaintiff.

In any event, just as the trial judge did in *Monks*, the arbitrator, in fact, made a but-for decision. Just as in *Monks*, the insurer argued that the accident was not a cause of the insured's impairment or the losses resulting from that impairment (his loss of self-employment earnings).The insurer argued that the loss was due to other causes, for example, that his business was already failing and his accident-related impairments played no part in his inability to save it.[1282] The arbitrator preferred the plaintiff's evidence. He concluded: "I am therefore satisfied that Mr. Johnston has established, on a balance of probabilities, that his accident-related impairments materially contributed to his business losses from self-employment, subject, of course, to any evidence that

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[1279] *Ibid*., at p. 45 (italics in original, underliing added). See also p. 54.
[1280] *Ibid*., at p. 46 (internal footnotes and authorities omitted).
[1281] *Ibid*., at p. 41, footnote 48.
[1282] *Ibid*., at p. 49-53.

establishes that some or all of those losses would have resulted even if the accident had not happened."[1283] That, of course, is a decision that the accident was a but-for cause.

Workers' compensation benefits and motor vehicle accident benefits are paid under no-fault accident compensation regimes created by legislation. Assuming that the legislation creating these regimes does not provide the answer, what is the likelihood that a risk-based, rather than factual causation based, analysis of the meaning factual causation, will be imported into the meaning of causation in the enabling legislation? Some guidance may be available in recent decisions of the New Zealand Court of Appeal: see *Accident Compensation Corp. v. Ambros*[1284] and *Atkinson v Accident Rehabilitation Compensation and Insurance Corp.*[1285] The New Zealand Court of Appeal held that the causation requirements of the New Zealand no-fault *Accident Rehabilitation and Compensation Insurance Act* will not be interpreted to mean that the provisions are satisfied by conduct which can be shown only to have increased the risk of the occurrence of the injury that occurred. Rather, the injured person has to prove factual causation on the balance of probabilities. At least part of the rationale for the decision is that the New Zealand regime is not fault-based. Recall that part of the *Resurfice* (and *Fairchild-Barker*) rationale and justification is that the increased risk was the result of wrongful conduct (fault) on the part of the defendant (or a person identified with the defendant) sought to be held liable.

V. More Questions and Commentary

Resurfice is **NOT** entirely another "immaterial contribution" to the collection of Canadian cases dealing with material contribution. It is not immaterial because it has upset the applecart, whatever that cart was before. There was no meaningful content in the Canadian doctrine of material contribution before *Resurfice* - assuming there was any, at all, other than a way to permit judges and juries to duck hard decisions that might produce the dismissal of an action. (Some, of course, will suggest that that consequence is hardly "immaterial".) *Resurfice* is "immaterial" because there is not significantly more now, after *Resurfice*, despite the Supreme Court's restatement of the material-contribution principles. That I hold this view should not come as a surprise to those who have read my spilled ink on the subject.

I will repeat what I have said here, and elsewhere. There is a clear trail of bread-crumbs between what was said in *Resurfice* and McLachlin C.J.'s speech at the John Fleming memorial symposium. The title of the speech is "Negligence Law — Proving the Connection" .[1286]

[1283] *Ibid*., at p. 54.
[1284] [2007] NZCA 304
[1285] [2002] 1 NZLR 374 (C.A.).
[1286] Reprinted in in Mullany and Linden, eds., *Torts Tomorrow, A Tribute to John Fleming* (Sydney, LBC Information Services, 1998), 16.

Resurfice creates a brand new test, content to be determined at the expense of future litigants, within the guidelines of the two general principles outlined in paragraphs 23 through 29. It is not a "relaxed standard" of proof that conduct did cause injury, unless we are equating relaxed with absence of proof of a scientifically-valid connection. It is supposed to be a test for rare, exceptional cases. One problem is that the "unreasonable risk" requirement is satisfied by definition *every time* there is negligence, so long as the conduct could be a cause of the harm that materialized. (Legal theory sometimes calls this "harm within risk"). There cannot be negligence without creation of more risk than existed prior to the conduct alleged to be negligent. In order for the conduct to be negligent, that extra risk must be found to be unreasonable risk. There is no place(yet) between (1) the ordinary risk attached to activity which is not negligent, (2) the quality of the additional risk resulting from the conduct which is required as one of the factor which makes the conduct negligent, and (3) "unreasonable risk" which satisfies the *Resurfice* test.

Another problem is that the "impossibility" standard as explained in *Resurfice* is so broad as to encompass almost every situation where evidence is missing, except perhaps the obvious case where it is clear that the evidence actually exists (or probably could have been proven to exist) but the plaintiff did take the steps required to obtain and introduce it. That is likely not what the Supreme Court meant; but it is not at all clear that the "current limits of scientific knowledge" were meant as a necessary part of the meaning of "impossibility due to factors that are outside of the plaintiff's control." Nonetheless, that broad reach is the effect of what the Supreme Court wrote in *Resurfice*. "Almost everything" is rather an unusual example of rare or exceptional, no?[1287]

Is this too broad an accusation? Consider the cases that *Resurfice* offers as examples of the impossibility requirement. One is *Walker Estate v York-Finch General Hospital*.[1288] The Supreme Court in *Walker* did not consider the case one of impossibility. It specifically held that causation could be established on the facts of the case on a but-for basis (para. 97) however, the proper test for a tort action based on that type of wrongful conduct – "negligent donor screening" – was material contribution (paras. 88 and 97). In addition, the problem in *Walker* had nothing to do with "limits of scientific knowledge" except in a very broad sense. It was the problem of deciding what a person, other than the injured person, would have done or not done – what decisions that person would have made or not made – if presented with different facts.[1289] *Walker Estate* states:

[1287] *B.S.A. v. DSB* is an example of a case where the court thought the evidence could exist

[1288] [2001] 1 S.C.R, 2001 SCC 23.

[1289] This issue, sometimes called "decision-causation" or "decision-related causation" is neatly, nicely and succinctly discussed in Vaughan Black: "Decision Causation: Pandora's Tool-Box" in *Emerging Issues In Tort Law*, eds. Jason Neyers, Erika Chamberlain and Stephen Pitel (Hart Publishing, London, 2007), at pp. 309-330. Black discusses scholarship which suggests that there is something sufficiently unique about causation issues in decision-related causation cases that the but-for test is not appropriate. As Black points out, *Walker Estate*, whatever else it means, asserts that some decision-related causation issues, but not all, are not be susceptible to proper analysis under but-for but have to be handled under different causation test. That issue could have surfaced, in *Walford v. Jacuzzi Canada Ltd*., 2007 ONCA 729 (argued March 5,

> 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 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 the "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.[1290]

And,:

> Although the Court of Appeal declined to interfere with the findings of Borins J. on this issue, there is evidence in the record which demonstrates that the causal link was established. As stated above, the proper test for causation in negligent donor screening cases is whether the defendant's negligence materially contributed to the plaintiff's harm. Even using the strict but-for test, which is not required in these types of cases, causation is proved on the facts.[1291]

In addition, what are we to make of the fact that *Resurfice* uses *Walker* as an example even though *Walker* explicitly holds that *both* the but-for test and the *Athey* version of material contribution were applicable to the *Walker* facts. If there is anything that is clear about the *Resurfice* version of material contribution, it is that it applies only to facts to which the but-for test *does not* apply. If but-for is applicable, material contribution is irrelevant.

Cook v. Lewis[1292] is the other case that *Resurfice* offered as an example fitting its "impossibility" requirement. Indeed, in 2002, the Supreme Court had used "impossibility" in describing the circumstances in which the *onus-reversal* rule in *Cook v. Lewis* applies. In *St- Jean v. Mercier*, the Supreme Court stated: "It should only be applied in cases where there is a true impossibility to determine the author of the delict."[1293]

2007; reasons released October 23, 2007), reversing 2005 CarswellOnt 1392, [2005] O.J. No. 1376, 2005 CanLII 11188 (Ont. S.C.J.) which is a paradigm of the decision-related causation case. In *Walford*, the Ontario Court of Appeal had no problem applying the but-for test to a case where, under the facts as found by the Court, causation and liability depended on what a person other than the injured plaintiff (her mother) would have done if the defendant had not been negligent (in the advice given to the mother); that is, if the defendant had properly warned the third person (the mother) about the risks related to the use of an object which the mother planned to purchase (from yet another person) for use by daughter (the injured person). The Court of Appeal held that the incident would not have occurred but for the failure of the defendant to properly advise the mother about risks relating to the use of an object. The Court of Appeal held that the trial judge ought to have accepted the mother's evidence that she would not have bought the object had she been given proper advice. If she had not bought the object, it could not have been used by the injured person and the incident would never have occurred.

[1290] *Walker Estate*, para. 88.

[1291] *Walker Estate*, para. 97.

[1292] [1951] S.C.R. 830.

[1293] *St-Jean v. Mercier* at para. 120.

It is correct to describe *Cook* as an impossibility case only if it is correct to say that there could be no relevant evidence other than that obtainable through science. However, there was never any suggestion in *Cook*, itself, that it was necessarily the case that the required evidence was not available. *Resurfice* describes *Cook* as an example of "the situation where it is impossible to say which of two tortious sources caused the injury, as where two shots are carelessly fired at the victim, but it is impossible to say which shot injured him." (*Resurfice,* para. 27): However, we do not know if that was, in fact, the case as the case was sent back for a new trial. We do not know if the evidence might have once existed. We do not know if, while it might be correct that the limits of then science could not relate bullet to gun by anything about the gun or bullet, themselves, there might have been other circumstantial evidence that might have eliminated one of the two hunters.

In any event, it is important to realize that Cook v. Lewis is an example of alternative causation. It had to be one or the other of the hunters. It could not be both. If material contribution is used in an alternative liability scenario, it is used to as a basis for ***imposing*** *liability on a person even though that person's conduct was not, in fact, a factual cause.*

Next, what about those cases were the evidence was once obtainable? Does it matter why that evidence is no longer obtainable? *Resurfice* says "factors that are outside of the plaintiff's control". That, clearly, eliminates cases where the absence of the evidence that could have existed is, in some relevant sense, the "fault" (responsibility) of the injured person or otherwise considered the injured person's failure. There may be cases where the absence is due to the wrongdoer's conduct. (That is how Rand J. described the problem in *Cook*.) However, there will be cases where the evidence might once have existed but its absence at trial is not due to any sort of misconduct attributable to injured person or defendant. We need not go as far as alien abduction. It might be that neither side knew of the possible existence of this evidence until it was too late, and one cannot say that the plaintiff ought to have known. What then? Is that not a factor outside of that plaintiff's control? Yet, this means the evidence existed.[1294]

In short, the "general principles" that the *Resurfice* offers at the least conflate the questions involved in the empirical issue of causal contribution and the normative issue of legal responsibility. **The Supreme Court's new test does not determine when factual causation exists. It determines when liability may or will be imposed, even in the absence of sufficient evidence to permit a valid conclusion of causation.** The *Resurfice* general principles do more than make causation virtually redundant where the Resurfice "unreasonable risk" based version of material contribution applies. They make it completely redundant as between the plaintiff and a specific defendant, always assuming the evidence is there to establish that that defendant's misconduct could have caused the type of harm suffered by that plaintiff.

Negligence is, by definition, the creation of unreasonable risk. Consider these comments about *Resurfice* by Professor Russ Brown in Hegemony.

[1294] See *Bowes v. Edmonton (City)* 2007 ABCA 347. This paragraph was written before *Bowes*.

> *Hanke* appears to represent the evolution of "material contribution" into a generic and comprehensive alternative applicable to all cases where the plaintiff cannot demonstrate probable cause under the but-for test.[1295]
>
> *Hanke*'s express reference to duty considerations in determining how to adjudicate causation amplifies a misplaced and (given *Cooper v. Hobart*) superfluous "policyization" of causation whereby policy considerations pertinent to duty ... bleed into and affect determinations of factual causation. In short, the inquiry is no longer whether the defendant caused the plaintiffs injury, but whether liability is "fair" in the circumstances.[1296]

Professor Brown had, earlier, elsewhere, summarized this aspect of his views.

> But lest this detract from my principal point, let me just reiterate – in *Hanke,* we seem to see the evolution of "material contribution" into a generic and comprehensive alternative applicable to all cases where the plaintiff cannot demonstrate actual causation to the but-for standard. As such, the requirement of causation is now virtually redundant, and indeed appears to have been expressly absorbed into *Hanke* by that normative, policy-laden duty of care inquiry.[1297]

Do we now have categories of negligence that trigger this new doctrine, only some of which create an unreasonable risk which is unreasonable enough to trigger the *Resurfice* doctrine? Should we be unearthing our typologies of negligence? Does anybody remember where they buried their crypt containing the corpse of the "negligence - gross negligence" distinction?

By the way, an argument could be made that *Resurfice*'s facts fit the impossibility standard as explained by the Supreme Court.[1298] A bit O'Henryish, no?

Many of us will appreciate the Supreme Court's consideration in sparing us the pages of discussion of doctrine that one finds in, say, the House of Lords decisions in *Barker v. Corus*, *Fairchild v. Glenhaven*, *Chester v. Afshar*[1299] and *Gregg v. Scott*.[1300] Still, if the Supreme Court was going to undertake to make any comments at all, it should have been done better; or not at all.

A obvious problem, in light of *Barker* and *Rizzi*, at least to a litigator, is how we – lawyers and judges - in Ontario, are supposed to decide what it is that that *Resurfice*

[1295] *Hegemony*, at 433.
[1296] *Hegemony*, at 445 (internal footnotes and quotation marks omitted).
[1297] On "The Court" at http://www.thecourt.ca/2007/02/15/resurfice-v-hanke-scc-places-limits-on-material-contribution-test/#comment-1910 . "The Court" is Osgoode Hall Law School's blog on the Supreme Court of Canada.
[1298] This sentence was written before *Bowes v. Edmonton (City)*. The view of of *Resurfice* applied by the majority of the Alberta Court of Appeal in *Bowes* would seem to apply to the facts of Resurfice, particularly if there was evidence as to any aspect of the design procedure that was no longer available due to the passage of time. This may be one more reason to conclude that the majority's understanding of *Resurfice* on material-contribution is wrong.
[1299] [2005] 1 AC 134, [2004] UKHL 41.
[1300] [2005] 2 AC 176, [2005] UKHL 2.

decided in order to advise our clients or decide cases. We will have to ask ourselves at least these questions.

1. Do we rely on what the Supreme Court actually said in *Resurfice*?

2. Do we rely on what *Barker* and *Rizzi* and *Vescio* say the Supreme Court said? Paraphrasing from the classic Dustin Hoffman / Sir Laurence Olivier movie "Marathon Man", "is it safe" to rely on what *Barker* and *Rizzi* say the Supreme Court said?[1301] Or, will this precipitate an appeal? Plagiarizing myself: "Years earlier, another judge of the Ontario Superior Court made the pointed and poignant observation that it 'ignores reality' to expect that a trial judge will use very technical principles of *stare decisis* to avoid applying what seems to be the Court of Appeal's current thinking on some issue of law, even if it is expressed as an obiter comment." See, Krever J., as he then was, in *Woloszczuk v. Onyszczak*.[1302] More recently, in *Authorson v Canada (Attorney General)*,[1303] the Court of Appeal took issue with a trial judgment which the Court stated "fails the reality test" [1304] and was "revisionism".[1305] Or, borrowing explicitly from *Authorson*,[1306] can we say that the *Barker and Rizzi* propositions are "a blatant case of revisionism" that should have been "dismissed … out of hand"? As it is, these decisions on the meaning of *Resurfice* will result in "years of unnecessary litigation and an unfortunate drain on scarce judicial resources." What is sauce for the goose *is* … *etc*., no?

3. Do we rely on *Cottrelle* or *Aristorenas* – "is it safe" – or will this, too, precipitate an appeal?

4. Is there a conflict between *Resurfice*, on the one hand, and *Rizzi, Barker, Aristorenas, Cottrelle* on the other and, if so, who has the last word – or, as Humpty Dumpty put it, who is to be master? In *R. v. McKibbon*,[1307] the trial judge was asked to conclude that a recent Supreme Court of Canada decision had necessarily overruled an earlier, otherwise applicable, Ontario Court of Appeal decision. The judge wrote, in part, that until the Court of Appeal "says that its decision has been overruled by the Supreme Court of Canada decision … or until the Supreme Court of Canada says so, it is my view that the course of prudence for a Judge of this Court is to follow the decision of the Ontario Court of Appeal."

5. How much extra risk is "unreasonable risk"?

[1301] Probably not, in light of the subsequent aside from the Court of Appeal in *Misko v. Doe*, even if the aside is buried in a footnote.
[1302] (1977), 14 O.R. (2d) 732 at 739, 74 D.L.R. (3d) 554 (H.C.J.).
[1303] 2007 ONCA 501.
[1304] 2007 ONCA 501 at para. 163.
[1305] 2007 ONCA 501 at para. 48.
[1306] 2007 ONCA 501 at para. 48.
[1307] (1981), 61 C.C.C. (2d) 126 at 128, 34 O.R. (2d) 185 (H.C.J.), affd 64 C.C.C. (2d) 441, 35 O.R. (2d) 124 (C.A.).

6. What is the standard of proof for the *Resurfice* version of material contribution; that is, the level of certainty that the faulty conduct materially increased the risk? Is it more likely than not – the balance of probability? Or is it something less; that is, possibility? If the latter, how, for lack of a better word, substantial must the possibility be?

7. *Resurfice* says nothing about any quantitative or qualitative threshold for sufficient possibility. How much of an increase in risk is a material increase? Is a "greater than *de minimis*" increase material by definition? Recall that the statement about the standard in proof, in *Resurfice*, may be read as being only in relation to the but-for test: "[t]he rules of causation consider generally whether 'but for' the defendant's acts, the plaintiff's damages would have been incurred on a balance of probabilities."[1308]

8. We have to assume that the *Resurfice* material-contribution doctrine will apply to cases where there is more than one negligent person and permit the court to impose liability on more than one defendant using that doctrine. Are these multiple defendant/wrongdoers solidarily (jointly) liable or proportionally (severally) liable? That is, is each liable for the whole of the plaintiff's award or only the percentage by which the particular defendant increased the risk? As to this, see *Barker v. Corus (UK) Plc*[1309] and *Fairchild v Glenhaven Funeral Services Ltd.*[1310] If the Supreme Court thought it appropriate to introduce a risk-based test for factual causation, why do this without giving Canadian courts any guidance on the joint (solidary, *in solidum*) liability, proportional (several) liability, apportionment, and contribution questions?[1311] Why force the audience to litigate these issues on a blank canvas?[1312] Some readers will know that *Barker v Corus* held that liability under the *Fairchild-Barker* exception is proportional (several), not joint (solidary, *in solidum*). This decision was subsequently

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[1308] *Resurfice*, para. 22.

[1309] 2006 UKHL 20.

[1310] 2002 UKHL 22.

[1311] See, infra, Part IX "Joint Liability and Several Liability, Briefly". See, also, *Risk As Legal Causation*", supra, Part III, "Solidary (Joint) or Proportional (Several) Liability" (LSUC Special Lectures, April 2008, URL _____). See, also, "Joint Liability and Several Liability: Show Me The Principle But Hold The Metaphysics", http://www.bbburn.com/articles/cba_apr2006rev2007.pdf.

[1312] The Canadian slate might not be completely blank. *Laferrière* v. *Lawson*, [1991] 1 S.C.R. 541 at 606 appears to assert that possibilistic causation, if it is ever adopted, should be associated with proportional liability not solidary liability. Justice Gonthier wrote: "*If the chance itself is compensated, however, damages will only be measured according to the level of probability*. If the actual damage which has been caused is compensated, then the full value of the actual damage will be accorded." (emphasis added). If the Supreme Court panel is hoping a certain author will write something sufficiently useful about that subject, so that they will not have to work through the issues themselves, they should not hold their breath, collectively or individually.

overruled by statute in respect of mesothelioma claims: United Kingdom legislation, the *Compensation Act 2006*, 2006, c. 29.[1313]

9. If the defendants are solidarily (jointly) liable (each liable for all of the damages awarded, not just their individual "shares") on the basis of *Resurfice*, what is the basis for apportionment as between them for contribution purposes? The Supreme Court would have had to deal with the problem in *Resurfice* had it held both defendants liable on the basis of the new material contribution doctrine. After all, the underlying premise of their liability is that they have been each held liable for the injury notwithstanding that the evidence is not sufficient to permit a valid conclusion that the conduct of either was a cause of the injury. Canadian apportionment legislation (for contribution between wrongdoers and injured person's contributory fault) requires that tortious conduct of the two or more tortfeasors be causes of the injury, even though the apportionment is done on the basis of comparative blameworthiness. (Some event which "contributes to the occurrence of the injury is a cause of the injury. Trust me on this one, too. I wrote a book about the subject once upon a time and some more words more recently.) What about apportionment between person held liable whose conduct has been found to be a cause based on but-for and another who has been held liable based on *Resurfice's* material contribution? How will that work? Does the blameworthiness approach still work? It might in some cases.[1314]

10. Does the *Resurfice* material-contribution test apply to the injured person's conduct too? It is difficult to see a principled basis for any conclusion that it does not.

11. Just as in the apportionment for contribution purposes, how does one apportion for contributory fault as between injured person and wrongdoer held liable where the contributory fault is "only" conduct that increased the risk and the negligent conduct of the defendant held liable again "only" conduct that increased the risk. Again, it seems that the blameworthiness approach might work. However, the apportionment legislation also refers to conduct of the injured person which caused or contributed to the injury.

12. Expanding a question I listed in the but-for section. The first threshold in the *Resurfice* material-contribution test is the requirement that the evidence required to establish causation on a but-for basis does not exist due to factors outside of the plaintiff's control? Does that mean that a case where the evidence could have existed, but if so it was destroyed by others will not be a but-for case,

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[1313] The legislation and related material can be found at the following web sites, as of Oct. 30, 2007. The first URL is the link to the legislation itself. The other links are to explanatory material.
http://www.legislation.gov.uk/acts/acts2006/pdf/ukpga_20060029_en.pdf
http://www.legislation.gov.uk/acts/en2006/ukpgaen_20060029_en.pdf
http://www.opsi.gov.uk/acts/en2006/2006en29.htm
http://www.opsi.gov.uk/si/em2006/uksiem_20063259_en.pdf

[1314] As to the apportionment problem, generally, see J Stapleton, "Lords a'leaping Evidentiary Gaps" (2002), 10 Torts L.J. 276.

even if it would be if the evidence had not been destroyed? What are the parameters of the "the impossibility must be due to factors that are outside of the plaintiff's control" requirement? In particular, what does "outside of the plaintiff's control" mean? Is that an objective test? A subjective test? What is the date as of which the court is to decide if the absence of evidence was due to factors outside of the plaintiff's control?

13. Are the current limits of scientific knowledge in the requirement that the "impossibility must be due to factors that are outside of the plaintiff's control; for example, current limits of scientific knowledge" a necessary condition or merely an example? If it is merely an example, is there a defining characteristic that must exist for the situation to be one that is outside of the plaintiff's control? What other limitations might apply to this aspect of the *Resurfice* requirements? *Fairchild* sets out a host of requirements which have to be met before the English version of the *Resurfice* material-contribution is applicable. Which, if any, of these conditions will became part of the *Resurfice* version? This is an aspect of the fact that the *Fairchild-Barker* version of material contribution is limited to industrial disease cases, or perhaps extends to medical negligence.[1315] That restriction is certainly not part of *Resurfice*: the use of *Cook v. Lewis* as an example of "impossibility" is proof enough.[1316]

14. Where do we now put duplicative-causation (overdetermined) harm? In which of the but-for or *Resurfice* material-contribution categories? Duplicative-causation (overdetermined) harm exists where the harm can be said to have been caused by two or more independent (of one another) events or series of events.[1317] We do not have any gap in the evidence making it impossible to determine the relationship between the events and the harm. That seems to make the *Resurfice* version of material-contribution inapplicable. However, a literal application of the but-for test produces the answer that none of the independent events are but-for

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[1315] United Kingdom judges seem to have no trouble noting this restriction. Plaintiffs' counsel seem less inclined to pay attention to it. See, for example, *Bye v. Fife Council* [2006] ScotSC 100 at para. 32, released 27 December 2006.

[1316] Consider this one in the mass tort context where we have the so-called "indeterminate defendant" problem. That label is used for the situation where the harm was caused by at least one person in a defined class, but not all, but the current limits of scientific knowledge do not allow us to identify which person or persons. Thus, the indeterminate defendant situation, by definition, satisfies the "impossibility" requirement of *Resurfice*. There is more discussion of other issues arising from the "current limits of scientific knowledge requirement in the discussion of *Sam v Wilson* in the British Columbia section of Part III Material Contribution.

[1317] Duplicative means that one all of the events or series of events co-exist and any one of the events or series of events could be a cause even if the other event or series of events did not exist. If the existence of any one event or series of events (A) pre-empts (prevents / precludes) another event or series of events (B) from being a cause, then (A) and (B) are not duplicative: Richard Wright, "Causation in Tort Law" (1985) 73 California Law Review 1735; see also Wright at < http://www.ali.org/ali/AM05Wright.htm >, accessed August 11, 2007: "whether each potential cause was indeed a (duplicative) factual cause or, instead, one was a (pre-emptive) factual cause while the other was not a factual cause but rather was a pre-empted condition — a condition that would have been a factual cause in the absence of the other condition but the causal effect of which was cut off or pre-empted by the other (actually causal) condition."

causes because there always another sufficient cause. Do we have a hidden meaning for "impossible" that applies to this conundrum of logic? Or, are the duplicative-causation cases a (for want of a better term, here) "special application" of the but-for test?

15. What did the Supreme Court mean by stating that the Alberta Court of Appeal "*further erred* in applying the material-contribution test in circumstances where its use was neither necessary nor justified"?[1318] The Supreme Court held that the Alberta Court of Appeal was wrong because the but-for test applied. Obviously, that test could apply only if it was capable of producing a valid answer that there was or was not factual causation. That, then, necessarily means that the use of the Athey material-contribution test "was neither necessary nor justified". Does the phrase as a whole add anything? Can it add anything either than a pro-plaintiff emphasis? Do each of "not necessary" and "not justified" mean something different when applied to the facts of *Resurfice*? As indicated, the meaning of "not necessary" is clear enough. It means that the but-for test applied and it could have produced a pro-plaintiff finding if there had been negligence in the design of the machine. What, then, does "not justified" add? Does "not justified" simply mean "not justified because it was not necessary because the but-for test applied", in which case "not justified" is superfluous ? Or does it mean something else? If so, what?

16. The causation inquiry determines both who (which defendants) and what (what conduct). Is the same test to be used for both questions? Or, since we now have two different tests for factual causation, will there be situations where but-for is used to answer one question and material contribution the other? This seems to be a question that could arise frequently in mass tort claims. Is there principled reason (other than practicability) for saying no?

17. May a case where the causation test is material contribution ever be tried with a jury? If so, what portions of inquiry required to establish whether the two general principles asserted by *Resurfice* – the impossibility of valid use of the but-for test and the materialization of foreseeable harm within the risk – will be for the jury to decide and what portions for the judge?

18. And, as ever, the kicker: what advice do we, as lawyers, give our clients?

On some of these questions, we have the recent advice of the Supreme Court on *stare decisis*, *ratio*, *obiter dicta*, and the binding or persuasive status of its *obiter* pronouncements on matters of law. A valid argument can be made that all of the comments in *Resurfice* about the meaning of the material-contribution test were *obiter*, since the Supreme Court's decision that the but-for test applied, and why it applied rather than the material-contribution test, made it unnecessary for it to say anything more about material contribution. There is nothing in the explanation as to why but-for applied that tells us anything about the meaning of material contribution. On the other hand, the

[1318] *Resurfice*, para. 29 (emphasis added).

discussion of material contribution is so general and brief that it is impossible to tell if the Supreme Court thought the discussion necessary to its but-for analysis.

The discussion appears in the Supreme Court's reasons in *R. v. Henry*.[1319] Binnie J. dealt with the dictum that "a case is only an authority for what it actually decides", which leads to the question of how we decide what it is the case actually decided: more to the point, how we are to decide what it is the Supreme Court said that is binding on inferior courts, what is safe for inferior courts and lawyers to ignore, and what we ignore at our clients' or the litigants peril. He wrote:

> The issue in each case, to return to the Halsbury question, is what did the case decide? Beyond the *ratio decidendi* which, as the Earl of Halsbury L.C. pointed out, is generally rooted in the facts, the legal point decided by this Court may be as narrow as the jury instruction at issue in *Sellars* or as broad as the *Oakes* test. All obiter do not have, and are not intended to have, the same weight. The weight decreases as one moves from the dispositive *ratio decidendi* to a wider circle of analysis which is obviously intended for guidance and which should be accepted as authoritative. Beyond that, there will be commentary, examples or exposition that are intended to be helpful and may be found to be persuasive, but are certainly not "binding" in the sense the *Sellars* principle in its most exaggerated form would have it. The objective of the exercise is to promote certainty in the law, not to stifle its growth and creativity. The notion that each phrase in a judgment of this Court should be treated as if enacted in a statute is not supported by the cases and is inconsistent with the basic fundamental principle that the common law develops by experience."[1320]

Under *stare decisis,* a basic rule is that comments on legal issues that are not part of the *ratio decidendi* are *obiter*. They are not binding, merely persuasive, as between judges at the same level of hierarchy in subsequent cases. However, considered pronouncements by appellate courts are treated a bit differently. Remember "the big pecker, little pecker" analogy? "Where an appellate court expresses a deliberate and considered opinion on a point of law then such ruling is binding on the lower courts even though it was not absolutely necessary to rule on the point in order to dispose of the appeal." In *R. v. Popovic (Askov)*, the Ontario Court of Appeal stated: "Such a deliberate and considered pronouncement intended to be acted on in the trial of a subject cannot be regarded as *obiter* and is binding."[1321]

As I mentioned, *Resurfice* does not tell us whether the liability of two or more defendants held liable for the same harm under the *Resurfice* version of material contribution is joint or proportional (several). It is safe to assume that the Supreme Court is up to speed on the recent UK decisions, including *Barker v. Corus* and *Fairchild.* That

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[1319] 2005 SCC 76 at paras. 53-57, [2005] 3 S.C.R. 609.
[1320] 2005 SCC 76 at para. 57.
[1321] (1974), 3 O.R. (2d) 23 at 36 (C.A.), affd [1976] 2 S.C.R. 308, 62 D.L.R. (3d) 56. See, also, P.M. Perell, "Stare Decisis and Techniques of Legal Reasoning and Legal Argument", online at www.legalresearch.org/docs/perell.html, at the text that relates to footnote 33.

means the Supreme Court was well aware of what the House of Lords said in *Barker* about the consequence of the UK version of the *Resurfice* material-contribution test: proportional liability. That result was then overruled by statute in the *Compensation Act 2006* (UK). *Resurfice* says nothing about any aspect of the joint or proportional liability issue and any aspect of apportionment. The apportionment issues include both contributory fault by the injured person and contribution between the wrongdoers where there is more than one wrongdoer held liable, as there would have been, *probably*, in *Resurfice* had the defendants been held liable.

Here are two rhetorical questions. Did the Supreme Court intend the issues I have mentioned to be argued on a *tabula rasa* from first instance, without any guidance from it? If so, why?

VI. Class Actions and Causation

First, everybody go to their local law bookstore, order and read J. Cassels and C. Jones, The Law of Large-Scale Claims: Product Liability, Mass Torts, and Complex Litigation in Canada.[1322] Failing that, at least get read J. Cassels & C. Jones, "Rethinking Ends And Means In Mass Tort: Probabilistic Causation And Risk-Based Mass Tort Claims After Fairchild v. Glenhaven Funeral Services".[1323]

In a hypothetical world, if something fundamental were changed – so that F only sometimes equals MA and other times it equalled XA; and one used XA when, for some relevant reason, one could not determine the value of MA – then a brave scientist trying to determine if it would be safe to stand in front of a large, on-rushing bus, might have to do two calculations in order to be certain. That scientist, were he standing in front of the bus whilst performing those calculations, might decide that it would be better to move out of the way, just in case there was not time to do both; just in case it was not safe under the applicable test. Or, just in case the statistically-derived "yes: it is probably safe" answer turned out to be right, but only statistically. Mark Twain once wrote that there are "lies, damned lies, and statistics."

In this world, fortunately for judges, systems of law are not like science. Law can, apparently, have its own self-contained universes working on rules that are completely unaffected by changes elsewhere in the system; even some that, at least to the outsider, would seem at least somewhat connected. In any event, as we know, law is not science and law is not bound by the laws of science, so judges (and lawyers, whence come judges) apparently do not have to ask themselves if something fundamental changed (even if it has) as they stand in front of the bus.

Now that that is out of the way, it is worth asking whether any of the Supreme Court panel, before they signed on to the *Resurfice* reasons, asked themselves anything

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[1322] Toronto, Irwin Law Inc., 2005.

[1323] (2003) 82 Can. B. Rev 598. The article may be downloaded by members of the Canadian Bar Association from the online version of the Canadian Bar Review.

that might have in anyway involved any part of this question: "how will anything we say here affect the law applicable to the mass torts claims, in or outside of class actions, that are coming up the legal pipe or that I might have to decide before I am required to retire at age 75?" My impression is that nobody did. If anybody did, it was not done adequately. That is because there is no indication, in the *Resurfice* reasons, that the Supreme Court considered the complexity and consequences of applying either orthodox but-for or *Resurfice* material contribution to, at least, mass tort claims where we have either or both of the indeterminate plaintiff and indeterminate defendant problems. I suggest that if they had, there'd have been some sort of caveat; maybe even some more spilled ink. As Craig Jones has pointed out, the necessary consequence of a literal application of orthodox but-for to mass tort claims is likely to be under-compensation and under-deterrence.[1324] On the other hand, a few moments of thought should lead us all to conclude that an inevitable consequence of *Resurfice* material-contribution is over-compensation and over-deterrence. (Over-compensation for the lawyers acting, too, but that is a good thing, right?)[1325]

My point is that if *Resurfice* has changed causation law – it should, by now, be obvious even to the most recalcitrant member of the legal profession – then the courts will have to consider whether and how those changes affect class action certification jurisprudence. *Resurfice* has at least established that we have two, mutually exclusive tests, one of which will determine whether the plaintiff is able to satisfy the legal causation requirement in tort actions and many (perhaps all) of the other causes of action. On a certification motion, on the "cause of action" issue, will the courts have to make a decision as to which test is more likely to be the applicable test? It would seem that, under the plain and obvious requirement, it should be sufficient for the class to show that it is not plain and obvious that the cause of action would fail or either o the *Resurfice* material contribution tests. I assume that, at the least, a decision will have to be made as to whether the material-contribution test could apply, at all, given that the but-for test is the default test. In addition, the applicable test probably has at least some relevance to the proper answer to some of the other certification criteria – at least the definition of the class, and the questions of sufficient common issues and preferable procedure.

I end with this question. If material-contribution as now defined by *Resurfice* is an available test for proof of the causation requirement in cases where fault has been established, is there any logical (principled) basis upon which the plaintiff **could ever be held to have failed** to establish causation on a *Resurfice* material-contribution basis,

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[1324] Cassels & Jones, "Rethinking Ends And Means In Mass Tort: Probabilistic Causation And Risk-Based Mass Tort Claims After Fairchild v. Glenhaven Funeral Services" at ____

[1325] This is for people (lawyers and others) who read footnotes. How would you like a Canadian class action that cannot lose, so long as (1) you have at least one defendant with enough money; (2) the final appellate court does not find some "policy" reason to dismiss the action; (3) and, the law does not change before you get your final judgment and collect. All you need to do is find a deep-enough pocket defendant who is part of an "indeterminate defendant" group of tortfeasors and an appropriate representative plaintiff. The "indeterminate defendant" label is used for the situation where we know that the harm was caused by at least one person in a defined group, but not all of the members of the group, but the current limits of scientific knowledge do not allow us to identify which person or persons. Thus, the indeterminate defendant situation, by definition, satisfies the "impossibility" requirement of *Resurfice*.

individually or collectively, in the mass tort type of case exemplified by *Heward v. Eli Lilly & Company*.[1326] *Heward* is an example of a variation of the "indeterminate plaintiff" rather than "indeterminate defendant" mass tort claim. It is probable that use of the drug injured at least one of the members of the class of plaintiffs. What may be impossible to prove on a probability basis, because of the current limits of science, is that the drug probably injured all of the plaintiffs in the class, even if it can shown that the drug probably injured one or more of the plaintiffs.

Certification: Causation, Common Issues and Preferable Procedure

In this section, I consider the effect that the *Resurfice* material-contribution test should have on the certification of class actions in Ontario, and by extension the provinces and territories in Canada that have class action legislation.[1327]

I suggest that, in cases where fault has been admitted or is not likely to be contested in the trial of the merits, the applicability or potential applicability of the *Resurfice* material-contribution test should make it more likely that the courts will find that causation of injury issues are common enough to not prevent certification. This, in turn, should make it more likely that the certification motion will succeed.

The class action is, currently, the only practicable way to manage "mass tort"[1328] claims; that is, the situation where a large number of people suffer the same type of injury as the result of the same or legally equivalent conduct of more than one person and wish to sue for recompense collectively rather than individually. The *Resurfice* material-contribution test, where applicable, should reduce the likelihood that the certification court will find that causation presents common-issue problems. Where the test applies, it would be easier for the individual plaintiff to prove causation. Therefore, it must easier for the plaintiff class to satisfy the causation requirement for certification.

Where the loss claimed by the class is damages of some sort, whether on account of personal (physiological or psychological) injury, or property damage, or "pure" economic loss unrelated to underlying personal injury or damage, and *Resurfice* material-contribution test is the applicable test for the determination of the causation aspect of the cause of action, there will always be sufficient commonality and the class action will always be the preferable procedure, because causation is not an issue. The only issue is damages assessment. That will not be enough to prevent certification.[1329]"

Consider what Professors Cassels and Jones wrote about *Fairchild v. Glenhaven Funeral Services*.[1330] *Fairchild* is the United Kingdom's analogue to *Resurfice*.

[1326] 2007 CanLII 2651 (Ont. S.C.J.), leave to appeal granted 2007 CanLII 26607 (Ont. S.C.J. Div. Ct.) [*Heward*]. If, as I think at the moment, the answer is no, then leave to appeal should not have been granted.
[1327] For example, the *Class Proceedings Act, 1992,* S.O. 1992, c 6.
[1328] There are often other causes of action, too. However, the commonly used label is "mass tort".
[1329] The *Class Proceedings Act, 1992*, s. 6.1
[1330] *Fairchild v Glenhaven Funeral Services Ltd*., [2002] UKHL 22, [2003] 1 AC 32. See also *Barker v. Corus (UK) Plc.*, [2006] UKHL 20, [2006] 2 AC 572.

> A thoughtful application of the *Fairchild* principles to mass torts will permit a more efficient use of the justice system and better ensure that the true costs of harmful activities are internalized by the defendant ... [and] such an approach is, in the unique context of the mass tort, completely congruous with moralist, as well as economic, analyses of the purposes of tort law.[1331]

In short, Professors Cassels and Jones assert that applying the *Resurfice* material-contribution-to-risk test in class actions to permit the actions to pass certification[1332] is consistent with both the rationales for the class action procedure and tort law. Professors Cassels and Jones also wrote:

> Mass torts present both unique problems of causation and also unique opportunities for dealing with causal indeterminacy in a principled and effective way. Ideas of 'probabilistic causation', inherently difficult in individual cases, begin to make sense when harm is viewed in aggregate populations. Indeed, it is in mass tort claims where the most interesting innovations in causation analysis can be expected."[1333] "[D]ealing with large-scale claims on a probabilistic basis may require more than procedural innovations and advanced methods of proof of causation. In fact, it may require that we re-examine the necessity of establishing precise causal connections between plaintiff and defendant *at all*.[1334]

In this respect, it is important to remember that the *Resurfice* version of the risk-based material-contribution test is not, at least currently, as limited in its scope of application as is the *Fairchild* version.[1335]

Where the *Resurfice* material-contribution test is the applicable test for the determination of the causation aspect of the cause of action, there should all always be sufficient commonality for certification, and the class action will always be the preferable procedure, because both fault and injury-causation will not be an issue. It is a precondition to the application of *Resurfice* material-contribution that the defendant be found to have breached a duty owed to the plaintiff; that is, that the defendant be at fault and that the fault could have caused the type of injury actually suffered by the plaintiff.[1336] After that? "[I]f the plaintiff's only obstacle to recovery is causation, then

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[1331] Craig Jones and Jamie Cassels, "Rethinking Ends And Means In Mass Tort: Probabilistic Causation And Risk-Based Mass Tort Claims After *Fairchild v. Glenhaven Funeral Services*" (2003) 82 Can. B. Rev 598 at 600-01 (internal footnotes omitted).

[1332] And, implicitly, settle with substantial enough payments to the class or succeed on the merits.

[1333] Jamie Cassels and Craig Jones, *The Law of Large-Scale Claims*, at 205.

[1334] *Ibid.*, at 204 (emphasis in original). "Probabilistic" is used in the sense of "possibilistic"; that is, even a probability percentage which is *not* greater than 50% may be sufficient.

[1335] See Brown, *Hegemony*, at 448 at footnotes 77-78; Black and Cheifetz, *Looking Glass*, *supra, footnote* 5 at 253; and, as to *Fairchild*, see Jane Stapleton, "Lords a'Leaping Evidentiary Gaps" (2002) 10 Tort L. J. at pp. 293-94. *Resurfice* is not a large-scale claim or a class action. There is nothing whatsoever in the reasons that suggests that court gave any particular consideration to the problems of proof of causation in these actions. However, one of the examples cited – the *Walker Estate* example derived from negligent screening of blood donors (*Resurfice,* para. 28) – could easily produce a class action.

[1336] *Resurfice,* at para. 25.

causation is no obstacle".[1337] If fault is not an issue, and causation is not an issue, the only remaining issue is damages.

There is a distinction between causation of injury and causation of the losses that are the consequences of the injury.[1338] Future damages are assessed on possibility, not probability.[1339] Causation, then, is also an issue in damages assessment; however, the individualistic aspects of damages assessment cannot, as a matter of statute, be sufficient of themselves to form a basis for denying certification.[1340]

There are instances in which it is probable that the type of injury suffered by a person could have been caused by the tortious conduct of one or more wrongdoers. However, for some relevant reason, other than the mere failure to gather the relevant evidence which does exist or could have existed, the injured person is unable to show, on the balance of probabilities, which wrongdoer or wrongdoers it was. This would be an insurmountable hurdle for an action in tort under an orthodox application of either the but-for test or the *Athey* material-contribution test. As indicated, under these tests, the injured person must establish, on the balance of probability, that the wrongful conduct "actually caused the loss complained of."[1341]

This problem is commonly present in class actions which assert what are commonly known as mass tort claims, whether the problem is because there is more than one wrongdoer whose tort could have been the cause of the injury, or there are potential causes other than the tort for the injury. In *Harrington v. Dow Corning Corp.*,[1342] the British Columbia Court of Appeal wrote: "... modern methods of mass production and distribution often make it difficult or impossible to identify the exact source or sources of injury, to link a particular victim to a particular defendant, and to demonstrate accurately the harmful effects of a defendant's act other than on the basis of epidemiological studies and statistical probabilities. Class proceedings were designed with precisely these uncertainties in mind."[1343] There will be something inherent in the factual underpinning of the cause of action – either or both of the relationship between the injured person and one or more of the wrongdoers and the mechanism of factual causation – that necessarily creates causal uncertainty as to the issue of whether a particular defendant's tortious conduct was a cause of the particular defendant's injury, even after it is adequately established that that sort of misconduct by somebody could have caused the particular plaintiff's injury. The problem may exist whether the harm is personal injury

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[1337] Brown, *Hegemony*, at 445.

[1338] "It is important to distinguish between causation as the source of the loss and the rules of damage assessment in tort". *Blackwater v. Plint,* [2005] 3 S.C.R. 3 at para. 78, 2005 SCC 58.

[1339] *Athey*, at para. 27.

[1340] The *Class Proceedings Act, 1992*, s. 6.1 provides: "6. The court shall not refuse to certify a proceeding as a class proceeding solely on any of the following grounds: 1. The relief claimed includes a claim for damages that would require individual assessment after determination of the common issues."

[1341] *Stewart v. Pettie*, *supra*.

[1342] 2000 BCCA 605, 193 D.L.R. (4th) 67.

[1343] *Ibid.*, at para. 40. See also Jaime Cassels & Craig Jones , *The Law of Large-Scale Claims: Product Liability, Mass Torts, and Complex Litigation in Canada* (Toronto, Irwin Law Inc., 2005), c. 4, at 203-210.

(physiological, psychological, or economic), property damage with or without resultant economic loss, or economic loss not the result of property damage. This is usually called an indeterminate causation problem.[1344]

On the whole, these are the types of situation likely to produce a viable class action. The award will be sufficiently large, in the aggregate. There is likely to be one or more target defendants with sufficient assets. The potential award will be large enough to interest the lawyer(s) whose fees will be a portion of the award[1345] and whose involvement is necessary because of the complexity of class action procedure.

In order for a class action to proceed, the class has to obtain an order from a judge certifying the action as a "class proceeding". To obtain certification, the class must satisfy the certification judge that the proposed class proceeding meets the threshold criteria listed in the enabling legislation.[1346] Two of the requirements of the *Class Proceedings Act, 1992* are that "the claims or defences of the class members raise common issues"[1347] and that "a class proceeding would be the preferable procedure for the resolution of the common issues".[1348] In *Hollick v. Toronto (City)*,[1349] the Supreme Court explained the meaning of "common issues". The Court wrote: "the underlying question is whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis. Thus an issue will be common only where its resolution is necessary to the resolution of each class member's claim. Further, an issue will not be "common" in the requisite sense unless the issue is a substantial . . . ingredient of each of the class members' claims."[1350] Thus, it is not sufficient that the issue be common to the class members' claims. The resolution of the issue must "significantly advance the action". [1351]

The class action legislation is procedural, not substantive. It does nothing more than provide a procedure for asserting the valid causes of action of a number of people in

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[1344] Initially, the "indeterminate defendant" problem: see J.G. Fleming, "Probabilistic Causation In Tort Law" (1989), 68 Can. Bar Rev. 661 and J.G. Fleming, "Probabilistic Causation In Tort Law: A Postscript" (1991), 70 Can. Bar Rev. 136 See also Cassels and Jones, *op. cit.*, *supra*, footnote 47, at 203 and following. The "indeterminate defendant" label was traditionally used for the situation where we know that the harm was caused by at least one person in a defined group, but not all of the members of the group, but the current limits of scientific knowledge do not allow us to identify which person or persons. Thus, the indeterminate defendant situation, by definition, satisfies the "impossibility" requirement of *Resurfice*

[1345] And, where approved by the court, a first charge on the settlement funds or the monetary award: the *Class Proceedings Act, 1992*, s. 32(3):

[1346] *Ibid*., s. 5.

[1347] *Ibid*., s. 5(1)(c): "The court shall certify a class proceeding on a motion … if ... the claims or defences of the class members raise common issues". The statue contains a definition of "common issues" in s. 1. "'Common issues' means, (a) common but not necessarily identical issues of fact, or (b) common but not necessarily identical issues of law that arise from common but not necessarily identical facts".

[1348] *Ibid*., s. 5(1)(d): "The court shall certify a class proceeding on a motion … if ... a class proceeding would be the preferable procedure for the resolution of the common issues".

[1349] 2001 SCC 68, [2001] 3 S.C.R. 158.

[1350] *Ibid*., at para. 18 (internal quotation marks and authorities deleted)

[1351] *Ibid*., at para. 32.

one action. The legislation does provide validity to any cause of action that does not satisfy the common law or legislative requirements for the existence of that cause of action.[1352] The first requirement for certification is that the class statement of claim, or the notice of application, must disclose a cause of action.[1353] The pleaded cause(s) of action need only meet the test set out in *Hunt v. Carey Canada Inc*.[1354] An action will be dismissed as disclosing no cause of action only if it is plain and obvious that the pleaded cause(s) of action have no chance of success.[1355] Accordingly, all the class has to do, on the certification motion, is show that it is *not* plain and obvious that the cause of action disclosed by the pleadings (and the supporting affidavits, if necessary) must fail.[1356]

Since causation is part of any cause of action, where causation is an issue on the certification motion, it will be plain and obvious that the claim has no chance of success *only if* it is plain and obvious that an individual plaintiff could not prove causation *under the easiest to satisfy* of the applicable tests for causation. If there is a causation issue on the certification motion, the certification judge will have to decide what the applicable causation test is in respect of each of the causes of action in respect of which certification is sought. At the certification-motion stage, the class will get the benefit of the easiest test to satisfy of the applicable tests for proof of causation. Unless it is plain and obvious that only the but-for test applies, the certification court will have to consider whether causation could be established under either of the easier to satisfy *Athey* material-contribution test or the *Resurfice* material contribution test.

Satisfying the causation requirement, what ever that requirement means is always essential for success in any civil cause of action.[1357] As such, there is always that much commonality in every viable class-member's claim. However, that basic commonality is not sufficient to satisfy the requirements of ss. 5(1)(c) and 5(1)(d) of the *Class Proceedings Act, 1992*.[1358] The mere fact that a cause of action is disclosed in the pleadings "is not in itself sufficient to qualify it as a common issue."[1359] At least where the but-for and *Athey* material-contribution tests apply, the certification judge will have to decide whether the "pleadings and evidence … demonstrate a way to prove on a class-wide basis that the alleged wrongful conduct" caused the alleged injury.[1360] The test under consideration was the but-for test. Thus, the statement should apply to the *Athey* material-contribution test since it is also a test for the existence of conduct that is a

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[1352] *Serhan Estate v. Johnson & Johnson*,(2006), 269 D.L.R. (4th) 279 at para. 41, 2006 CanLII 20322 [*Serhan*] and *Ontario New Home Warranty Program v. Chevron Chemical Co.* (1999), 46 O.R. (3d) 130 at para. 50 (S.C.J.).
[1353] the *Class Proceedings Act*, s. 5(1)(a).
[1354] [1990] 2. S.C.R. 959.
[1355] *Ibid*.
[1356] *Serhan*, at para. 42; *Hunt v. Carey*, at para. 33.
[1357] Quebec law also has a causality requirement that must be satisfied. See, Lara Khoury, *Uncertain Causation In Medical Liability* (London: Hart Publishing, 2007).
[1358] *Hollick v. Toronto (City)*, at para 19.
[1359] *Heward v. Eli Lilly & Company*, 2007 CanLII 2651, at para. 101 (Ont. S.C.J.)
[1360] *Heward v. Eli Lilly & Company*, 2007 CanLII 26607, at para. 26 (Ont. S.C.J., Div. Ct.) (emphasis in original).

factual cause of the injury. In principle, the statement should also be applicable to the *Resurfice* material-contribution test, but using the *Resurfice* meaning of "causation".

As indicated, the but-for causation question now involves asking whether there is "a substantial connection" between the alleged tortious conduct and the injury suffered by injured person.[1361] This statement of the test has been applied in a class action certification motion.[1362] If the *Athey* material-contribution test applies[1363] the question would be whether, "view[ing] the facts in a robust and pragmatic fashion"[1364] the plaintiff has established on the balance of probability that the defendant's tortious conduct "materially contributed to the injury of the plaintiff."[1365]

If there is similar question where the *Resurfice* material-contribution test applies, it would be the easily answered question of whether there is a possibility that the defendant's breach of duty was a cause of the plaintiff's injury. It is easily answered because the class pleadings *will never* disclose a cause of action if that possibility does not exist. The action would not satisfy s. 5(1)(a) of the *Class Proceedings Act*. Thus, in respect of the *Resurfice* material contribution test, the court will never have to engage in any form of fact-specific inquiry trying to relate the conduct of a particular defendant to the injury sustained by a particular plaintiff. In substance, the *Resurfice* material-contribution test, where it applies, presumes individual causation on proof of general causation; therefore, it eliminates the need to engage in the usual consideration of the significance individual causation issues.[1366]

Almost all of the reported certification motions where causation is discussed as an issue seem to have been decided on the premise that the applicable test was but-for. Material contribution is not mentioned. However, in *Ragoonanan Estate v. Imperial Tobacco Canada Ltd.*[1367], the certification judge cited *Athey* and appears to have concluded that the material-contribution test would apply. In *Anderson v. St. Jude Medical Inc.*,[1368] the certification judge wrote that the causation "questions would fall to be determined ... in accordance with the principles of causation accepted, and expounded, in *Athey v. Leonati*"[1369] but did not go on state which test applied. In *LeFrancois v. Guidant Corporation*,[1370] the certification judge seemed to suggest that satisfying the Athey material contribution test would be sufficient even if the but-for test was not

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[1361] *Resurfice*, at para 23.
[1362] *Windsor v. Canadian Pacific Railway Ltd.*, 2007 ABCA 294 at para. 29, applying *Resurfice*.
[1363] I am assuming that the *Athey* version of the material-contribution test still exists.
[1364] *Aristorenas*, at para. 57.
[1365] *Ibid*., at para. 51.
[1366] For a precursor of this consequence including a discussion of the meaning of "general causation" and "individual causation" (also called "specific causation), see *Harrington v. Dow Corning Corp*., particularly at para. 56.
[1367] 2000 CanLII 22719, at para. 117 (Ont S.C.J.)
[1368] (2003), 67 O.R. (3d) 136, 2002 CanLII 5686 (S.C.J.) [*Anderson*]. See also *R. v. Drady*, 2007 CanLII 27970 at para. 50 (Ont. S.C.J.)
[1369] *Anderson*, at para 35.
[1370] 2008 CanLII 15770 (Ont. S.C.J.).

satisfied.[1371] Certification was granted in all of these cases. There are a number of reported certification decisions since the release of *Resurfice* (in February 2007) where the issue of the applicability of *Resurfice* material-contribution could have been considered. However, it is not mentioned.

Where causation is an issue on the certification motion, the defendant invariably takes the position that there is insufficient commonality; that the causation inquiry is too individualistic; that there are too many different issues requiring too much different evidence. The practice on certification motions is that the parties file affidavits setting out why the essential issues are or are not more common than not common, and why the class action procedure is or is not the preferable procedure for the resolution of these issues.[1372] The affidavits identify the issues in the action, describe the law and evidence relevant to the issues, and set out the parties' position on whether the causation issues are common enough to the class to make the class action the preferable procedure, given the stated aims of the class action procedure: access to justice, maximizing the efficient use of limited judicial resources, and, as appropriate, behavioural modification. If the essential causation issues are common issues, then it is almost certain that a class action is the preferable procedure for the resolution of those issues.

Cases such as *Anderson v St. Jude Medical Inc.*,[1373] *Heward v. Eli Lilly & Company*,[1374] and *Taylor v. Canada (Health)*[1375] show how the procedure plays out under the but-for test. All three cases are product-liability, medical device or drug cases: *Anderson* (medical device), *Heward* (drug), *Taylor* (medical device). *Anderson* and the certification decision in *Heward* predate *Resurfice*. In each case, the parties seem to have assumed that the but-for test was the applicable test and focussed on whether the evidence that would be required to satisfy the but-for test meant that the causation issues were not sufficiently common to the class. In each case, the plaintiffs' affidavits set out why the factual issues were common enough that a class action was the preferable procedure and the defendants' affidavits set out why they were not. In each case, the certification judge reviewed the factual issues and held that the issues were common enough.

Anderson is representative. Paragraphs 26-30 of *Anderson* contain a succinct picture of the current procedure at certification motions when the parties seek to satisfy the certification judge that the resolution of the but-for causation question does or does not take the action outside of the parameters of sufficient commonality and preferable procedure.[1376] The class material set out the proposed common issues. The class argued

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[1371] *Ibid*., at para. 81 There is also seems to be at recognition of *Resurfice* in the relevant passage which ends with "materially contributed to the defendants' gain in the sense recognized in Athey v. Leonati ... and subsequent cases".

[1372] See, for example, *Anderson*, at paras 26-30.

[1373] *Ibid*.

[1374] 2007 CanLII 2651 (Ont. S.C.J.), leave to appeal granted 2007 CanLII 26607 (Ont. S.C.J. Div. Ct.) [*Heward*].

[1375] 2007 CanLII 36645 (Ont. S.C.J.) [*Taylor*].

[1376] The procedure would have to be the same under the *Athey* material-contribution test.

that "the proposed issues satisfy the requirement of commonality because their resolution is necessary to the resolution of each class members claim. It was submitted, further, that the issues are substantial ingredients of each member's case and that their resolution will substantially advance the claims".[1377] In response "[t]he main thrust of the elaborate and comprehensive submissions of counsel for the defendants was that even the revised common issues are inadequate to justify certification as they will not substantially advance the plaintiffs' case."[1378]

The defendant's counsel submitted that the causation issues were so plaintiff-specific that the causation inquiry, for each member of the class, would necessarily amount to "a long series of issues specific to particular complications of which it is likely that none would be common to all class members."[1379] He argued that there was necessarily "a complete breakdown of commonality".[1380] He provided a shopping list of asserted facts and opinion, assertions, based on the defendants' affidavits and expert reports, all of which are variations of the same cant: there would be so many individual issues of such differing complexity that it the essential issues were not common or there were so many individual issues to be decided that resolution of the common issues would not substantially advance the action.[1381] The certification judge's description was that defence counsel "rel[ied] *heavily* on the affidavits of experts that were delivered on behalf of the defendants".[1382] Given that the affidavit material is the only evidence that the defence could rely on absent notorious evidence of which the certification judge could take judicial notice, and is exactly what one would expect the defence to rely on – because if the defence had tried to go outside the filed material, improperly, the court would have said so – it might be that that the certification judge was being obliquely critical of what seems to have been a defence "kitchen-sink". Support for this view is the certification judge's statement that defence counsel "dealt *at length* with the complexities of the questions of causation that would need to be determined after the trial of the proposed common issues".[1383] Alternatively, the trial judge was hinting, less than obliquely, that he found the expert opinions to be more advocacy than impartial expertise.

The shopping list is instructive for its exhaustiveness, if nothing else. I have listed the defence contentions starting with the most general and descending into the most specific. According to the certification judge, the defendants' counsel:

a. invited the trial judge to conclude that "it was self-evident that the question of the standard of care should not be dealt with in isolation from questions of causation and that the standard may have varied with the degree of knowledge of the defendants over the period in which the devices were implanted";[1384]

[1377] *Anderson*, at para. 23.
[1378] *Ibid*., at para 24.
[1379] *Ibid.*, at para 30.
[1380] *Ibid.*, at para. 29.
[1381] *Ibid.*, at paras. 26-29.
[1382] *Ibid.*, at para. 26 (emphasis added).
[1383] *Ibid*., at para. 26 (emphasis added).
[1384] *Ibid*., at para. 28. The judge declined the invitation. This is not surprising as the submission is contrary to a number of basic principles, not just on causation. It is probably bad form to invite a motion judge to

b. "placed … emphasis on the number and complexity of the issues of causation that would remain after a trial of the common issues";[1385]
c. "denied that each of the proposed issues would raise the same question for each member of the class";[1386]
d. argued that, "in reality, some of the issues raised many different questions that were by no means common, or relevant, to the claims of all class members."[1387]
e. characterized one or more issues as "posing an interesting scientific question, but one which would not determine for any member of the class whether the implantation of the … device had adverse effects, and as one that would serve little practical purpose";[1388]
f. argued that "it made no sense for the limited question of causation included in the proposed common issues and the specific inquiries with respect to the effects on each individual member of a class to be decided by different judges";[1389]
g. "referred to the expert evidence of numerous alternative causal possibilities for the complications identified by the plaintiffs, likely variations in the susceptibility and reactions of different members of the class and the possibility that the problems of which they complain were caused, or contributed to, by unknown factors, their own conduct or the treatment they had received from their physicians".[1390]

The certification judge stated that the parties had set out their positions in that manner to comply with *Rumley v. British Columbia*.[1391]

In *Rumley*, the Supreme Court had held it is sufficient if the "essential question" on an issue that has to be determined is a common issue. However, it is not necessary that all of the aspects of the inquiry be common issues.[1392] The issue in *Rumley* was standard of care, not causation, but that distinction is not relevant. Rumley necessarily applies to causation issues, too. The certification judge wrote:

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decide in your favour on a wrong principle of law. For example, the Supreme Court said in *Rumley* that it did not matter that the standard of care had varied over time. The court said, at para. 32, "[t]hat the standard of care may have varied over the relevant time period is not an obstacle to the suit's proceeding as a class action but simply means that the court may find it necessary to provide a nuanced answer to the common question." It is also standard practice, even in Ontario, that breach of duty (negligence) is determined first and it is accepted that this can be done without determining questions of factual causation. This is not an absolute rule as there will, no doubt, be some cases where it makes practical sense to dispose of the causation question first so that, if there is no causation, breach of duty need not be dealt with. However, it is the rare case. See Klar, *Tort Law*, at 388-89, footnote 8.

[1385] *Ibid*., at para. 29.
[1386] *Ibid*., at para. 28.
[1387] *Ibid*., at para. 29.
[1388] *Ibid*., at para. 26.
[1389] *Ibid*., at para. 28.
[1390] *Ibid*., at para. 27
[1391] [2001] 3 S.C.R. 184, 2001 SCC 69
[1392] *Ibid*., at para. 36

> To a large extent, the focus of counsel's submissions was provided by the statement of McLachlin C.J.C. in *Rumley v. British Columbia* … 'It would not serve the ends of either fairness or efficiency to certify an action on the basis of issues that are "common only when stated in the most general terms. Inevitably such an action would ultimately break down into individual proceedings. That the suit had initially been certified as a class action could only make the proceeding less fair and less efficient'.[1393]

The crux is the "common only when stated in the most general terms" description. What McLachlin C.J. meant would be a statement of the causation issue which would be so general, so abstract, as to be of marginal significance to the resolution of the individual actions.

Essentially, what the defence attempted to do was to convince the certification judge, by a wealth of detail, that the only way to meaningfully state the essential causation issues was to break them down into so many smaller parts that the questions necessarily became uniquely individualistic. Some might describe this as attempting to convince the certification judge that the causation issues were never a forest, but always only a collection of discrete, isolated trees. The argument failed. The certification judge agreed with the plaintiff class.[1394]

> As I have indicated, the case against certification has been very largely directed at the specific issues of causation that will not be resolved by a trial of the common issues. I accept the submission of counsel for the plaintiffs that the existence of these issues should not be considered to preclude certification. They may be difficult in some cases but … I do not believe the difficulty is likely to be as great as has been suggested by defendants' counsel. This is not a case where … there will be a 'plethora' of individual issues into which the common issues will be completely subsumed. Nor is it a case where the termination of a trial of the common issues would mark just the beginning of the inquiry into the defendants' liability. On the contrary, whether or not the plaintiffs succeed in whole or in part at such a trial, the proceedings would in my judgment have been advanced very significantly. Apart from the specific issues of causation and assessment of damages if the plaintiffs are successful, all the elements required to establish liability in negligence would have been determined at the trial.[1395]

The certification judge also wrote: "There is no requirement in the CPA that the common issues 'predominate' over individual issues and it has been recognized that certification may be justified even where there are 'substantial individual issues': *Hollick v. City of Toronto*".[1396] It is not rhetorical to ask whether the analysis in favour of certification would have been even stronger if the certification judge had held that *Athey* material contribution could be the applicable test.

[1393] *Anderson*, at para 25 (citation omitted).
[1394] *Ibid.*, at para. 40, and particularly at para. 51.
[1395] *Ibid.*, at para. 51.
[1396] *Ibid.*, at para. 48 (citation omitted).

A problem for the defendant is that if that the essential common question is stated in an abstract enough way – a general enough way – it amounts to a restatement of a necessary requirement common to the causes of action of all of the class members which each would have to prove to succeed. The Supreme Court recognized this in *Rumley*. The Court wrote: "With regard to commonality … all class members share an interest in the question of whether the appellant breached a duty of care. On claims of negligence and breach of fiduciary duty, no class member can prevail without showing duty and breach. Resolving those issues, therefore, is "necessary to the resolution of each class member's claim".[1397] British Columbia's counsel spotted that this could amount to saying that that duty and breach of duty are always issues that are sufficiently common to justify certification because no plaintiff can win without establish duty and breach of duty. The court acknowledged this.

> There is clearly something to the appellant's argument that a court should avoid framing commonality between class members in overly broad terms. As I discussed in *Western Canadian Shopping Centres*, *supra*, at para. 39, the guiding question should be the practical one of "whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis". It would not serve the ends of either fairness or efficiency to certify an action on the basis of issues that are common only when stated in the most general terms. Inevitably such an action would ultimately break down into individual proceedings. That the suit had initially been certified as a class action could only make the proceeding less fair and less efficient.[1398]

However, the court had an answer. It was that the pleadings alleged "systematic negligence" rather than particularistic misconduct.[1399] "These are actions (or omissions) whose reasonability can be determined without reference to the circumstances of any individual class member."[1400] The court's point was that the class had chosen to allege what would necessarily be the same misconduct on the part of the defendants in any subsequent individual actions. So, while the individuals would still have to show, at their own trials, that the misconduct had caused their injury, they would not have to prove negligence. The issue would simply be whether the negligence was causative.

The court noted, no doubt ironically, that the decision of the class to restrict the allegations of negligence to systematic negligence, in order to increase the likelihood that the class action would be certified, make the individual claims more difficult to prove on the merits.[1401] I wrote "ironically" because I am sure that the Supreme Court justices realized that the certification was the event that would determine, in practice, how the individual claims were resolved. It is certain that the justices realized that that most of the individual actions would never get to trial, except in the most egregious cases, would never go to trial if the class action was not certified, and would still never go to trial if the class action was certified because most class members would not opt out. Given that, and

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[1397] *Rumley*, at para. 27.
[1398] *Ibid.*, at para. 29.
[1399] *Ibid.*, at para. 30.
[1400] *Ibid.*, at para. 30.
[1401] *Ibid.*, at para. 30

given that British Columbia already had, in practice if not formally, admitted fault, certification was the Rubicon which would decide whether most of the individual claimants would get more than what was available to them under the government program without significant individual litigation.[1402]

Rumley was a class action on behalf of a class made up of disabled children[1403] who had attended one residential school in British Columbia over a period of more than 40 years. The allegations were that there had been a culture of sexual abuse at the school; that children had been sexually abused by employees; that older children had sexually abused younger children; and that the province had been negligent, breached its fiduciary duties, and was vicariously liable. It was accepted that some that some abuse of some children had occurred. The dispute, then, was not really about the validity of any of the individual actions where there the claimant was believable. It was, rather, whether all of the potential claims should be collected into one action. All of the class lawyers, the Crown, and the judges had to have realized that if a class action was not certified, a significant enough portion of the people who had been abused would never be compensated. So, the underlying rationale for the fight at the certification level had nothing to do with the merits of the underlying actions. It had everything to do with ensuring that the maximum number of eligible claimants were compensated; with how much it was going to cost the British Columbia taxpayer; and, so there is no misunderstanding, about how much the money class counsel were going to get.

Just like duty and breach of duty, causation is always an issue unless it is admitted. Thus, there is always the most general statement of the essential causation issue which is always common to all of the individual claims: did the defendant's impugned conduct cause the injury of which the plaintiff complains. Issues of factual causation are questions of fact. Questions of fact can always be broken down into finer detail; however, not infinitely so. There is an essential indivisible concept. We could call this a "Planck's concept" of law.[1404] The assertion that there is a bright line which marks the transition from common enough to too individualistic is a smokescreen for the truth, which is that the courts are making "ought" calls, normative calls, policy decisions, when deciding whether to certify and action. In truth, decisions that one set of facts contains common enough issues and the other does not are driven by concerns whose boundaries are not set

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[1402] After a provincial inquiry, the "government responded … by acknowledging responsibility for abuse": *ibid*., at para 10. The government set up a program to make limited payments to qualifying individuals. The problem was that the payments were not enough, or perceived by some to not be enough. The range was a minimum of $3,000 to a maximum of $60,000: *ibid*., at para. 9. And, of course, the payment scheme did not provide for significant payments to entrepreneurial counsel. The *Rumley* class action was the result. See, *ibid*, at paras. 2-10.

[1403] Initially deaf or blind children; later, just deaf children.

[1404] After the concepts of Planck length and Planck time in Quantum Theory, which represent indivisible, and hence, shortest, measurable units. Of course, at Planck scales, the Heisenberg uncertainty principle may be applicable. That not too small problem has the potential of impairs the commentator's (observer's) ability to make any valid or otherwise useful statements about what is actually happening, because the act of observing what is happening is considered to necessarily affect (hence change) what is happening from what would have happened if one hadn't observed.

by consistently principled class-action jurisprudence.[1405] If the certification judge is of the view that, looked at it in its entirety, the proposed class action should be certified, the judge will find sufficient commonality on the causation issues. The trial judge will find that the causation question(s) as stated are sufficiently common, or state "a more nuanced" version[1406]

The same type normative "is this a claim which the class members ought to be permitted to asserted collectively" permeates the reasons of the Ontario Court of Appeal in *Pearson v. Inco Ltd.*[1407] I suggest this obvious in the court's reference to what the class had done in *Rumley*. The Court noted that, in *Rumley*, the plaintiff class had narrowed the allegations against British Columbia in order to simplify the action and increase the likelihood that it would meet the class action common issues requirements. However, in *Pearson*, notwithstanding that Inco essentially conceded that there was at least one basis for a finding that the issues were sufficiently common, [1408]:the class attempted the opposite of what the *Rumley* class had done.[1409] The Pearson class, seemingly, attempted to broaden matters, to make matters more complicated, in order to increase the likelihood of certification. The court wrote:

> Inco takes the position that in framing the causes of action in the way that he did, the appellant is attempting to complicate the basis of liability. In this way, the appellant has artificially inflated the number and complexity of the common issues to make the action appear ripe for certification as a class proceeding. ....
>
> In effect, the appellant has done the opposite of what the plaintiff did in *Rumley v. British Columbia* ... where the plaintiffs elected to limit their allegations to systemic negligence without reference to the circumstances of any individual class member.
>
> Inco's point is well taken. The appellant cannot broaden the grounds of liability to make a simple case appear complex to give the illusion that the case is suitable for certification. However, it is not clear that the appellant has done so in this case. The appellant is entitled to plead bases for negligence in the alternative. Inco has not yet pleaded to the claim. The appellant had no reason to assume that Inco would make any concessions concerning the application of the *Rylands v. Fletcher* doctrine. *In considering whether the appellant has met the preferable procedure requirement, the court must look to what is*

[1405] My point is that cases are being certified now that would not have been certified a decade ago. The pendulum might swing back.

[1406] *Rumley, supra*, footnote 95, at para. 32. And, note the ability of the courts to define subclasses: the *Class Proceedings Act, 1992*, *supra,* footnote 2, ss. 5(2), 6.5. S. 6.5, 8, 11, 15, 21, 27. Section 6.5 is: 6. The court shall not refuse to certify a proceeding as a class proceeding solely on any of the following grounds: 5. The class includes a subclass whose members have claims or defences that raise common issues not shared by all class members

[1407] (2006), 78 O.R. (3d) 641, 2006 CanLII 913 (Ont. C.A.) reversing, 2204 CanLII 34446 (Ont S.C.J. Div. Ct.) affirming [2002] O.J. No. 3532 (S.C.J.); affirmed 2006 CanLII 22456 (S.C.C.) [*Pearson*].

[1408] Notwithstanding that "Inco submit[ed] in this court that its basis of liability is simple and straightforward given the doctrine in *Rylands v. Fletcher*. Inco appeared to concede that if nickel escaped from its property, and it clearly did, the only real issues would be causation and damages, which will require individual assessments." *Pearson*, ibid, at para. 47.

[1409] *Ibid*., at para 48.

> *really in issue in the case. If based on what is truly in dispute the common issues are relatively unimportant, a class action will not be the preferable procedure and the action should not be certified.*[1410]

There is a very telling summation. "As was said in *Cloud* [*Cloud v. Canada (Attorney General)*, 73 O.R. (3d) 401] at para. 84, "[t]his assessment is not quantitative so much as qualitative. It is not driven by the mere number of individual adjudications that may remain after the common trial."[1411]

"Manageability" is an aspect of the preferable procedure requirement. In *Cloud v. Canada (Attorney General)*, the Ontario Court of Appeal stated: "the fact that beyond the common issues there are numerous issues that require individual resolution does not undermine the commonality conclusion. Rather, that is to be considered in the assessment of whether a class action would be the preferable procedure."[1412] In *Pearson*, the Court summarized what it described as "a number of principles that apply in determining whether the plaintiff has met the preferable procedure requirement." that had been set out in *Cloud*.[1413] The court wrote:

> 1. The preferability requirement has two concepts at its core: first, whether the class action would be a fair, efficient and manageable method of advancing the claim; second, whether the class action would be preferable to other reasonably available means of resolving the claims of class members.
> 2. The analysis must keep in mind the three principle advantages of class actions: judicial economy, access to justice, and behaviour modification.
> 3. This determination requires an examination of the common issues in their context, taking into account the importance of the common issues in relation to the claim as a whole.
> 4. The preferability requirement can be met even where there are substantial individual issues; the common issues need not predominate over the individual issues.[1414]

Once the discussion moves into "preferable" procedure, the normative aspect is patent.

Now to the *Resurfice* point. What if, in a particular case, the plaintiff does *not* have to prove that the breach of duty of particular defendant was a probable cause of the injury sustained by the plaintiff in order to satisfy the causation requirement? What if, in a particular case, the plaintiff can resort to some other test which is less stringent than the but-for test? What if, in a particular case, it is sufficient that the plaintiff establish breach of duty and that there is a possibility that that breach was a cause of the plaintiff's injury? What if the reason for this rule is that it would be impossible, on the individual level, for the plaintiff to do what the defendant has asserted that plaintiff would have to do to establish factual causation? What if the court would rule, in an individual action, that the

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[1410] *Ibid.*, at paras. 47-49 (emphasis added).
[1411] *Ibid.*, at para. 74. "*Cloud*" is *Cloud v. Canada (Attorney General)*, (2004), 73 O.R. (3d) 401, 247 D.L.R. (4th) 667, 2004 CanLII 45444 (C.A.) [*Cloud*].
[1412] *Cloud*, at para. 58, applied in in *Pearson*, *supra*, footnote 111, at para. 65.
[1413] *Pearson*, at para. 67.
[1414] *Ibid.*, at para. 67.

plaintiff did not have to have to do any of what the defence counsel argued in *Anderson* that each of the class members would have to do. What if all the plaintiff would have to do was establish on the balance of probability that: (1) the defendant had breached a duty of care owed to the plaintiff; (2) that the plaintiff had suffered an injury of the type that could have been caused by the defendant's breach; and (3), for reasons outside of the plaintiff's control it was impossible for the plaintiff to establish factual causation using the but-for test? Does that not eliminate the need for the certification judge to undertake the sort of analysis that shown in *Anderson*?

I have set out all that is required of a plaintiff who can take advantage of the *Resurfice* material-contribution test. That type of test applies where there is something about the facts of the case that makes it "*inherently* impossible, given the nature of the situation, for the plaintiff to prove that the defendant's tortious conduct actually contributed to the injury."[1415] It is self-evident that this something, whatever it is, will either be sufficiently common or will not be. One example of a common enough "something" would be the "current limits of scientific knowledge". This is an example because, in *Resurfice*, the one example the Supreme Court gave of a situation triggering relevant impossibility is "current limits of scientific knowledge".[1416]

In *Rumley* terms, where the *Resurfice* material-contribution test is applicable, the essential causation question becomes: could the defendant's breach of duty cause the type of injuries sustained by those who qualify as class members. Another way to ask the question is: is there a possibility that it could cause those types of injury. Whatever the form of the question, it has already been answered in favour of the class. It was answered when the certification judge decided whether the pleadings disclosed a cause of action. If there is no possibility of causation at all, the action would have failed to satisfy s. 5(1)(a) of the *Class Proceedings Act, 1992*.[1417] The fact that the action satisfies s. 5(1)(a) and the *Hunt v. Carey* test means that there was sufficient evidence to satisfy the certification judge that there is a possibility that the breach of duty was a cause of the types of injury alleged by the class. That must be so if it is *not* plain and obvious that pleadings *do not* state of cause of a action.

Waiver of Tort and Causation

In a handful of recent cases relating to the sale of allegedly defective medical devices or drugs, the class has also claimed an accounting and disgorgement of the gain made by the defendant(s) from the sale of the defective product.[1418] Ontario judges have

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[1415] Richard Wright, "Liability For Possible Wrongs: Causation, Statistical Probability; And The Burden Of Proof" [*Possible Wrongs*] (emphasis added; forthcoming, 2008 or 2009, used with permission). In our context, "inherent impossibility" should be understood to mean by reference to valid, known, science; i.e., the current limits of science.

[1416] *Resurfice*, at para 25.

[1417] That the pleadings or the notice of application disclose a cause of action.

[1418] For example, *Serhan, Heward*, and *Taylor*, *supra*.

refused to rule that the claim for the disgorgement of the gain, colloquially known as "waiver of tort", does not disclose a cause of action.[1419] The substantive issue is whether there can be any claim for disgorgement of gain, in tort, where the gain does not correspond to a loss sustained by a plaintiff. That correspondence does not exist in these cases. Nonetheless, Ontario judges have certified class actions containing that claim on the basis that it is not clear and obvious that the cause of action does not exist.[1420]

I suggest that the disgorgement claim does not create any overwhelming causation-related common issues concerns, at least so long as the claim is properly pleaded. There is nothing about any particular plaintiff that is at all relevant to the causation inquiry on this form of disgorgement of gain claim.[1421] The causation inquiry is simply: did the defendant make a gain in revenue (or at least a profit) from the sale of the defective product and, if so, how much? However, an Ontario judge has asserted that there could be a common-issues causation problem even in respect of a "waiver of tort" disgorgement claim. In *Heward*, the judge hearing the leave to appeal motion held that that it seemed necessary to consider individual cases in order for causation of the gain to be proved on a but-for basis, unless there were inferences that dispensed with the need to consider what each purchaser of the defective product would have done if given the correct information.[1422] The leave to appeal judge conceded that there were cases in which such assumptions (or inferences) could be made in the proper case.[1423] Indeed, he seems to have conceded that it would have been possible for the class to plead facts sufficient to justify a court concluding that the necessary inferences or assumptions should be made on a certification motion.[1424] However, he held that it was not "clear ... that the pleadings or the evidence support the assumption ... that Eli Lilly's gain was caused by its wrongful conduct."[1425] Class counsel in at least one other not-yet-certified class action were paying attention. In *Peter v. Medtronic, Inc*., [1426] "each of the plaintiffs has filed affidavit evidence to the effect that she or he would not have had a Defibrillator implanted if aware of the battery problem".[1427] In addition, "while there [was] no evidence that Health Canada ha[d] taken any action with respect to the Defibrillators, there [was] evidence of a recall by the regulators in the United States."[1428] Not surprisingly, *Peter v Medtronic*, Inc. was certified.[1429]

[1419] *Serhan.*
[1420] *Serhan, Heward*, and *Taylor*.
[1421] See *Heward,* 2007 CanLII 26607, at paras. 32-33.
[1422] *Heward*, 2007 CanLII 26607, at paras. 26-34.
[1423] *Ibid*., at para 30-31.
[1424] *Ibid.*, at para. 32. This is an unusual concession unless what the leave judge meant was that the pleadings could have been structured to make allegations which, could, as a matter of law, trigger the necessary inferences.
[1425] *Ibid.*, at para. 32.
[1426] 2007 CanLII 53244 (Ont. S. C. J.)
[1427] *Ibid.*, at para. 103.
[1428] *Ibid.*, at para. 103.
[1429] *Ibid.*, at para. 3.

I suggest that the leave judge in *Heward* was mistaken in believing that there would be any significant common issues problem, even if the pleadings were deficient.[1430] First, assuming the product was defective, both issues would be an issue only to the extent the defendant wanted to make it so. That is, it should be assumed that the purchasers would say they would not have purchased a defective product; that Health Canada would say it would not have approved the product if properly warned. Next, there seems to be a plausible argument for the application of *Hollis v Dow Corning Corp*[1431] which, if applied, would produce a presumptive, irrefutable finding of causation between the class and Eli Lilly. Even if that presumption were not available, it is easy to guess what the individual class members' evidence would have to be. It is unlikely that competent defence counsel would want to sufficiently irritate trial judges by requiring each and every individual plaintiff to testify as to the obvious. It seems certain that the evidence of most class members would have to be that they would not have bought or taken the product if they had been adequately informed and that this evidence would be accepted.

As such, the issues raised by the leave judge seem to be more of a common issues manageability problem than a commonality issue in principle. As indicated, "manageability" is an aspect of the preferable procedure requirement.[1432] In addition, even if there is a commonality issue, the statement of Cullity J in *Taylor v Canada (Health)*[1433] is relevant: "If the questions of causation are found to raise individual issues so that findings of liability could not be made at the common issues trial, a resolution of the common issues I have accepted would achieve judicial economy to a significant extent when compared with a requirement that these issues be advanced, and relitigated, in each individual proceeding."[1434] Cullity J described this as a "manageability"[1435] issue and wrote that "the procedures for resolving individual issues are to be determined by the judge trying the common issues".[1436]

And, finally, the issues underlying the second "inference" – forcing the class to call evidence as to what Health Canada would have done – walk the defendant squarely into the ambit of the *Resurfice* material-contribution test. If it does apply, it takes the case out of but-for. The problem the leave judge described in relation to the conduct of Health Canada seems to echo the *Walker Estate* example in *Resurfice*. The Supreme Court wrote: "A second situation requiring an exception to the "but for" test may be 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

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[1430] The leave judge in *Peter v Metronic* thought so, too. see 2007 CanLII 53244 at para. 103.
[1431] [1995] 4 S.C.R. 634, 129 D.L.R. (4th) 609
[1432] See, *Pearson,* at paras. 65-73 and *Cloud*, at paras. 58, 73-75, quoted and applied in *Pearson*, at paras. 65, 67. See, *supra*, at text associated with footnotes __.
[1433] 2007 CanLII 36645 (Ont. S.C.J.)
[1434] *Ibid.*, at para. 81
[1435] *Ibid.*, at para 88
[1436] *Ibid.*, at para 89.

causation."[1437] If the *Resurfice* material-contribution test applies, there is, by definition, no need to consider individual "what would this person have actually done" issues.

Heward Reimagined

Now let us look at *Heward* in a bit more detail.

Let us consider only a hypothetical action based on allegations of a defective, or otherwise harmful, drug or medical device that a number of manufacturers or distributors, or both, negligently, or intentionally, or recklessly, or any version of wrongfully, introduced into the market and which was used by enough people to produce a "mass tort" claim. And, let us assume that at least some of the manufacturers or distributors no longer exist or have assets even if they do exist. And, let us assume that, for whatever reason, that it is neither possible nor practicable to determine, in the case of at least some of the people who used that device or drug, and who suffered a harm within the risk created by the use of the product, which manufacturers' or distributors' product the person used. And, let us complicate our hypothetical by assuming that the type of harm complained of could also be the result of factors unrelated to the product. And, let us complicate the situation even more by assuming that for, at least some of the people who used the product, it is neither possible nor practicable to determine whether their harm is product related or other factor related.

What's that? You say I have described something which is not only a hypothetical situation? It is an existing action? Really? Remarkably, it turns out that in the real world – that place outside of the confines of the National Capital Commission – there exist "mass tort" class actions such as *Heward v. Eli Lilly & Company*[1438] (successful class-action certification motion reasons and successful leave to appeal reasons). We do not have to mention problems such as the Agent Orange and DES litigation in the United States or the mesothelioma litigation in the United Kingdom because, as you will recall: "Much 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. It suffices at this juncture to simply assert the general principles that emerge from the cases."[1439]

In the class-action certification motion in Heward v. Eli Lilly & Company,[1440] an Ontario judge certified a class action against Eli Lilly relating to the manufacture and sale of an anti-psychotic drug, Zyprexa. The drug has proven to be very popular and useful for the purpose for which it is prescribed: treating schizophrenia, related psychotic disorders and bipolar disorders. Unfortunately, it seems to have some side-effects. The action is based on the side-effects. The class allegations are that Eli Lilly knew that "the use of the drug gives rise to a significantly increased **risk** of diabetes and a variety of related

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[1437] *Resurfice*, para. 28. See, also, *Bowes v Edmonton (City)*, 2007 ABCA 347.
[1438] 2007 CanLII 2651 (Ont. S.C.J) leave to appeal granted 2007 CanLII 26607 (Ont. S.C.J., Div. Ct.).
[1439] *Resurfice*, para. 20.
[1440] 2007 CanLII 2651 (Ont. S.C.J). Argued and decided before *Resurfice*, reasons released in February 6, 2007.

complaints including hyperglycemia, pancreatitis, other blood sugar disorders, weight gain and, in elderly patients, strokes - and that the defendants have consistently failed to disclose to, or warn, Canadian patients and their physicians of these risks." (para 6, my emphasis.) Not surprisingly, one of the major claims in the action is disgorgement based on "waiver of tort".

Eli Lilly sought leave to appeal. Leave was granted.[1441] The basis of the decision to grant leave was the leave judge's concern over the issue of the **causal connection** between the alleged wrong and the alleged gain. The leave judge summarized the certification judge's decision on the causal connection between Eli Lilly's alleged misconduct and the disgorgement claim this way.

> [28] Cullity J. was correct in stating there must be a causal connection on a class-wide basis between the gain subject to disgorgement or constructive trust and the wrongful conduct. It is Cullity J.'s conclusion that such a connection was disclosed that leads me to doubt the correctness of this aspect of his decision. Continuing at para. 101 of his reasons, Cullity J. explained how the necessary causal connection arose:
>
> > Similarly, in this case, a necessary causal link between the wrong and the amount claimed by way of "restitution" or disgorgement would be established if the plaintiffs can prove their claim that the defendants were negligent in placing Zyprexa on the market, or in continuing to market it after November, 2001, without sufficient warning of its side-effects. In the event of a finding to this effect, the defendants would not have derived any proceeds but for their breach of duty and, in this sense, the proceeds would have resulted from the wrong.
>
> [29] Cullity J. makes a significant assumption in this statement. To say with any confidence that Eli Lilly would not have derived proceeds from the sale of Zyprexa (the "gain") but for its failure to sufficiently warn of its side-effects (the "wrongful conduct"), the pleadings or evidence must, at the very least, support one of the following inferences: (1) the class members would not have agreed to take Zyprexa if properly warned of the risks associated with the drug, or (2) Zyprexa would not have been approved for sale if Health Canada was properly warned of the risks associated with the drug. Absent these inferences, it seems the only way to determine the amount for which the defendants could be ordered to account in waiver of tort is to investigate whether each member of the class would not have taken Zyprexa if properly warned. This is the antithesis of a common issue.[1442]

In essence, the leave judge said that the certification judge had assumed that causation had to be proven on a but-for basis, but if this were correct that manner of proving an essential requirement for success in the action made it necessary to consider individual cases. This was at odds with the common element requirements for class actions and, therefore, could make the class action procedure inappropriate. (It seems to me that even the inferences the leave judge first suggested would require evidence in respect of the individual plaintiff.) The leave judge's concerns on the causation issue

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[1441] 2007 CanLII 26607 (Ont. S.C.J., Div. Ct.). Argument June 13, 2007; reasons July 10, 2007.
[1442] 2007 CanLII 26607 at paras. 28-29.

resulted into his decision that the test for leave had been met and in the grant of leave on issues dependant on proof (and the manner of the proof) of causation.

> [44] For the reasons outlined above, the motion is allowed in part. Leave to appeal to the Divisional Court is granted on the following issues:
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> 1. Did the certification motion judge err in concluding that proof of the amount of the alleged wrongful gain subject to an accounting and disgorgement and/or a constructive trust is a common issue?
>
> 2. Did the certification motion judge err in concluding that a class proceeding is the preferable procedure to resolve the plaintiffs' claim in waiver of tort?[1443]

The certification judge had, indeed, used the but-for test and only the but-for test.

> [47] On the basis of the facts pleaded in this case, it would be open to a trial judge to find (a) that the defendants breached a duty of care by deliberately concealing, or withholding, information about harmful side-effects of Zyprexa for the purpose of gaining the approval of Health Canada, (b) that they intended to, and did, profit thereby and (c) that, but for the breach of duty, such profits would not have been obtained. ...
>
> [101] The finding that a cause of action based on waiver of tort has been disclosed in the pleading is not in itself sufficient to qualify it as a common issue. In particular, the court must be satisfied that it is possible to determine on a class-wide basis whether a sufficient causal connection existed between the wrongful conduct and the amount for which the defendants could be ordered to account. In *Serhan*, the "but for" test of causation would have been satisfied if a finding was made that the products involved were, as pleaded and supported evidentially, dangerously defective to the knowledge of the defendants. Similarly, in this case, a necessary causal link between the wrong and the amount claimed by way of "restitution" or disgorgement would be established if the plaintiffs can prove their claim that the defendants were negligent in placing Zyprexa on the market, or in continuing to market it after November, 2001, without a sufficient warning of its side-effects. ...[1444]

One might wonder why the certification judge did not consider whether the *Athey* "material contribution" test might also apply. We have to assume that the certification judge thought that nothing about the facts would make the use of but for "unworkable" under whatever meaning "unworkable" had at the time. That conclusion is not implausible given the wealth of meanings that "unworkable" had.

I will finally get to the point. The certification motion was argued and decided before *Resurfice*. The leave to appeal motion was argued after the release of *Resurfice*. There is no indication in the leave reasons[1445] that anybody – lawyers or judge – considered whether anything the Supreme Court had said in *Resurfice* about how causation is to be proven was relevant. I think we should not assume that the reasons are

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[1443] 2007 CanLII 26607 at para. 44.
[1444] 2007 CanLII 2651 at paras. 47, 101 (Ont. S.C.J.)
[1445] 2007 CanLII 26607

silent because somebody was cute enough to say it was not relevant because the issue, in *Heward*, was not tort but just waiver of tort, unjust enrichment etc.

I think it is worth asking whether the *Heward* leave judge erred in failing to consider whether the applicable test was now *Resurfice* contribution to risk material-contribution. Is it impossible for the plaintiffs as a class, or individually, for reasons outside of their control, to establish that but-for the wrongful conduct of Eli Lilly, that the drug would not have been released to the public? They do not know what Health Canada would or would not have done. This is the decision-causation issue. Vaughan Black has a very good paper on this issue: Black, "Decision Causation: Pandora's Tool-Box"[1446] Doesn't the *Eli Lilly* problem at least smell like proving the consequences of "negligent donor screening"? I will get back to that bit of lingering odour. If we assume all of the allegations made against Eli Lilly are accurate, and that conduct breached a duty of care to one or more members of the class, that conduct likely did increase their risk of some harm, even if it was only a lighter pocket-book.

What follows is a suggestion as to how an aspect of the causation issue ought to have been handled at the certification and leave to appeal levels. I will not review the case-law predating *Resurfice* which sets out how causation issues are to be handled on certification motions beyond the extent already discussed.[1447]

The first requirement for the assertion of a viable class action, under any of the provincial statutes, is that there at least be the potential of a valid cause of action. The first requirement, on any certification motion, is that the action be able to pass the admittedly low "plain and obvious" threshold – that the class be show that it is *not* plain and obvious that there is no cause of action.[1448]

Before *Resurfice* - the certification motion

The certification judge would have to decide if the applicable test for causation was but-for or *Athey* material-contribution. The certification the judge would say: "Now I have to decide if but-for is unworkable". That means, first deciding what unworkable means. Let us see, Cheifetz points out that there are at least 11 meanings already in Canadian jurisprudence; Black says there is no workable meaning at all; Demeyere says

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[1446] Emerging Issues In Tort Law, eds. Jason Neyers, Erika Chamberlain and Stephen Pitel (Hart Publishing, London, 2007), 309-330. The table of contents for the volume can be seen, here.

[1447] That law is canvassed in Cassels & Jones "The Law of Large-Scale Claims" at ___ and in their Can. Bar. Rev article, "Rethinking Ends And Means In Mass Tort" at ____. Cases include *Windsor v. Canadian Pacific Railway Ltd*., 2007 ABCA 294, *Anderson v. St. Jude Medical Inc*, (2003), 67 O.R. (3d) 136, 2003 CanLII 5686 (S.C.J.) and *Rumley v. British Columbia*, 2001 SCC 69, [2001] 3 S.C.R. 184.

[1448] *Hunt v. Carey Canada Inc*., [1990] 2 S.C.R. 959. Ontario's the Class Proceedings Act 1992, S.O. 1992, c. 6, s. 5 is representative. The section sets out the requirements for certification. The cause of action requirement is in s. 5(1)(a). "The court shall certify a class proceeding on a motion … if [all of the following requirements are met: DC](a) the pleadings or the notice of application discloses a cause of action". British Columbia's , the *Class Proceedings Act*, R.S.B.C. 1996, c. 50, s. 4 is one of the equivalent provisions. Section 4(1)(a) states: "The court must certify a proceeding as a class proceeding on an application under section 2 or 3 if all of the following requirements are met: (a) the pleadings disclose a cause of action; …".

it is "immaterial"; Jane Stapleton calls it "an incantation"; and Cheifetz, again - I like him because he has nice quotes from Carroll even if he (Cheifetz) is sometimes impenetrable - says the content wouldn't fill up a small thimble. Is there some way I can decide if but-for is going to be practicably applicable without having defining unworkable? Let me see ... [certification judge starts to read through Supreme Court jurisprudence .... since it seems he was not helped all that much "by the purifying ordeal"[1449] of counsel's argument] ... of course there is, *Hollis v Dow Corning*, [1995] 4 S.C.R. 634."

Why *Hollis*? Remember the key facts. The advice (warning) regarding the implants was not from Dow to patient. It was from Dow to doctor. The warning was held to be inadequate. Dow wanted to call evidence to show that that the inadequate warning was not a but-for cause because, inadequate or not, the real but-for cause was the conduct of the doctor. Putting it another way, Dow wanted to call evidence to show that the inadequate information it provided to the doctor who used the breast implants did not make a difference to what the doctor told the patient, to what the doctor did. The Supreme Court told Dow it was not going to allow manufacturers who rely on intermediaries to provide the warning to the end user to assert that the manufacturer's failure to provide the intermediary with the correct information to pass on to the end user did not make a difference, even if it was the fact that the manufacturer's conduct did not make a difference. Quoting from *Hollis*:

> [59] … In sum, in a case like the present, I see no reason why in establishing the liability of the manufacturer the law should adopt a rule requiring the plaintiff to delve into what the doctor might have done.
>
> [60] Simply put, I do not think a manufacturer should be able to escape liability for failing to give a warning it was under a duty to give, by simply presenting evidence tending to establish that even if the doctor had been given the warning, he or she would not have passed it on to the patient, let alone putting an onus on the plaintiff to do so. Adopting such a rule would, in some cases, run the risk of leaving the plaintiff with no compensation for her injuries. She would not be able to recover against a doctor who had not been negligent with respect to the information that he or she did have; yet she also would not be able to recover against a manufacturer who, despite having failed in its duty to warn, could escape liability on the basis that, had the doctor been appropriately warned, he or she still would not have passed the information on to the plaintiff. Our tort law should not be held to contemplate such an anomalous result.[1450]

Why doesn't *Hollis* apply to the facts of *Heward*? What is the principled difference between the facts of *Hollis* and the facts of *Heward*. In both cases, plaintiffs do not legally receive the drug (*Heward*) or device (*Hollis*) except after consultation with a doctor. If *Hollis* applies, the only issue was whether Eli Lilly's warning (conduct,

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[1449] The phrase comes from English cases and was used *Heward* by the certification judge: *Heward v. Eli Lilly & Company*, 2007 CanLII 2651 at para. 25 (Ont. S.C.J), *Commerzbank Ag v Price-Jones*, [2003] EWCA Civ 1663 at para. 48 (Eng. C.A.) and *Cordell v. Second Clanfield Properties Ltd*., [1969] 2 Ch. 9 at 16 (Ch. D.).

[1450] [1995] 4 S.C.R. 634, paras. 59-60.

whatever) was adequate. If it was, case dismissed. If it was not, just as for Dow in *Hollis*, Eli Lilly would not be allowed to call evidence as to the situation for a particular plaintiff. Factual causation was presumed.

I suggest that we have just used but-for to show that the certification judge was right and the leave judge was wrong.

Finally, if the meaning of Athey material-contribution was as empty as I have suggested it was, in *Snark*, and others have suggested elsewhere – the literature is listed in *Snark* – then what choice did the certification judge have but to conclude that causation law might not be a problem. Or, at the least, use the cant we hear too often and conclude that the matter should be left for determination at trial on a full factual record?

After *Resurfice* - the leave to appeal certification motion

First of all, we (here) have to decide what *Resurfice* means in Ontario. The leave judge did not have to do that because the Ontario Court of Appeal had already ruled that *Resurfice* did not change anything about causation law, it only "clarified" it: see *Barker v Montfort Hospital*[1451] *and Rizzi v Mavros*.[1452] On that basis, the analysis that the leave judge should have done is the same as that the certification judge should have done. That analysis is above. The end result, in my view, is that the certification decision stands. However, let us assume that *Resurfice* does say what its words seem to mean on material-contribution.[1453]

I will recapitulate, first, what the Supreme Court said in *Resurfice* is now Canadian law on causation. We have a but-for test and a material-contribution test. But-for is the test that is to be used except where, for reasons outside the plaintiff's control, it is impossible to prove causation on a but-for basis. In cases where that sort of impossibility exists, and the plaintiff has an injury, the plaintiff can establish causation by showing 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, material contribution applies - Canadian courts are now to find factual causation has been established - where (1) the plaintiff has an injury; (2) the defendant has breached a duty owed to the plaintiff; (3) the plaintiff is able to satisfy the requirements of the but-for test by showing a "substantial connection between the injury and the defendant's conduct; (4) but, if for some reason outside of the plaintiff's control the plaintiff cannot establish causation on a but-for basis; (5) and the plaintiff is able to

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[1451] Supra.
[1452] Supra.
[1453] And that there is coherent core of meaning. As I wrote in *Snark*, at 6. "[i]t is wrong to assume that the Supreme Court" intends incoherence in its pronouncements on causation. See, also, ." See, Brown, *Hegemony*, at 452 and at 455: "If possible, we ought not to assume that the Supreme Court of Canada … intended an incoherent result" (at 452).

show that defendant's negligence increased the risk of the plaintiff sustaining the very injury the plaintiff complains of – a given, by definition if there has been a finding of a negligence since there cannot have been a finding of negligence without a finding that the conduct increased the risk of the occurrence of the injury; (6) as (4) and (5) taken together amount to a finding of factual causation even if the evidence does not allow the conclusion that the defendant's conduct was probably a factual cause of the injury.[1454]

If there is a but-for analysis that could properly apply to the *Heward* facts, that should mean that the *Resurfice* version of material contribution does not apply. I am taking the Supreme Court at its word, here. That poses a problem given it almost used *Walker Estate* as an example of material contribution, and we know that *Walker Estate* was also a but-for case, but we will pretend we do not know that. Or, we note that the Court did not actually use *Walker Estate* as an example. Rather, it referred to the fact pattern in *Walker Estate* as one in which would make the material-contribution test applicable "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" without indicating what it was about *Walker Estate* that made it possible to prove what the negligent blood donor, or even somebody else in a position to prevent the donor from giving blood, would have done if the CRC pamphlet had contained the information it should have. Of course, it may be that the Court concluded that it did not have to identify what that was, and in any event it should not even attempt to try, since the trial judge since the trial judge had already decided that it was not possible to do so.[1455]

Also, keep in mind that *Resurfice* does not suggest that the *Hollis* version of but-for is obsolete. We should not assume it was intended to mean that, not the least because it does not say so and *Hollis* is not mentioned. Also, a careful reading of *Resurfice* makes it clear that the Supreme Court left all sorts of room for but-for variations. Whether the Court intended to is yet another question. It is also worth remembering that the *Hollis* but-for test is a variation of the standard but-for test that produces a finding of deemed (imposed), irrebutable, factual causation.

Now go back to *Walker Estate* and material contribution. The Supreme Court in *Resurfice* specifically used *Walker* as an example of a type of factual situation to which *Resurfice* material contribution could apply. It is time to quote again.

> [28] A second situation requiring an exception to the "but for" test may be 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. For example, although there was no need to rely on the "material contribution" test in *Walker Estate* v. York Finch Hospital, this Court indicated that it

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[1454] *Resurfice*, paras. 23-25.

[1455] See (1997), 39 C.C.L.T. (2d) 1, [1997] O.J. No. 4017 (QL) (Ont. S.C.J.). And, it really did not get any help on this issue from the Ontario Court of Appeal. That Court did not find that factual cause existed, in fact. That Court applied *Hollis v. Dow Corning* and held that causation was presumptively, irrebuttably, established: see (1999), 43 O.R. (3d) 461, 169 D.L.R. (4th) 689, 1999 CanLII 2158 (Ont. C.A.). Look up Keats' "negative capability"; or perhaps Orwell's "doublethink".

> could be used 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. Once again, the impossibility of establishing causation and the element of injury-related risk created by the defendant are central.[1456]

Is there a principled distinction between the *Walker* facts and the *Heward* facts. Consider what we get after a bit of judicious word substitution in the quoted paragraph.

> A second situation requiring an exception to the "but for" test may be 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. For example, although there was no need to rely on the "material contribution" test in *Walker Estate* v. York Finch Hospital, this Court indicated that it could be used where it was impossible to prove that the Health Canada which permitted the sale in Canada of the drug which injured the plaintiff to be sold and so used by the plaintiff would not have approved the sale had Eli Lilly properly informed Health Canada about potential problems / side effects with the drug. Once again, the impossibility of establishing causation and the element of injury-related risk created by the defendant are central

Breaking the chain of causation?[1457] If we are to assume that the drug should not, or would not, have been released by Health Canada had it been properly informed, then we are asking ourselves what Health Canada would have done if properly informed. That is exactly what the *Walker Estate* courts, including the Supreme Court, asking about the donor.[1458]

In any event, what we all have to agree is that, at present, so long as causation is a requirement for liability under current Canadian obligations law, the test has to be either (1) but-for, whatever it means; or (2) *Athey* material contribution, whatever that means if that test still exists; or (3) Resurfice material-contribution, whatever it means. I suggest that I have shown that:

> 1. a correct use of but-for law, as it was pre-*Resurfice*, leads to a conclusion that factual causation is not a problem that should prevent certification;
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> 2. a correct use of material contribution law, as it was pre-*Resurfice*, leads to a conclusion that factual causation is not a problem that should prevent certification;

[1456] Resurfice, para. 28.

[1457] On this analysis, why didn't the conduct of Bow Valley Husky break the chain of causation in *Bow Valley Husky v Saint John Shipbuilding*? It was certainly very possible to prove what it Bow Valley would have done had it been warned about the Thermoclad inflammability. We have to assume it would have installed the circuit breaker called for in the Raychem specifications. That small conundrum may be one reason why the Supreme Court chose not to mention the case as a material-contribution example.

[1458] Sauce for goose, no?

3. a correct use of but-for law, post-*Resurfice*, leads to a conclusion that factual causation is not a problem that should prevent certification;[1459]

4. a correct use of possibilistic, risk-based, material-contribution law, post-*Resurfice*, leads to a conclusion that factual causation is not a problem that should prevent certification.

Assuming this analysis is correct, we should pay attention to see if it surfaces in the appeal reasons or argument.

Whether proof of factual causation issues should be problem that prevents certification is an entirely separate question. On that issue, I recommend, highly, Craig Jones & Jamie Cassels text: *The Law of Large-Scale Claims: Product Liability, Mass Torts, and Complex Litigation in Canada* (Irwin).

The discussion began with my suggestion that the judge hearing the leave motion in *Heward* was wrong in granting leave on the basis that he did: essentially that there could be a good argument that the issues involved in proving the causal connection between Eli Lilly's alleged wrong(s) and the relief claimed were so individualistic (sufficiently outside the common issue sphere) as to make the class action procedure inappropriate. I also pointed out that both certification judge and leave judge did not, it seems, consider whether the appropriate test for the causal connection was but-for or material contribution. The certification judge's reasons are based on but-for. The leave judge asserted that the application of but-for poses common issues problems.

I suggested that, under both pre- and post- *Resurfice* analyses, (1) there is a good argument that the proper test was material contribution but (2) that even under but-for there was a strong enough argument that the case did not have the individualistic issues that so concerned the leave judge or (3) in the jurisprudence was so muddled that (4) no matter how one juggles the balls, the leave judge should have deferred to the certification judge's discretion.

What is clear is that both levels of reasons do not consider what the proper test is for causation. Instead, both simply assume that it is but-for. On that issue, all I will add, with respect to class action jurisprudence, generally, that the current principles of class-action law requires judges to *not* apply the applicable test for causal connection – but-for, or material contribution, or any other test for causal connection (should there ever be one) – in such a way that the mere invocation of the test is necessarily (in a practicable sense) inconsistent with the rationale underlying the creation of the class action procedure. The tension between test and procedure is, I think, implicit in the use of but-for (which almost seems individualistic by definition) and explicit in a failure to warn case where the causal question is a "subjective" what would [a particular] plaintiff or other person have done if

[1459] It is a given that if the orthodox but-for test would not create common issue problems, the *Athey* material-contribution test would not.

given the correct information rather than the inadequate (albeit correct as far as it went) or incorrect information that the person was given.

Anyway, it seems the that if any version of but-for is applicable to the *Heward* facts, then it is the *Hollis* version, which applies to the failure to warn claim. It would not apply, of course, if was "unworkable" under pre-*Resurfice* analysis, or "impossible" to properly apply under the *Resurfice* analysis, or not applicable even if could apply because of a "*Walker*-like" exception. However, let us assume none of those problems apply and see where it takes us, in terms of whether leave to appeal should have been granted in *Heward* on the basis of common issue problems resulting from the inquiries that would have to be made to apply the but-for test.[1460]

Given *Reibl v Hughes*,[1461] the *Hollis* but-for test in the *Heward* context has both subjective and objective components. The question is: what would this P have done if given the correct information. On the subjective component, we know what the P has to say. “I would have done something different if I had received the proper warning.” P has to say that or the action fails, there. So, there is no real issue on that point. The certification judge was entitled to assume that is what the Ps would say on the “what they say they would have done point” and the leave judge should have assumed that, too. That is not the end of the matter since the trial judge is not obliged to accept P's protestations: that is the *Reibl* objective component. The judge will accept P's protestations only if objectively reasonable: what would the reasonable P in this particular P's position have done. But, since it is objective, doesn't that suggest on its face it is a sufficiently common issue? The reasonable P is a common issue, right? And, ask yourself, who is going to lead evidence on the objective component – the evidence that the objective P would have gone ahead regardless? There will likely be something negative from the plaintiff. But most of the evidence will have to come from the defendant(s) who should not have all that much difficulty adducing appropriate evidence as to what even the objective moron in a hurry would have done (or not done) if properly informed.

There might be a legal issue on the question of from whom the warning was required to come; that is, whether the learned intermediary doctrine applied at all. Realism suggests it does because the drug was intend to be used only under a doctor’s (that is an expert’s) supervision, so it falls within the *Hollis* requirements. However, if it did not then Eli Lilly had to provide a warning directly to the end-user in a form that was adequate to be understood by the end-user: see *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd*.[1462] McLachlin J, as she then was, wrote:

> [36] In my view, the facts of this case do not fall within the learned intermediary defence. This Court has left open the possibility that a manufacturer might discharge its duty to warn by warning an intermediary: Hollis, supra, at p. 659. However, La Forest J.,

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[1460] Again, if the but-for test does not create common-issues problems, then the more “relaxed” *Athey* material-contribution test would not have, nor should the new *Resurfice* material-contribution test.
[1461] [1980] 2 S.C.R. 880.
[1462] [1997] 3 S.C.R. 1210 at para 36.

> for the majority, made it clear that the rule was an exception to the general rule requiring manufacturers to provide a warning to the ultimate consumers of their product. The exception will generally only apply either where the product is highly technical and is to be used with expert supervision, or where the nature of the product is such that it is unrealistic for the consumer to receive a warning directly from the manufacturer. La Forest J. stated that since the rule operates to discharge the manufacturer's duty to the ultimate consumer, the intermediary must be "learned" in the sense that its knowledge of the product and its risks is essentially the same as that of the manufacturer.[1463]

That, however, does not change the common issue analysis. The subjective and objective aspects of what the end-user would have done remain the same regardless of the source of the warning.

So, when looked at it terms of how the events have to play out when the action is tried, it seems to me the leave judge's concerns about the use of but-for were overstated.

Or, since the Supreme Court has nicely left us in a pickle that we do not know what the causation law means in complicated cases in Canada any more, and for Ontario, the Court of Appeal has made the situation even juicer by claiming that *Resurfice* did not change the matter, the leave judge should have said that, given the state of the jurisprudence, that he did not have good reason to doubt the correctness of the certification decision.

Or, if we drop down from theory to the literal words of the Ontario procedure and argue that Eli Lilly could not satisfy the specific tests for the granting of leave under Ontario Rule 62.02(4)(a) or (b).[1464] Rule 62.02(4)(a) requires "a conflicting decision by another judge or court in Ontario or elsewhere on the matter involved in the proposed appeal and [that] it is, in the opinion of the judge hearing the motion, desirable that leave to appeal be granted". The alternative ground under Rule 62.02(4)(b) requires that "there appears to the judge hearing the motion good reason to doubt the correctness of the order in question and the proposed appeal involves matters of such importance that, in his or her opinion, leave to appeal should be granted." There are no conflicting decisions triggering the rule – that was conceded by the leave judge. There is no **good** reason, unless we say that reason is the inadequate state of the causation jurisprudence generally and in specific in relation to the common-issues question on class-action certification motions, and that involves a matter of sufficient importance that it should be clarified. The leave judge might have said that but he did not.[1465]

Does that amount to a certain amount of washing one's hands of the problem? Yes. But, then, the various trial courts, Courts of Appeal, and the Supreme Court have created it. Let them fix it, which they seem to be disinclined to. That is their job which, I

[1463] [1997] 3 S.C.R. 1210 at para 36. McLachlin J., as she then was, dissented; however, this paragraph is a part of the the dissent with which the majority agreed.

[1464] Ontario Rules of Civil Procedure, R.R.O. 1990, Reg. 194, Rule, 62.04

[1465] And, of course, if one takes the Ontario Court of Appeal at its word, then there is nothing that needs to be clarified, at least about factual-causation jurisprudence generally, right?

have argued elsewhere (as have others), they are not doing adequately in the causation area.

In summary, there is an argument that the *Hollis* form of but-for is the applicable test in *Heward*. One has to ignore some aspects of Supreme Court jurisprudence to make that argument work; however, if the Supreme Court believes it is entitled to ignore its own jurisprudence, then why can't practitioners, judges and academic lawyers? However, even if it is not, that alone does not produce a basis for the leave judge's conclusion that the application of that test produced common-issue problems. The leave judge should have considered whether whatever he thought was inherent in the procedure of the robust and pragmatic application of orthodox but for, or *Athey* material-contribution (if he thought it still existed) or the *Resurfice* material-contribution test adequately addressed, at the certification level, any common issues concerns.

On the other hand, class action, common-issues jurisprudence, on causation is, itself, also so messy that who knows what notions lurk in the judicial minds. Perhaps what we need is a court to say that there is no real problem with the causal connection issue in *Heward* because, on the facts of *Heward*, (A) it is an inference which the court is entitled to draw from no evidence at all[1466] and because (B) otherwise innocent plaintiffs would be deprived of the remedy that they are entitled to, assuming harm and deprivation occurs, because of our too complex rules of causation.[1467] But no court would say (A), right?

In fact, *B.S.A. Investors Ltd. v. DSB*[1468] said (A).

> [43] I would add that there is an important difference between drawing an inference as to causation from circumstantial evidence, which is often done, and drawing an inference as to causation from no relevant evidence at all, which may be done only in the rare circumstances set out above. This is the difference alluded to by Lambert J.A. in *Haag* when he distinguished between a logical inference and a legal one; the legal reference should not be resorted to unless the logical inference is impossible to establish with either direct or circumstantial evidence.

And no Canadian judge would write (B), right? That question is rhetorical, too. Almost 20 years ago, a very senior Canadian judge delivered a paper in which the judge wrote that some people "perceive" that too-technical rules for factual causation are depriving injured people of compensation they ought to obtain, stating: "I would suggest that it is because too often the traditional 'but-for', all-or-nothing, test denies recovery where our instinctive sense of justice — of what is the right result for the situation — tells us the victim should obtain some compensation."[1469]

[1466] See legal fiction.
[1467] That may or may not be fiction.
[1468] 2007 BCCA 94.
[1469] Hon. B. McLachlin, "Negligence Law — Proving the Connection" in Mullany and Linden, eds., *Torts Tomorrow, A Tribute to John Fleming* (Sydney, LBC Information Services, 1998) p. 16.

Let us begin to wind this up. Assume, for the moment, that I (or somebody else) could show that an orthodox application of but-for – what but-for is understood to mean in the ordinary case which is that there are no other independently sufficient causes; that is, there is only one sufficient causal factor – to a scenario produces a series of inconsistent answers. I can do this. I know others can, too. We will call this proposition (X)

Assume that analysis is done. The person doing the analysis concludes that but-for does not apply and goes to material contribution.

Assume, for the moment, that material contribution in its *Resurfice* formulation, read for what it seems to say, does not apply to the *Heward* facts. All you need to do is assume, as you did, that the impossibility requirement is related to some problem which is, or is analogous to, the absence of evidence due to problems in science. We will call this proposition (Y).

How can we validly (in a legal sense) have a situation where neither of the only two tests for factual contribution applies? We cannot, so long as those are the only two tests; and, *Resurfice* says they are the only two tests. Obviously, something "caused" the result, even it is not something that amounts to cause under Canadian legal logic.

So we have to conclude our understanding or either (X) or (Y), or our application of (X) or (Y) to the facts, is wrong. Or there is a third, as yet, undiscovered test lurking out there. We have to exclude, for the present, that last assumption. So, in making the decision as to whether it is but-for or material contribution, are we going to modify, clarify, 'whatever-ify' the test(s) just for the scenario that produced the conundrum or across the board?

Remember George Carlin's seven words that could not be said on the public airwaves? Canadian causation jurisprudence has those seven plus one more: metaphysics. Regardless, let us try a chorus of, in four-part harmony – we should get Arlo Guthrie here to do, in Alice's Restaurant mode – the *Alphacell* mantra: causation is "essentially a practical question of fact which can best be answered by ordinary common sense rather than abstract metaphysical theory." If we cannot get Guthrie, we could do it plainsong. Or, if there is a good arranger reading, he or she could score a nice fugue for us. The beauty of fugues is that they are the equivalent of chasing one's tail, eternally.

Of course, there is no conundrum if we trot something NESS-like (and I do not mean LOCH) out from its resting place in the academy but, then, that is .... ssshhhhh ..... metaphysics. Or, it is just me being *snark*y, again. We can turn anything into but-for (or, more accurately, Wright's NESS, or Stapleton's targeted but-for) by tossing parts of the tapestry out the window. That may be normatively valid. It ain't science though.

I suppose that, given the Ontario Court of Appeal has now said, twice, explicitly,[1470] that *Resurfice* did not change **ANYTHING** about the law of causation, it only clarified the area, that it is possible that that is why *Resurfice* is not mentioned in the leave to appeal reasons. I doubt it, though, and I am going to assume that is not the reason.

Let us recapitulate, then, what it was that the Supreme Court clearly said in *Resurfice* about what is now Canadian law on causation. We have a but-for test and a material-contribution test. The but-for test produces a finding that negligent conduct is or is not a probable cause of the injury. The material-contribution test produces a finding that the negligent conduct is or is not a possible cause of the injury. The but-for test is to be used except where, for reasons outside the plaintiff's control, it is impossible to prove causation on a but-for basis. Whether the impossibility problem is limited a particular type of reason is not clear. All that we know is that "the limits of scientific knowledge" is one acceptable reason. In cases where the requisite type of impossibility exists, and the plaintiff has an injury, the plaintiff can establish legal causation (not factual causation) by showing 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, material contribution applies – Canadian courts are no to find causation has been established – where: (1) the plaintiff has an injury; (2) the defendant has breached a duty owed to the plaintiff; (3) for some reason outside of the plaintiff's control the plaintiff cannot establish causation on a but-for basis; (4) and the defendant's negligence increased the risk of the plaintiff sustaining the very injury the plaintiff complains of; even if (5) the evidence does not actually allow a valid conclusion that the defendant's conduct probably caused the injury complained of. This is the substance of paragraphs 23-25 of *Resurfice*.

> [23] The "but for" test recognizes that compensation for negligent conduct should only be made "where a substantial connection between the injury and 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": *Snell v. Farrell*, at p. 327, *per* Sopinka J.
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> [24] However, in special circumstances, the law has recognized exceptions to the basic "but for" test, and applied a "material contribution" test. Broadly speaking, the cases in which the "material contribution" test is properly applied involve two requirements.
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> [25] 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

[1470] *Barker v. Montfort Hospital*, and *Rizzi v. Mavros*. Barker and Rizzi both predate the leave argument and decision, so would have been available to the leave judge.

> 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 notions of fairness and justice to deny liability by applying a "but for" approach.

There is nothing in the leave reasons that indicates whether the leave judge considered the applicability of the *Resurfice* material-contribution-to risk test. That test was part of the relevant jurisprudence when the leave motion was argued. It is, then, necessary to consider whether the leave judge erred in failing to consider whether the applicable test was now *Resurfice* **contribution to risk** material-contribution.

Is it impossible for the plaintiffs as a class, or individually, for reasons outside of their control, to establish that but-for the wrongful conduct of Eli Lilly, the drug would not have been released to the public? They do not know what Health Canada would or would not have done. This is the decision causation issue. Vaughan Black has a very good paper - *Decision Causation: Pandora's Tool-Box* – on the subject.[1471]

Doesn't the problem in *Eli Lilly* of establishing the consequences of the alleged Eli Lilly misconduct, at least to the extent that Health Canada was involved, seem very like "negligent donor screening"? If we assume all of the not-nice allegations made against Eli Lilly are accurate, and that conduct breached a duty of care to one or more members of the class, that conduct likely did increase the users risk of some harm, even if it was only a lighter pocket-book.

It is no doubt coincidental to the *Resurfice* issue but, according to the certification decisions, three of the six named plaintiffs allege they took the drug and developed diabetes afterwards. The other three are the spouses of the first three and claim base on the injuries sustained by their spouses.[1472]

I end with this question: if material-contribution-to-risk, as now defined by *Resurfice*, is the applicable test for the causal connection, then assuming fault on the part of a the defendant, is there any principled, logical, basis upon which the plaintiff could ever fail to establish causation on a *Resurfice* material-contribution-to risk basis, individually or collectively, in the mass tort type of case exemplified by *Heward*.[1473] If, as I have argued above, the answer is "no", then leave to appeal should not have been granted.[1474]

Name-dropping is an important skill for a practitioner: name dropping in the sense that it is sometimes more important to know who said something (and essential to know "who" where it is precedent issue) than the merits of what was sais. So, in that vein, I will

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[1471] In *Emerging Issues In Tort Law*, eds. Jason Neyers, Erika Chamberlain and Stephen Pitel (Hart Publishing, London, 2007), 309.

[1472] See paras. 7-8 of the certification motion reasons.

[1473] You will notice that I did not write "upon which a judge could find that plaintiff had failed to establish". One basis that might be principled, but would not necessarily be logical, is some sort of "policy" ground.

[1474] There are also good arguments in support of the view that the leave judge was wrong even on a but-for basis. I have outlined some of them.

quote a bit of what Cassels & Jones had to say about the effect of *Fairchild*-based risk-and-possibility-causation in their 2003 Canadian Bar Review article: "Rethinking Ends And Means In Mass Tort: Probabilistic Causation And Risk-Based Mass Tort Claims After *Fairchild v. Glenhaven Funeral Service*s".[1475] The authors were writing about *Fairchild*, but their words apply even more strongly to *Resurfice*, since its version of risk-based material contribution is not, at least currently, narrowly constrained as is the *Fairchild* version.

> Now, proponents of assessing causation probabilistically and imposing liability on a 'creation of risk' basis have gained a somewhat surprising ally -a unanimous House of Lords in the decision of *Fairchild et al. v Glenhaven Funeral Services Ltd. et. al*. In *Fairchild*, the Lords decided that workers injured by exposure to asbestos dust could recover from the companies who negligently exposed them to the substance –and thus to the risk of disease - even though it could not be known which of the negligent defendants had caused the illness, and in fact recognizing that, in all likelihood, they were imposing liability on parties whose negligence did not in fact contribute to the injury. Significantly, in imposing liability, the majority of the Lords resisted the temptation to describe their action in the customary, if obfuscative, terms of `reversal of onus' or the `drawing of inferences', preferring to openly acknowledge that what they were in fact doing was rewriting the laws of liability and imposing it without any necessity that causation be shown, at least in a certain category of cases.
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> Our main purpose here is to explore the application of this new liability - 'risk-based liability' - to mass tort claims viewed in the aggregate. *Even in individual litigation, we believe that Fairchild will be extended in the years to come in order to aid plaintiffs faced with causal uncertainty.* But in mass tort litigation, where the claims of numerous plaintiffs and numerous defendants can be aggregated, Fairchild provides further impetus to the movement towards a fully probabilistic assessment of liability and damages, and the arguments against imposing risk-based liability are muted in the context of the class action lawsuit. A thoughtful application of the *Fairchild* principles to mass torts will permit a more efficient use of the justice system and better ensure that the true costs of harmful activities are internalized by the defendant (the economic justification of both negligence and strict liability rules). Most importantly, though, we argue that such an approach is, in the unique context of the mass tort, completely congruous with moralist, as well as economic, analyses of the purposes of tort law.[1476]

I suppose it is possible that the Supreme Court wants causation in mass tort cases to become as relevant as it is becoming in vicarious liability cases, given the Supreme Court's rationale and justification for vicarious liability. However, if that is so, one would think the *Resurfice* panel would have been considerate enough to mention it.

[1475] (2003) 82 Can. B. Rev 598.

[1476] (2003) 82 Can. B. Rev 598 at 600-01 (emphasis added in 2nd paragraph; internal footnotes omitted).

VII Counting Heads: One Wrongdoer or Multiple Wrongdoers

Is the *Resurfice* material-contribution test applicable where there is only one person who is the source of all of the potentially sufficient causal candidates (antecedents) and where some of the antecedents are not wrongful? Remember that that was the situation in *McGhee and Bonnington*. *Snell*, if we were to consider it a decision whose facts, if they were to resurface in the future, would be handled under material-contribution not but for, is also is an example of the one-wrongdoer situation. Or, is the material contribution test restricted to cases where the harm was possibly caused by more than one wrongdoer, with or without the presence of possibly sufficient, not-wrongful, causal candidates? In addition, if proportional liability is to be the basis of the extent of liability under the material-contribution test, is proportional liability applicable not only as between (a) the multiple wrongdoers and the plaintiff where all of the potential causes are tortious but also as between the (b) the plaintiff and a defendant where there is both potentially sufficient wrongful and non-wrongful causal candidates?

The *McGhee* material-contribution-to-risk test (even if we trace it back to *Bonnington*), even if we consider it influencing *Athey* in some sense, was a test that developed in one wrongdoer situations. The issue was whether that defendant could be held liable where that defendant was responsible for all of the candidate causal factors, both wrongful (actionable, tortious) and non-wrongful (non-tortious) but it was not possible – it was inherently impossible, on the evidence - to form a valid medical conclusion as to whether the harm was caused by the tortious conduct or the non-wrongful conduct. However, when the *McGhee* contribution-to-risk test resurfaced in England, first in *Fairchild v. Glenhaven* and then in *Barker v. Corus*, it was used to permit more than one defendant to be held liable for harm that, in fact, could have been caused by only one of the defendants. The problem was that it was only possible to say that the wrongful conduct of each was a possible candidate. It was not possible to determine, validly, whether it was probable that the mesothelioma was the probable result of the inhalation of asbestos fibres at any one of the three employment sites; nor was it possible to eliminate any of the employment sites as a probable candidate. *Barker* confirmed that the basis of the doctrine, called in *Barker* the "*Fairchild* exception" is that liability is being imposed even though it is impossible to establish factual causation on a probability basis against any defendant. The basis of the doctrine is not a legal fiction that the evidence is to be deemed sufficient for a finding of factual causation.

There is no reason, in principle, why the number of candidate-defendants (candidate-wrongdoers) should matter to the application of the material-contribution-to-risk principle. The principle is concerned with the question of whether a particular defendant's wrongful conduct increased the risk of the type of harm suffered by a particular plaintiff. That issue can exist whether a single person is responsible for both the wrongful and non-wrongful potential causes, or whether a number of defendants are each responsible for separate wrongful potential causes, and whether or not there are also other wrongful or non-wrongful possibilities not the responsibility of any of the defendants.

In Canada, arguments have been made that the *Resurfice* principle applies in both single-defendant cases and multiple-defendant cases, without any mention of a relevant distinction. Of the four cases in which the Resurfice material contribution doctrine has been applied, three are single-defendant cases (*Bohun*,[1477] *Zazelenchuk*,[1478] *Bowes*[1479])[1480] – single defendant in the sense that the doctrine was used to determine whether that particular defendant, only, was liable – and one had multiple defendants held jointly liable (*Mainland Sawmills*[1481]).

The issue of the extent of liability under the material-contribution doctrine – for all of the damages or just the proportion equivalent to the amount of contribution to the risk (the amount by which the risk was increased) – exists whether there is one potential wrongdoer or more than one. It exists, as well, where the potential causal-antecedents include both the wrongful and non-wrongful factors.

Where there is only one defendant, the application of material contribution with proportional liability will result in the plaintiff recovering less than all of the loss. The plaintiff has the same risk, under material contribution, where there is more than one wrongdoer held liable but some of the wrongdoers do not have sufficient assets to pay their proportional shares. Would applying material contribution with proportional liability, in the single wrongdoer situation (i.e., *Snell*, *Bonnington, McGhee*) necessarily be contrary to, or inconsistent with, any aspect of existing jurisprudence? Proportional liability, in this situation, amounts, in result, to what seems to be the equivalent of apportionment between tortious and non-tortious causes. The consequence to the plaintiff is the same.

There is, as yet, no Canadian jurisprudence, because the apportionment issue was not considered in *Resurfice* and has not yet been considered in any of the subsequent decisions.[1482] Recall that *Athey* held that apportionment between tortious and non-tortious causes, in an action against one defendant, is not permitted, where the non-tortious causes were not the result of any conduct or omission by the defendant. *Athey* states:

> [23] In the present case, the suggested apportionment is between tortious and non-tortious causes. Apportionment between tortious and non-tortious causes is contrary to the principles of tort law, because the defendant would escape full liability *even though he or she caused or contributed to the plaintiff's entire injuries*. The plaintiff would not be adequately compensated, since the plaintiff

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[1477] Supra.
[1478] Supra.
[1479] Supra.
[1480] I am treating these cases a single-wrongdoer case even though the plaintiffs sued more than one person. The other defendants were, at the most, irrelevant.
[1481] Supra.
[1482] I suggest the Supreme Court would have had to say something about the issue had it mentioned the House of Lords decisions in *Fairchild* and *Barker*, which may be yet another reason why the Court chose to mention no jurisprudence other than its own.

> would not be placed in the position he or she would have been in absent the defendant's negligence.[1483]

The no-apportionment between tortious and non-tortious causes is necessarily applicable, and has been applied without discussion, in multiple wrongdoer examples where there could well have been non-tortious causes, too.[1484] The context of all of these pre-*Resurfice* (and pre- *Fairchild-Barker* cases) is, of course, a defendant who was held liable on the basis that the conduct was a cause of all of the injuries, even if the basis for the finding of factual causation was put in material-contribution terms rather than but-for terms. That is explicit in the italicized words in the *Athey* quotation: "even though he or she caused or contributed to the plaintiff's entire injuries." As I have shown, "materially contributed" was used (and understood) by Canadian common law lawyers and judges as a synonym for "caused". At common law, absent statute, if a defendant was held liable at all in tort, the defendant was liable for all damages, not proportionally. A finding of causation resulting in liability meant that the defendant had caused all of the damages.[1485]

Applying material-contribution with proportional liability to the situation of tortious and non-tortious causes produces a result which, in result, is the same as one would get if the damages were apportioned in the sense contemplated under, and prohibited by, *Athey*. There are two responses. The first is that it is not apportionment of damages if we accept that the liability that has been imposed on the defendant, where the test for legal causation is material contribution, is liability for the increase in the risk. Putting this another way: it is not apportionment of damages as between two or more persons liable for those damages where the actionable injury for which each is separately liable is the increase in risk and not the actual injury sustained by the person, even though the increase in risk is not actionable without the actual injury occurring.[1486] Under this explanation, there is no apportionment of damages because the defendant is not

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[1483] *Athey*, para. 23. (emphasis added). This proposition cannot be taken too literally. The plaintiff's contributory fault would be a non-tortious (not-wrongful) cause from the perspective of the defendant. However, in tort, by statute, there is apportionment of damages between plaintiff and defendant where there is contributory fault on the part of the plaintiff. And, there are now analogues in some other causes of action where wrongful conduct of the injured person is held to also be a cause of the injury. See, generally, Cheifetz, "Allocating Financial Responsibility Among Solvent Concurrent Wrongdoers" (2004), 28 Adv. Q. 137 at pp. 348-49. See, also, *Treaty Group Inc. v. Drake International Inc*., 2005 CanLII 45406, paras. 55-74, 15 B.L.R. (4th) 83 (Ont. S.C.J) affd 2007 ONCA 450 (C.A),

[1484] *Walker Estate* is an obvious example. The conduct of the donor becomes non-tortious if one assumes that the CRC warning was inadequate and there was no other valid reason to hold the donor negligent for donating blood.

[1485] the Ontario Law Reform Commission, *Report on Contribution between Wrongdoers and Contributory Negligence* (1988), c. 3, at 31-33. OLRC at 31:"Since each concurrent wrong doer is liable for the entire injury, each is said to be liable in *solidum*." See also, Cooper-Stephenson, Personal Injury Damages (2d) at 776-79 and Cheifetz, "Joint Liability & Several Liability: Show Me The Principle But Hold The Metaphysics", http://www.bbburn.com/articles/cba_apr2006rev2007.pdf.

[1486] *Barker* v. Corus at para. 35 per Lord Hoffmann: "Consistency of approach would suggest that if the basis of liability is the wrongful creation of a risk or chance of causing the disease, the damage which the defendant should be regarded as having caused is the creation of such a risk or chance." And, at para. 36: "Treating the creation of the risk as the damage caused by the defendant would involve having to quantify the likelihood that the damage (which is known to have materialized) was caused by that particular defendant."

considered to have factually caused anything actionable other than the increased risk in respect of the injury that materialized. Liability is imposed on the defendant for causing the increased risk that the defendant has caused, and only that risk, so the measure of the liability is an amount determined by multiplying the increase in risk against the assessed value of the harm.[1487] The result is that the defendant can never be liable for anything more than that percentage (absent agreement or legislation.).

The second response is even more basic. The plaintiff has not and would not have succeeded under the but-for test, or any other version of a test which determines whether the conduct is, in fact, a factual cause, if probability was required. Put crudely, part of the loaf is better than none. As such, the principles from the orthodox, factual causation regime, including solidary liability, do not necessarily apply to liability which results from the application of *Resurfice* material-contribution test or any other version of a risk-creates-liability test. Liability has been imposed which would not exist under the orthodox regime. Other consequences, such as apportionment between tortious and non-tortious causal candidates, may be permitted, too.

The answer – that there is to be apportionment between tortious and non-tortious causes even where there is only one wrongdoer who is the source of the causes – where the basis of liability is the material-contribution-to-risk principle – is already the law in England and Wales.[1488] Lord Hoffmann wrote in *Barker v. Corus*, that the risk-creation rationale in *Fairchild* cases for proportional liability – that the facts permit no better conclusion than that a defendant's conduct is a possible cause of the harm – applies, in principle, whether we have more than one wrongdoer and more than one tortious cause (*Barker, Fairchild*) or only one defendant who is the source of both the candidate tortious and non-tortious sources (*McGhee, Bonnington*). Lord Hoffmann wrote:

> [16] It seems to me …. that once one accepts that the [Fairchild] exception can operate even though not all the potential causes of damage were tortious, there is no logic in requiring that a non-tortious source of risk should have been created by someone who was also a tortfeasor.
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> [17] It should not therefore matter whether the person who caused the non-tortious exposure happened also to have caused a tortious exposure. The purpose of the *Fairchild*

[1487] *Barker* v. Corus at para. 36 per Lord Hoffmann: "Treating the creation of the risk as the damage caused by the defendant would involve having to quantify the likelihood that the damage (which is known to have materialized) was caused by that particular defendant. It will then be possible to determine the share of the damage which should be attributable to him. The quantification of chances is by no means unusual in the courts. For example, in quantifying the damage caused by an indivisible injury, such as a fractured limb, it may be necessary to quantify the chances of future complications. Sometimes the law treats the loss of a chance of a favourable outcome as compensatable damage in itself. The likelihood that the favourable outcome would have happened must then be quantified: see, for example, *Chaplin v Hicks* [1911] 2 KB 786 and *Kitchen v Royal Air Force Association* [1958] 1 WLR 563."

[1488] *Barker v. Corus*. This issue may be yet another reason why the Supreme Court decided to mention no cases other than its own. Proportional liability has been rejected at first instance in Scotland: *Wright v. Stoddard International Plc*, [2007] ScotCS CSOH_138. That case is under appeal. The trial judge in *Wright* preferred Lord Rodger's dissent on the issue in *Barker* and held that was bound by *McGhee*, a "Scotland" House of Lords decision and not *Barker*, an "England" House of Lords decision.

> exception is to provide a cause of action against a defendant who has materially increased the risk that the claimant will suffer damage and may have caused that damage, but cannot be proved to have done so because it is impossible to show, on a balance of probability, that some other exposure to the same risk may not have caused it instead. For this purpose, it should be irrelevant whether the other exposure was tortious or non-tortious, by natural causes or human agency or by the claimant himself. These distinctions may be relevant to whether and to whom responsibility can also be attributed, but from the point of view of satisfying the requirement of a sufficient causal link between the defendant's conduct and the claimant's injury, they should not matter.[1489]

A decision that injuries are factually divisible between causal candidates presumes that it can be shown that the injuries were, in fact, caused by one of the causal candidates. Whether this can be done is a question of fact.[1490] A decision that the injuries are not divisible between casual candidates means one of two alternatives. (1) The court

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[1489] *Barker* v. Corus, para. 16, 17, per Lord Hoffmann. Two earlier English cases, Holtby v. Brigham & Cowan (Hull) Ltd., [2000] EWCA Civ 111, [2000] 3 ALL ER 421 (CA) and Allen & Ors v British Rail Engineering Ltd., [2001] EWCA Civ 242 have apportionment of the damages because the courts held that, on the facts, the injuries were divisible. These cases are discussed in Ariel Porat and Alex Stein, "Indeterminate Causation and Apportionment of Damages: An Essay on *Holtby*, *Allen* and *Fairchild*" (2003), 23 Oxford J. Leg. Stud. 667.

[1490] In *Blackwater v. Plint*, at para. 74, the Supreme Court reminded the profession that difficulty is no reason for ducking the question of whether injuries are divisible or not. "Untangling the different sources of damage and loss may be nigh impossible. Yet the law requires that it be done, since at law a plaintiff is entitled only to be compensated for loss caused by the actionable wrong. It is the 'essential purpose and most basic principle of tort law' that the plaintiff be placed in the position he or she would have been in had the tort not been committed". The process is the same whether there is one wrongdoer or more than one and whether the wrongs are concurrent or successive.

A defendant must not be found to be the cause of all of the injury merely on the basis that the defendants's conduct is a cause of a divisible part of the injury: *Blackwater v. Plint*, at para. 74: "a plaintiff is entitled only to be compensated for loss caused by the actionable wrong"; *Athey v. Leonati*, at para 24; *Mizzi v. Hopkins* (2003), 64 O.R. (3d) 365, 2003 CanLII 52145 (C.A.); *Alderson v. Callaghan* (1998), 40 O.R. (3d) 136, 21 C.P.C. (4th) 224 (C.A.); *Viridian Inc. v. Dresser Canada Inc*., [1999] A.J. No. 633 at para. 26, [2000] 2 W.W.R. 389, (Alta. Q.B.); *Reeves v. Arsenault* (1995), 136 Nfld. & P.E.I.R. 91, 423 A.P.R. 91 (P.E.I. S.C.); and *E.D.G. v. Hammer*, [2003] 2 S.C.R. 459, 2003 SCC 52. In practice, the difficulty, where there are multiples sources of injury, of "[u]ntangling the different sources of damage and loss" might mean that a concurrent or subsequent wrongdoer is, in fact, be paying for loss that wrongdoer did not actually cause. This does not mean that a defendant has been held liable to pay loss that the evidence showed the wrongdoer did not cause. In the case of alleged pre-existing disability, it means nothing more than that the subsequent wrongdoer was not able to adequately establish the existence of the pre-existing disability: see, *Reeves v. Arsenault*, at para. 23 and Dillingham Constructions Pty. Ltd. v. Steel Mains Pty. Ltd., [1975] HCA 23 at para 11. (1975) 132 C.L.R. 323 (Aust H.C.).

I discuss damage and damages divisibility and indivisibility issues, briefly enough, in Cheifetz, "Joint Liability & Several Liability: Show Me The Principle But Hold The Metaphysics", <http://www.bbburn.com/articles/cba_apr2006rev2007.pdf>, commencing at 17 and various places thereafter (search on "indivisible). As I wrote, at 17 and footnote 56, the Ontario Law Reform Commission stated almost 20 years ago that "[i]t appears that no clear test as to when damages (*sic*) will be considered divisible has been developed by either the courts or academic commentators in Britain, Canada, or the United States": Ontario Law Reform Commission, *Report on Contribution between Wrongdoers and Contributory Negligence* (1988), at 8-9. (The OLRC meant "damage" not "damages".) John Fleming wrote that "whether injury is susceptible to apportionment seems to depend on pragmatic rather than theoretical considerations": Fleming, , The Law of Torts (9th) at _____ There is still no test.

is unable to conclude that any of the candidates are a probable factual cause of any part of the injury. (2) Or, factual causation has been established in relation to all of the injury because the court is satisfied that more than one of the causal candidates could have caused all of the injury or only a part of it, but on the evidence the court is unable to allocate any particular injury to any one or more of the causal candidates identified as probable causes. That situation might include a non-tortious causal candidate either from a source outside of the wrongdoers or also caused by one of the wrongdoers. Could that situation trigger proportional liability on the part of that wrongdoer? The answer is "no" so long as the wrongdoer is responsible for a tortious causal candidate that has been held to be a probable factual cause. That is, the tortious wrongdoer whose conduct has been held to be a cause cannot limit liability by arguing that there is also some non-tortious conduct which might possibly have been a cause. The possibility is made irrelevant by the finding that the defendant's actionable misconduct was a probable cause.

The essence of the material-contribution scenario, in respect of any particular wrongdoer, is that that wrongdoer is not responsible for any wrongful (tortious) conduct which is a factual cause. *Athey* denied that Canadian law permits apportionment between non-tortious and tortious antecedent events that are held to be causes. Major J. wrote:

> [24] The respondents submitted that apportionment is permitted where the injuries caused by two defendants are divisible (for example, one injuring the plaintiff's foot and the other the plaintiff's arm): Fleming, supra, at p. 201. Separation of distinct and divisible injuries is not truly apportionment; it is simply making each defendant liable only for the injury he or she has caused, according to the usual rule. The respondents are correct that separation is also permitted where some of the injuries have tortious causes and some of the injuries have non-tortious causes: Fleming, *supra*, at p. 202. Again, such cases merely recognize that the defendant is not liable for injuries which were not caused by his or her negligence.
>
> [25] In the present case, there is a single indivisible injury, the disc herniation, so division is neither possible nor appropriate. The disc herniation and its consequences are one injury, and any defendant found to have negligently caused or contributed to the injury will be fully liable for it.[1491]

[1491] *Athey*, para. 24-25. *Athey*'s blanket assertion that there is no apportionment between tortious and non-tortious causes is too broad as stated. What *Athey* means is that there is no apportionment between tortious and non-tortious causes causing the same damage. They do not cause the same damage if, in some sense, the damage was already caused before the tortious event. Anything that is necessarily inherent in the injured person's pre-accident status cannot be caused again. The "crumbling skull" doctrine is an application of this principle. There can be apportionment if the causes are sufficiently separated in time so that some aspect of the damages resulting from the earlier cause can be said to have occurred (been sustained) before the later event occurred. In addition, some non-culpable subsequent events reduce the value of an actionable injury. Death is good example. In that case, there is only a seeming overlap (indivisibility) in the damages. The problem is factual, not theoretical. It is necessarily the case that some aspect of the damages from the first tortious event necessarily occurred, in some relevant sense, before the second event. That aspect of the damages cannot be caused again. This explains the results in cases such as *EDG Hammer and HL v Canada.* The damage and damages were said to be divisible because, rightly or

Accordingly, there is no conflict with *Athey* where the evidence does not permit a valid conclusion, on a more likely than not (probability) basis, as to whether the tortious event is or is not a factual cause. It is a precondition of the application of the material-contribution test that it be impossible (for valid reasons) to show what the wrongful conduct of the defendant is or is not a factual cause on a probability basis.

There might be a case where the there are multiple tortious and non-tortious causes and where it is not possible to determine whether any of them are anything more than a possible cause. That was the *Barker* v. Corus situation.[1492] "*Barker* was not a case of concurrent joint tortfeasors, where the actions of either would be sufficient by themselves to produce the consequence. If it had been, there would have been no need to apply the Fairchild exception. The evidence did not establish that the actions of either tortfeasor would by itself have been sufficient to cause mesothelioma. They might have had nothing to do with the onset of the disease. The defendants were held liable because they had each created a material risk that the claimant would contract mesothelioma."[1493] This is not the *Athey* situation because, as indicated, *Athey* presumes the ability to determine that the causal candidates are factual causes. *Barker* states: "Consistency of approach would suggest that if the basis of liability is the wrongful creation of a risk or chance of causing the disease, the damage which the defendant should be regarded as having caused is the creation of such a risk or chance. If that is the right way to characterize the damage, then it does not matter that the disease as such would be indivisible damage."[1494]

Resurfice, of course, would have been an example of the multiple-defendants usage had the Supreme Court concluded that the material contribution test was, for some reason, applicable to the case. As a material-contribution-to-risk case, *Cook v. Lewis* is also an example of multiple defendants held jointly liable for conduct that could have been a cause. *Walker Estate* is also a multiple-wrongdoer case but that point is not obvious because the other wrongdoer was not sued: the blood-donor. There is, however, an essential difference between the *Cook v. Lewis* and *Walker Estate* fact patterns. The wrongful acts in *Cook* were alternative causes. The eye injury could only have been caused by one shot. There were are least two.[1495] The wrongful acts in *Walker Estate* were cumulative causes. It took the combination of the CRC's conduct (inadequately screening blood donors) and the blood donor's conduct (either not reading the warning at all or reading the warning and giving blood even though he ought to have known he was not supposed to) to produce the situation where HIV positive blood was given to Walker via transfusion.

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wrongly, the trial judge was satisfied that, on the evidence, certain damages had already been incurred (had become inevitable) by the time the later events occurred. They could not be caused again.

[1492] It was, in fact, also the *Fairchild* situation, but the case was argued as if there were no causal candidates other than the wrongful conduct of the employers. It is also the situation in Wright v. Stoddard. It will also be the reality of most situations, but that does not matter because the non-wrongful causal candidates are (will be) considered too remote from the incident to ever be considered legal factual causes.

[1493] *Barker* v. Corus at para. 29 per Lord Hoffmann (internal quotation marks omitted).

[1494] *Barker*, at para. 35 per Lord Hoffmann.

[1495] In fact, one of the two defendants alleged there was a third shot from an unidentified hunter. The jury did not believe that that hunter was the shooter, even if they believed that he existed. That much is clear.

One or more members of the Supreme Court might have changed his or her mind about the availability of apportionment of the plaintiff's damages as between tortious and non-tortious causes, at least for property damage cases involving profit-earning chattels, at some point between 1991, when the Court decided *Sunrise Co. v. The Lake Winnipeg*,[1496] and 1996, when *Athey* was decided, or 1997, when *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd*.[1497] was decided. In *Sunrise*, the majority held that there was not to be apportionment of the loss of revenue between the first tortious cause and the later non-tortious cause. It went farther and held that it there would not have been apportionment even if the plaintiff was at fault in respect of the later event.[1498]

There was a dissent in *Sunrise*.[1499] The dissent called for exactly that: apportionment of the plaintiff's loss between the tortious and non-tortious cases, by analogy to contributory negligence even where there was no contributory negligence. The dissent did not accept the proposition that property damage was inherently different from bodily injury for the purposes of the apportionment of damages. *Athey*, as mentioned, denied that such apportionment is permissible, in a personal injury action, as between tortious causes and non-tortious causes of the injured person's damages. *Athey*, of course, does not say that contributory-negligence apportionment is barred. It could not, of course, even though the plaintiff's contributory negligence is not a "tortious cause". *Athey* also does not does not mention *Sunrise*. We have to assume that *Athey* was not intended to overrule *Sunrise*, so *Athey* has to be limited to actions by people damages based on physical or psychological injury.[1500]

The facts of *Sunrise* are simple. The majority and dissent judges agreed on the facts, just not on all of the applicable law. Sunrise Co. was the owner of a ship, the *Kalliopi L.* The *Kalliopi L and* the *Lake Winnipeg* were approaching each other while travelling in opposite directions in the St. Lawrence Seaway. The *Lake Winnipeg*'s pilot did not do what he was supposed to do. The *Kalliopi L* had to take evasive manoeuvres. As a result, she grounded and damaged her hull. On her way to port for repairs, she grounded, again, causing additional damage to a different area of her hull. The two events were not related; that is, the damage to her hull in the first incident was not the cause of the later grounding. The repairs were performed concurrently. The first incident repairs required 27 days. The second incident repairs required 14 days. Neither job affected the other in the sense that the first incident repair duration would have been 27 days even if the second incident had not occurred, and the second incident 14 days even if the first

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[1496] [1991] 1 S.C.R. 3, 1991 CanLII 107, 77 D.L.R. (4th) 701

[1497] [1997] 3 S.C.R. 1210, 1997 CanLII 307, 153 D.L.R. (4th) 385. *Bow Valley Husky* has what was called apportionment of damages as between plaintiff and defendant based on contributory negligence. However, there is a good argument that the facts of the case fall within the *Sunrise* matrix. That is significant because the majority in *Sunrise* held that it would not matter if the plaintiff had also been at fault.

[1498] [1991] 1 S.C.R. 3 at 19-20.

[1499] McLachlin J., as she then was, and Gonthier J. dissented.

[1500] Just as we would be entitled to assume that *Resurfice* was not intended to overrule the SCC decisions that it did not mention, such *as Laferrière* v. *Lawson* and *St-Jean v. Mercier,* right?

incident had not occurred. The ship was out of service for the time required to perform the first-incident repairs, just as if the second had never occurred.

The majority declined to apportion. They held that it did not matter whether the second incident was tortious or not tortious. The loss was considered to have been caused, as a matter of law, before the second event occurred. Therefore, it could not be caused again. Therefore, the first tortfeasor was responsible for it all.[1501] According to the majority, "[t]he nature of the second casualty, whether tortious or otherwise, was irrelevant in any determination as to profit-earning capacity. The link between the second incident and the loss of profit suffered by the *Kalliopi L* was merely coincidental, not causal."[1502] Just so that there was no misunderstanding, the majority repeated this proposition in the penultimate paragraph of their reasons: "In summary, there is no causal link between the second incident and the loss of profit suffered by the owners of the *Kalliopi L*, such damage being merely coincidental. The *Lake Winnipeg* must, as a consequence bear the responsibility for the full 27 days detention in dry dock."[1503]

I will consider whether there is a conflict between *Sunrise* and *Resurfice* later in this article, in Part XVIII. The issue how to handle the situation where the effects of a later event may be seen as "overtaking" the effects of an earlier culpable incident, or at least capable of having some of the same effect on the injured person as the earlier incident. I conclude that the better position is that there is conflict, because *Sunrise* is an example of overdetermined causation (duplicative causation) cases which are one of the situations in which, by definition, but-for produces a false-negative.

VIII. Apportionment, Contributory Fault and Contribution Between Wrongdoers

I mentioned some of these issues in my list of some of the material-contribution questions arising from *Resurfice*. The Supreme Court in *Resurfice* did not have to deal with apportionment, contributory fault or contribution issues because it restored the trial judgment dismissing the action. However, inasmuch as it also did not have to deal with the material-contribution test for that very reason, but chose to and to provide what it referred to as "general principles", we might wonder why it did not also deal at least in general with these issues. After all, the extent of liability (of financial responsibility) is at least as important as the fact of liability and, in many cases, may be more important. I

[1501] [1991] 1 S.C.R. 3 at 19-20.

[1502] *Sunrise*, [1991] 1 S.C.R. 3 at 19. The majority did not comment on the question of whether there might have been fault because they said that would not matter. The dissent states there was no evidence of any fault. *Sunrise*, [1991] 1 S.C.R. 3 at 38.

[1503] [1991] 1 S.C.R. 3 at 20. I consider whether there is a conflict between *Sunrise* and *Resurfice* in *Scraping*. The issue how to handle the situation where the effects of a later event may be seen as "overtaking" the effects of an earlier culpable incident, or at least capable of having some of the same effect on the injured person as the earlier incident. I conclude that the better position is that there is conflict, because Sunrise is an example of overdetermined causation (duplicative causation) cases which are one of the situations in which, by definition, but-for produces a false-negative

may care about the theoretical basis of my liability (or contributory fault) if it will be minimal no matter the basis. I likely will care if it will not be minimal.

This is the issue. Under the *Resurfice* material-contribution test, is the nature (extent) of the wrongdoers' liability *to the injured person* liability *in solidum* (now colloquially called joint and several liability, also called "solidary liability" in recent federal legislation and in Quebec civil law) or proportional? The Supreme Court cannot have been unaware of the problem. It was the issue in the UK's *Barker v Corus*. The House of Lords held that, as matter of principle, if liability under the United Kingdom's material-contribution test is going to be based on possibility, not probability, then the extent of liability will be several (proportional, only), not joint and several. If the nature of the liability is several, then, absent some agreement between the wrongdoers or some legislation changing the situation, apportionment of fault is necessary to determine the amount that each wrongdoer is required to pay, and to determine the extent of the injured person's reduction for contributory fault, but not for contribution between wrongdoers where more than one wrongdoer is held liable to the injured person. Contribution issues do not arise, in principle, because each wrongdoer is liable only for that wrongdoer's proportional share which, in principle, would be calculated by using the amount of the increased risk percentage used by the court in deciding that the wrongdoer was liable.

Giving the Supreme Court the benefit of the doubt, the panel may have realized that they could not undertake an examination of these issues because (1) it would require that they do more than just discuss the general principles of the material-contribution test and (2) whatever general principles the Supreme Court asserted in relation to apportionment, contributory fault and contribution would have to be tested against, and would be subject to, provincial legislation dealing with these issues, at least in cases where the legislation applies. And, in addition, conclusions as to the interplay of *Resurfice* principles and the statute in cases where the statutes apply would certainly affect decisions in analogous cases to which the statutes do not apply. Readers should recall that some of the Canadian statutes have been held to apply only to tort claims. Others have been held to not be restricted to tort.

What follows is a limited discussion of some of the problems that will arise in attempts to marry *Resurfice* material-contribution liability with the provincial apportionment statutes and the traditional, long-standing, common law (and civil law) rule that wrongdoers who cause the same damage are jointly liable *in solidum*.

The first problem is that most require that there be damage "caused by" the conduct of the wrongdoers suing wording such as the B.C. *Negligence Act*. s. 1(1) – "If by the fault of 2 or more persons damage or loss is caused to one or more of them" or the Alberta *Contributory Negligence Act*, s. 1(1) – "When by fault of 2 or more persons damage or loss is caused to one or more of them". The choice of first word varies between "if", "when" and "where". However, these sections do use a form of "contribute". The statutes in this form will have a provision similar to this: "Nothing in this section operates to make a person liable for damage or loss to which the person's fault has not contributed." What is the relationship between "contributed" and "caused".

Do we mention that, by definition, the fault of a person held liable under the *Resurfice* material-contribution test *has not, in fact, contributed* to the damage or loss? Rather, liability has been imposed on that person notwithstanding that lacuna in the evidence. And, Alberta's *Tort-feasors Act* and Prince Edward Island's *Contributory Negligence Act* use "caused or contributed to" in their provisions repealing "last clear chance". Only the Ontario *Negligence Act* still uses "caused or contributed" in referring to the damage (Ontario uses "damages) the wrongdoers inflict on the injured person. However, even that phrase has been interpreted to mean there has to be a causal connection. "Section 1 is premised on a finding that two or more persons contributed causally to a plaintiff's damages": *R. v. Drady*, 2007 CanLII 27970 at para. 51 (Ont. S.C.J.).

Next, the various Tortfeasor Acts do not use any version of "caused" or "contributed" in stating the parameters for the availability of contribution between wrongdoers. Rather, as in the Alberta *Tort-Feasors Act*, s. 3(1), the phrasing is "When damage is suffered by any person as a result of a tort".

In addition, all of the statutes specifically provide for joint and several liability, either in all cases where two or more wrongdoers have caused the same damage (in Ontario, damages) or, at the least, for joint and several liability so long as the injured person is not also at fault (British Columbia, Nova Scotia and, potentially based on the legislation though not yet decided at least the provinces with legislation similar to British Columbia's.). So, for example, if a provincial statute establishes joint liability to the injured person amongst the multiple wrongdoers for liability caused by tortious conduct, assuming the provincial courts hold that *Resurfice* material-contribution causation satisfies the meaning of "cause" as used in the statute, does this mean that in that province *Resurfice* material-contribution liability is joint even if it would not be but for the statute? Canadian judges are not, of course, bound by House of Lord decisions such as *Fairchild* or *Barker*. So, we should not assume that that all first instance and provincial appellate judges required to decide the issue of the nature of the multiple wrongdoer's liability to the injured person will find the logic of the majority in *Barker* persuasive. After all, there was a dissent in *Barker*.[1504]

The feature of liability of concurrent wrongdoers that common law systems now describe as joint and several liability is known as solidary liability in Québec and other civil law systems. The traditional, and proper, common law term for this feature is "liability in *solidum*". In common law systems, the liability in *solidum* of concurrent wrongdoers causing the same damage (in Ontario, damages) was not a creation of statute. As such, to the extent it is still not, it can be changed by a decision of a competent court and, of course, by statute.

[1504] By Lord Rodger, whose view was that the extent of liability should be joint as it was held to be, albeit without discussion of the issue in this way, in *McGhee* and prior cases. Lord Rodger is a Scottish judge. His view of what the law should be has been recently applied in *Wright v. Stoddard International Plc & Anor*, [2007] ScotCS CSOH_138, released 02 August 2007, on the basis that (1) the trial judge found Lord Rodger's analysis more compelling and (2) in any event, under the rules of precedent, the binding law in Scotland on the issue is *McGhee*, which is a Scottish case, not *Fairchild* and *Barker* which are English cases.

It has been changed, in the United Kingdom, by the *Fairchild-Barker* doctrine, for some wrongdoers who might possibly be concurrent wrongdoers. In Canada, it has been changed in British Columbia, in cases to which the British Columbia *Negligence Act*, R.S.B.C. 1996, c. 333 applies, where the injured person is also at fault for the damage. The result should be the same in the other common law provinces or territories which have the same form of statute. So far, it seems that only Nova Scotia judges have realized this. This issue of statutory interpretation does not appear to have been considered in any reported case in the other provinces and territories. However, in a very recent decision, *Misko v John Doe*, 2007 ONCA 660, at para. 23,[1505] the Ontario Court of Appeal seems to have declared that Ontario law allows a judge to find that the liability to the injured person of concurrent tortfeasors (causing the same damage or damages) will be held to be something less than joint (solidary, in *solidum*) where justice requires. The Court did not explicitly say the liability will be several (proportional) but that seems explicit in the decision. Paragraph 23 is:

> [23] As the Supreme Court held in *Blackwater* at para. 80, where there are two wrongful acts that have affected the plaintiff, each "defendant must compensate for the damages it actually caused but need not compensate for the debilitating effects of the other wrongful act that would have occurred anyway. This means that the damages of the tortfeasor may be reduced by reason of other contributing causes". Section 1 provides the mechanism for vindicating this basic principle of fairness despite statutory joint and several liability and the *Athey* rule mandating full compensation to the plaintiff.

There would be a bit of irony in being able to quote from something written by McLachlin, C.J., which seems to underlie the risk-as-legal-causation principle – the *Resurfice* material-contribution test – in support of the argument that liability under that test should be proportional and not solidary. As mentioned earlier, a 1998 paper by McLachin C.J. contains the following passage.

> Tort law is about compensating those who are wrongfully injured. But even more fundamentally, it is about recognising and righting wrongful conduct by one person or a group of persons that harms others. If tort law becomes incapable of recognising important wrongs, and hence incapable of righting them, victims will be left with a sense of grievance and the public will be left with a feeling that justice is not what it should be. Some perceive that this may be occurring due to our rules of causation.
>
> In recent years, a conflation of factors have caused lawyers, scholars and courts to question anew whether the way tort law has traditionally defined the necessary relationship between tortious acts and injuries is the right way to define it, or at least the *only* way. This questioning has happened in the United States and in England and has surfaced in Australia. And it is happening in Canada. Why is this happening? Why are courts now asking questions that for decades, indeed centuries, did not pose themselves, or if they did, were of no great urgency? *I would suggest that it is because too often the traditional 'but-for', all-or-nothing, test denies recovery where our instinctive sense of*

[1505] Affirming, in result, but for different reasons, 2006 CanLII 31300 (S.C.J.)

justice - of what is the right result for the situation - tells us the victim should obtain some compensation.[1506]

It may well be significant that the Chief Justice chose to end the passage with the words "some compensation" and counter-point that to the description of but-for as an 'all or nothing" test. That structure may indicate some receptiveness to arguments that the liability resulting from the application of the *Resurfice* material-contribution test should not be all or nothing. "All or nothing" could be seen as solidary liability. Proportional liability could be seen as "some compensation". We are, no doubt, about to live in interesting times.

IX. Joint Liability and Several Liability, Briefly[1507]

Joint (Solidary) Liability

As indicated, joint liability (more accurately, "joint and several liability") is now used to describe one aspect of the relationship between injured person and wrongdoers where two or more wrongdoers may be held liable for or are held liable for the compensable consequences of the same injury. The same injury means indivisible injury. If it is sensible to say that one wrongdoer caused only this injury, and another that injury, we do not have the same injury. There is, obviously, no actual liability in the sense of an amount that can be collected through (legal) enforcement procedures until the wrongdoer settles or is found liable in court. So, when the term is used before judgment or settlement, it actually describes what would exist if the wrongdoers were held liable. This does not mean that all of the wrongdoers have to be liable for all of the damages attributable to injury; just that more than one of the wrongdoers is liable for the at least some of the same portion of the injury. A limit on the total amount recoverable from any one of the wrongdoers who are jointly liable does not necessarily affect what happens below the limit. Joint liability occurs in two ways. (1) The conduct or deemed conduct of each of the wrongdoers is a legal cause of the injured person's damages. (2) A person is vicariously liable for damages resulting from the actionable conduct of some other wrongdoer. The two categories may overlap. The person who is vicariously liable might also have acted wrongly in a way that is also a cause of the damages.

Several liability now means proportional liability.[1508] Where proportional liability exists in situations involving two or more wrongdoers who have caused the same injury,

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[1506] Hon. B. McLachlin, "Negligence Law - Proving the Connection" in Mullany and Linden eds., *Torts Tomorrow, A Tribute to John Fleming* (Sydney, LBC, 1998) at 16 (emphasis added). The "some compensation" message echoes McLachlin C.J's earlier comments in her dissent in *Sunrise*, [1991] 1 S.C.R. 3 at 39, that apportionment of damages is a "fairer result than the all-or-nothing approach" because "[i]t avoids intricate arguments about factors such as the order of accidents, their impact on the use of the ship, and causation. And it has the advantage of being generally applicable to all causes and producing a fairer result than the all-or-nothing approach ...".

[1507] This section of *Scraping* is substantially taken from my paper titled "The Search For Principal: Joint Liability And Several Liability" presented at the Canadian Bar Association National Civil Litigation Conference in Toronto on April 29, 2006.

[1508] "Proportional" and "proportionate" are synonyms for "several". I cite some cases in a later footnote.

the amount of each wrongdoer is some percentage of that injury which represents that wrongdoer's share, however share is defined, of the injury, even though all of the wrongdoers caused all of the injury. A wrongdoer will only be liable for more than that wrongdoer's share if there is some other reason; for example, vicarious liability imposed by law or under some form of applicable agreement.[1509]

Once upon a time, potential several (proportional) liability situations were rare; most commonly encountered in actions governed by workers' compensation legislation or as the result of settlements in multi-wrongdoer litigation. The settlement example occurs where the injured person settles with fewer than all of the jointly liable wrongdoers and agrees to claim from each of the remaining wrongdoers only their proportional (several) shares of the loss. There are now more instances of proportional liability as a result of statute, in areas where the liability for damages was, historically, joint, if liability existed at all.[1510] It is likely there will be more in the future. "Tort reform" initiatives from the institutional sectors almost always include proposals to eliminate or restrict joint liability and replace it with some form of proportional liability, even where the reform is accompanied by new rights of action.

Joint liability is no longer always the starting premise everywhere in common law Canada for the traditional action for personal injury or economic loss. In British Columbia and Nova Scotia, the two or more wrongdoers are proportionally (severally, not jointly) liable whenever the injured person is also at fault for the injury. Ontario law may have modified the meaning of joint liability for those instances in which its *Negligence Act* applies and the injured person does not sue all of the actual wrongdoers at fault, or at least someone vicariously liable for the actual wrongdoer (*Martin v. Listowel Memorial Hospital*) and, more broadly, in cases where this is required by justice (*Misko v. John Doe*).[1511] In addition, it would seem to be logical to conclude that a justice-based rationale for limiting the extent of liability of concurrent wrongdoers to proportional liability could apply, in Ontario, even to concurrent wrongdoing to which the *Negligence Act* does not apply.

More often than not, the difference between joint and several liability does (or should not) matter to plaintiffs' counsel. The difference matters only where (1) there are multiple[1512] wrongdoers and (2) the injury has been caused (in the enforceable legal sense

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[1509] See, generally, The Ontario Law Reform Commission, *Report on Contribution between Wrongdoers and Contributory Negligence* (1988), D. Cheifetz, *Apportionment of Fault in Tort* (Toronto, Canada Law Book, 1981), D. Cheifetz, "Allocating Financial Responsibility Among Solvent Concurrent Wrongdoers" (2004), 28 Adv. Q. 137. The seminal Commonwealth analyses of the subject are G. Williams, *Joint Obligations* (London, Butterworths, 1949) and G. Williams, *Joint Torts and Contributory Negligence* (London, Stevens & Sons Ltd., 1951).

[1510] For example, in Ontario, the *Securities Act*, R.S.O. 1990, c. S.5, s. 138.6(1) – proportionate liability in some circumstances arising out misrepresentations in a securities prospectus – and, federally, the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, s. 237.3(1) – certain types of financial loss a arising out of an error, omission or misstatement in financial information concerning a corporation that is required under the CBCA or its regulations.

[1511] *Misko v. John Doe*, *supra*; *Martin v. Listowel Memorial Hospital* (2000), 51 O.R. (3d) 384 (C.A.).

[1512] I use "multiple wrongdoers" to mean "more than one wrongdoer," rather than wrongdoers who have committed multiple wrongs.

of caused) by two or more persons. Either the target defendant(s) each have enough money to pay what the injured person's case is worth, or collectively they do, or they do not. If they do, collectively or individually, the plaintiff does not care how the defendants divide the amount to be paid between themselves, regardless of whether their liability to the plaintiff is joint or several. If judgment enforcement is needed, the plaintiff will collect from the defendant or defendants easiest to collect from. The plaintiff does not care if individually the defendants held liable do not have enough money but collectively they do. The plaintiff will collect from each until the total recovered is the full amount of the settlement or the judgment, subject to the prohibition against double satisfaction if there are separate judgments against the multiple wrongdoers.[1513] If the situation is one in which what we now call several liability limits the amount the plaintiff can collect from any of the settling wrongdoers or the defendants who have been held liable, the plaintiff will collect the balance from one or more of the others.[1514]

Defendants will not want to have to bear the entire compensable cost of the injury. To the extent permitted by law, they will want to force others who the injured person might have successfully claimed from, or collected from, but did not, to also pay for the injury.

In Canada in the common law regimes, "joint liability" now means the same as "joint and several liability". Where there is still any difference at all, it is only in certain consequences of settling with or suing fewer than all of the multiple wrongdoers. What joint liability now describes is the injured person's enforceable entitlement to collect the person's recoverable damages from any of the multiple wrongdoers, until the total collected is the full amount of the judgment. The injured person does not have to sue all of the wrongdoers to recover all of the recoverable damages.[1515] That somebody else is also liable for the same injury is irrelevant to the question of the liability of any one of the wrongdoers. The injured person needs to sue only the wrongdoer(s) who have sufficient assets. That the injured person might need to sue more than one of the wrongdoers to collect the full amount, because none of the wrongdoers individually have sufficient insurance or other assets does not alter the consequences of joint liability.

It might be that one or more of the persons whose conduct was a legal cause of the injury, or who might be held liable for the injury on some other basis, might not be

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[1513] See *Treaty Group Inc. v. Drake International Inc*., 2005 CanLII 45406 at para. 3-11 (Ont. S.C.J) and *Olsen v. Poirier* (1978), 21 O.R. (2d) 642 at 650 (H.C.J.), affirmed (1980) 28 O.R. (2d) 744 (C.A.). *Treaty Group* reviews Ontario (and common) law applicable to the right of the injured person to sue and succeed against multiple wrongdoers separately. *Treaty* emphasizes that what the injured person cannot have is double recovery for the same loss.

[1514] Where there are limits due to some pre or post incident agreement or, for cases subject to British Columbia or Nova Scotia law, where the injured person is all at fault.

[1515] Unless local rules regarding how apportionment is done where the injured person is also at fault could affect the result if the injured person does not sue everybody. That could be the case in Ontario as the result of *Martin v. Listowel Memorial Hospital* (2000), 51 O.R. (3d) 384, 192 D.L.R. (4th) 250 (C.A.). See Cheifetz, Allocating Financial Responsibility Among Solvent Concurrent Wrongdoers" (2004), 28 Adv. Q. 137.

subject to the jurisdiction of the court in which the plaintiff has sued. Or, one or more might not be worth suing, or might not be sued even if worth suing, for any number of reasons. The basic rule is that none of this is relevant where joint liability exists. Where there is joint liability, the sued wrongdoer cannot force the injured person to sue any person that the injured person has not sued, absent some sort of enforceable agreement between injured person and wrongdoer that somehow has that effect. In *Parkland (County) No. 31 v. Stetar*, Dickson J. stated:

> It is fundamental, however, to tort law that a plaintiff can proceed against any one of a number of joint or several tort-feasors; there is no duty upon him to sue all those whom he believes contributed to his hurt. He may elect to recover the full amount of his damage from a tort- feasor only partly to blame ... however, even in those cases in which for some reason the right to contribution does not exist, the victim retains the right of full recovery from the tort-feasor whom he has sued.[1516]

So, it is a consequence of joint liability that it is not a defence that someone else may also be, or might also have been, liable for the injury. It is not a defence that the injury was also caused by somebody who the injured person cannot sue or chooses not sue; whether the immunity is because of statute,[1517] or agreement between injured person and "immune" wrongdoer;[1518] or because the wrongdoer is bankrupt; or even if it is simply a case where, for whatever reason the injured person has chosen not to sue some of the persons who might be sued and held liable.

The starting Anglo-Canadian common law premise was and still is what we now call joint liability.[1519] Issues involving joint liability and several liability may exist no matter the legal basis of the relationship said to create the liability. Joint liability and several liability may exist in all of the areas of law that may support claims for compensation for injury: tort (used broadly to encompass all types of actionable wrong that do not fall into some other category), contract, fiduciary and trust, and equity, to the extent it is the source of actionable obligations not within any of the other categories. In Anglo-Canadian common law jurisprudence, persons subject to the same common law (I include equity when I use "common law" without qualification) obligation in respect of the same injury have always been jointly liable to the injured person, unless there was a

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[1516] [1975] 2 S.C.R. 884 at 899.

[1517] *Parkland (County) No. 31 v. Stetar*, [1975] 2 S.C.R. 884 (W2 who was at fault and would have been held also liable was sued by P after expiration of limitation period, P's action against W2 dismissed); *Horvath v. Thring*, 2005 BCCA 127 (W2 at fault but immune by statute; no provisions similar to those in workers' compensation statutes precluding recovery of W2's "share" from W1.)

[1518] *PDC 3 Limited Partnership v. Bregman + Hamann Architects* (2001), 52 O.R. (3d) 533, [2001] O.J. No. 422 (QL) (C.A.), reversing 49 O.R. (3d) 722 (S.C.J.). (W2 liability limited under pre-incident contract with injured person).

[1519] The extent to which it is still a *necessary* starting point in the United Kingdom (other than Scotland) may have been put into question by *Barker v. Corus (UK) Plc*, [2006] UKHL 20 in which the House of Lords held that fairness between injured person and wrongdoers held liable requires that the wrongdoers' liability under the material increase in risk principle established in *Fairchild v Glenhaven Funeral Services Ltd*., [2002] UKHL 22; [2003] 1 AC 32 is proportional, only, not joint. For mesothelioma cases only, the specific result in *Barker* has since been reversed by statute: the United Kingdom *Compensation Act 2006*

valid agreement to the contrary with the injured person or the joint liability was removed by statute. People party to the same contractual obligation or subject to the same trust or fiduciary obligation are jointly liable where the breach results in the same injury.[1520] Common law tort liability is no different. Absent statutory provisions altering the common law, persons liable in tort for the same injury always had and still have the type of liability we now describe as joint liability.[1521]

The modern meaning of "joint liability" and "joint and several liability" differs from their original common law meanings. In most common law jurisdictions, the terms now refer only to the extent of a wrongdoer's liability. The original meanings were procedural. The terms described two categories of multiple wrongdoer who had caused the same injury: those wrongdoers who could be sued in one action and those who could not but had to be sued separately. Wrongdoers who could be sued in one action were wrongdoers who had joint liability; or, because they could be sued in one action, they had joint liability. Wrongdoers who had to be sued in separate actions were wrongdoers who had several liability. However, neither of joint liability nor several liability defined the extent of the multiple wrongdoers' liability. Each of the multiple wrongdoers, whether they could be sued jointly (that is, in one action) or had to be sued in separate actions (severally), was liable for all of the injury that the wrongdoer had caused, even if another of the wrongdoers was also liable for that injury. As indicated, this was called liability *in solidum*. It is what is now meant by both joint liability and joint and several liability.[1522]

At common law, originally, the *only* differences between joint liability, joint and several liability, and several liability were: (1) defendants [persons] who were subject to joint liability or joint and several liability could be sued in one action; (2) defendants who were subject to several liability, only, had to be sued in separate actions; (3) where there was only joint liability, the mere fact of a judgment against or a settlement with any of the multiple wrongdoers (regardless of collection) released all of the rest, even those who were not sued or were not part of the settlement; (4) where there was also several liability (with or without joint liability) then the mere fact of judgment against or settlement with some did not release the others. Legislation has eliminated all of most of the draconian

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[1520] See, for example, G. H.L. Fridman, *Restitution* (2d) (Toronto, Carswell, 1992) at pp. 230-243 and G. Williams, *Joint Obligations*.

[1521] For a recent reminder, see R. v. Drady, 2007 CanLII 27970 at para. 16 (Ont. S.C.J.).

[1522] See, for example, Ontario Law Reform Commission, *Report on Contribution between Wrongdoers and Contributory Negligence* (1988), c. 3, at 31-33. OLRC at 31:"Since each concurrent wrong doer is liable for the entire injury, each is said to be liable in *solidum*." The key portions of the OLRC *Report* are reproduced in D. Cheifetz "Postscript 2:The Retreat Continues" (2005), 29 Adv. Q. 276 at 291-92. The Civil law equivalent is 'solidary' wrongdoers, which also means that each wrongdoer is liable in full for the damage collectively done": Williams, *Joint Torts*, at 1. Both of "solidarily liable" and "jointly and severally" liable are used in a number of federal statutes federal statutes to describe this type of liability: for example, the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, ss. 118, 119, 237.5; *Canadian Environmental Protection Act*, 1999, S.C. 1999, c. 33, s. 214;

consequences of joint liability in most but not all of the provinces and territories. There is no difference in Ontario and some of the other provinces.[1523]

Now, in common law Canada, except for certain procedural consequences after judgment or settlement in some jurisdictions, "joint liability" means the same as "joint and several liability" and both terms mean the same as liability *in solidum*. Both "joint liability" and "joint and several liability" mean that any wrongdoer who may be held liable to a plaintiff for the same injury may be sued for the whole amount of the plaintiff's injury, regardless of whether other wrongdoers may also be liable. In the phrase "joint and several liability," "several" adds nothing. And, in the phrase "joint and several liability" "several liability" does *not* mean what "several liability" means when used by itself. "Several liability", when used by itself, means "proportionate liability". From this point on, I will use only "joint liability" to mean both "joint liability" and "joint and several liability".

The type of liability that we describe as joint liability can be produced in two distinct ways. Absent statute or agreement that alters the general rule, joint liability is the result from concurrent causation. There is concurrent causation where the actionable conduct of two more persons is the cause of the same injury. And, joint liability occurs when one person is liable for loss caused by another. Both types apply to the same situation. In each case, the result is the same., there will be two or more persons who are each liable for all of an injured person's compensable injury.

The general rule in common law and civil law jurisdictions is that where the conduct of each of two or more wrongdoers is a factual cause of same compensable injury, each of the wrongdoers is jointly liable to the injured person for the damages awarded in respect of that injury. This type of joint liability, called at common law liability *in solidum* exists whether the actors are joint wrongdoers or several wrongdoers whose conduct caused the same injury.[1524] There are now statutes in each of the common law provinces and territories that, in sometimes somewhat different language, *codify* this principle; the do not create it.[1525] The legislation, by making all concurrent tortfeasors jointly liable, has not converted those who were not joint tortfeasors at common law into joint tortfeasors.[1526] This fact will only be important where there is something about a status of joint tortfeasor, rather than mere concurrent tortfeasor, relevant to the issues in the action. This could be an issue in jurisdictions where the procedural settlement or judgment consequences have not been abolished.

[1523] The Ontario example is the *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 139(1): "Where two or more persons are jointly liable in respect of the same cause of action, a judgment against or release of one of them does not preclude judgment against any other in the same or a separate proceeding."

[1524] For Québec, see Lara Khoury, *Uncertain Causation*, supra.

[1525] Again, for a recent reminder, see R. v. Drady, 2007 CanLII 27970 at para. 16 (Ont. S.C.J.).

[1526] see, *Apportionment* at 8; *Reeves v. Arsenault*. However, it is not at all unusual to read judgments in which concurrent tortfeasors who were not joint tortfeasors are mistakenly called joint tortfeasors. This is usually an irrelevant mistake in terminology. However a careful reader can find cases in which the result should have been different if the judge actually thought the sued defendants were joint tortfeasors.

Except in British Columbia and Nova Scotia, and seemingly now sometimes in Ontario, the relevant statutory provisions have been interpreted to mean that joint liability to the injured person exists, absent statute or agreement to the contrary, in all cases to which the statutes apply[1527] and in all cases where the same injury is caused by the actionable conduct of two or more persons.[1528] The legislation does not require multiple wrongdoers. It applies whenever the injured person is also at fault; that is, even if the persons at fault are only the injured person and one wrongdoer. The statutes add nothing whatsoever to the extent of liability that the wrongdoers to whom it applies already had. In British Columbia and Nova Scotia, the legislation has restricted the extent of the liability of the multiple wrongdoers in cases where the injured person is injured by the conduct of the wrongdoers and is also at fault. These wrongdoers are only proportionally (severally) liable, not jointly liable.[1529] That result is probably the correct grammatical reading. The apparent justification for this interpretation seems to be that, at common law, the contributory fault of the injured person would have been a complete defence. Accordingly, the legislation taking away that defence need not be interpreted expansively to be interpreted remedially, since the injured person still has a remedy and the potential for full recovery, at least so long as all of the wrongdoers have sufficient assets to pay their proportional shares.[1530]

A number of the common law provinces and territories (perhaps all other than Ontario) have the same or a sufficiently similar provision in their apportionment statutes. Alberta courts have explicitly rejected the argument even though the relevant wording in what is now Alberta's the *Contributory Negligence Act* is substantively identical to the

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[1527] In some of the provinces and territories, the statutes apply only to tort. In other provinces, the statutes apply to all claims from damages no matter the cause of action asserted. See, Cheifetz, "Allocating"; Klar, Tort Law (3d) (Toronto, Thomson/Carswell, 2003)

[1528] Again, in Ontario the requirement is the "same damages". In practice, the distinction between "damage" and "damages" is ignored in the Canadian common law jurisdictions. That is not the case in the United Kingdom where the requirement is the "same damage".

[1529] British Columbia and Nova Scotia courts, respectively, have held that the effect of the *Negligence Act*, R.S.B.C. 1996, c. 333. s. 1(1) and the *Contributory Negligence Act, R.S.N.S.* 1989, c. 95, s. 3(1) is to create "several" liability where the statute applies and the injured person is also at fault. In such cases, the concurrent wrongdoers are proportionally (not jointly) liable if the injured person is also at fault.. See, *Wells v. McBrine*, [1989] 2 W.W.R. 695; 33 B.C.L.R. (2d) 86, 47 C.C.L.T. 94 (B.C. C.A.), leave to appeal to S.C.C. refused (1989), 49 C.C.L.T. xxxi (S.C.C.). See, *Lunenburg County District School Board v. Piercey* (1998), 167 N.S.R. (2d) 68, 41 C.C.L.T. (2d) 60 at para. 65, 1998 CanLII 3265 (N.S.C.A.) where the Court stated that because "no contributory negligence should be found on the part of the [plaintiff] … the appellant Board is not entitled to the advantages provided in s. 3 of the *Contributory Negligence Act* … to limit its responsibility to Mr. Piercey to 59%."; and, *Inglis Ltd. v. South Shore Sales & Service Ltd*. (1979), 31 N.S.R. (2d) 541, 11 C.P.C. 127 at 131 (C.A.). B.C.'s s. 1(1) begins: "If by the fault of 2 or more persons damage or loss is caused to one or more of them, the liability to make good the damage or loss is in proportion to the degree to which each person was at fault". Nova Scotia's s. 3(1) begins: "Where by the fault of two or more persons damage or loss is caused to one or more of them, the liability to make good the damage or loss is in proportion to the degree in which each person was at fault."

[1530] See *Wells v. McBrine*, *supra*, footnote 17. On the other hand, at common law contributory fault was irrelevant outside of tort, so the rationale referring back to the common law situation is analytically valid only for tort. In other causes of action, for example, contract, the statute has provided wrongdoers with a partial defence the wrongdoers did not at common law.

British Columbia and Nova Scotia provisions.[1531] Ontario courts and the Supreme Court of Canada have rejected the British Columbia interpretation in relation to what is now Ontario's *Negligence Act*, s. 3 (the contributory fault section), on the asserted basis that the Ontario statute has different wording.[1532] The validity of the assertion that the literal difference produces a difference in meaning is grammatically questionable; however that does not matter until the Supreme Court of Canada overrules itself.[1533] However, in Ontario, the *Negligence Act* has now been interpreted to create or permit what amounts to a form of partial proportionate liability in those cases where the injured person is also at fault and has not sued all of the wrongdoers who were legal causes of the injury and, more broadly, where justice requires.[1534]

In *Misko*, in the analysis it used to arrive at the conclusion that a particular defendant could only be (what seems to be) severally liable, the Ontario Court of Appeal thought that it had to, and did, both distinguish and apply *Martin v. Listowel Memorial Hospital* on the issue of the interpretation of the s. 1 of the *Negligence Act*. However, the Court did not refer to *Martin*'s and *Ingles v. Tutkaluk Construction*'s rejection of the argument that section 3 of the *Negligence Act* should be interpreted to create proportional liability only as between the plaintiff and any one defendant. Such an interpretation would have the same effect, as between plaintiff and defendant, as interpreting section 1 of the *Negligence Act* to allow a Court to declare that proportional liability exists as between plaintiff and defendant in cases where the declaration is made. The difference, of course, is that that the reinterpretation of section 3 would apply in all cases to which the Act applies and the section applies. It would not require a court to find that proportional liability was required in the interests of justice. It is worth quoting some of what the Supreme Court of Canada said in rejecting the defendant's argument, in *Ingles*:

> [59] . . . The purpose of a regime which imposes joint and several liability on multiple defendants is to ensure that plaintiffs receive actual compensation for their loss. Given the wording of the Ontario *Negligence Act*, I can see no reason to deny this benefit to a

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[1531] R.S.A. 2000, c. C-27, s. 1(1): "When by fault of 2 or more persons damage or loss is caused to one or more of them, the liability to make good the damage or loss is in proportion to the degree in which each person was at fault". See, *Campbell Estate v. Calgary Power Ltd*., [1988] A.J. No. 855, [1989] 1 W.W.R. 36, 62 Alta. L.R. (2d) 253 (C.A.).

[1532] R.S.O. 1990, c. N.1. See *Ingles v. Tutkaluk Construction Ltd*., [2000] 1 S.C.R. 298, 183 D.L.R. (4th) 193 (S.C.C.), reversing (1998), 38 O.R. (3d) 384, 158 D.L.R. (4th) 147, [1998] O.J. No. 1126 (QL) (C.A.), reversing [1994] O.J. No. 1714 (QL) and [1995] O.J. No. 231 (QL), 18 C.L.R. (2d) 67 and 82 (Gen. Div.); and *Martin v. Listowel Memorial Hospital* (2000), 51 O.R. (3d) 384, 192 D.L.R. (4th) 250, 138 O.A.C. 77 (C.A.).

[1533] The Ontario *Negligence Act*, s. 3, provides: "In any action for damages that is founded upon the fault or negligence of the defendant if fault or negligence is found on the part of the plaintiff that contributed to the damages, *the court shall apportion the damages in proportion to the degree of fault or negligence found against the parties respectively*." (emphasis added). Some readers may see hints of the classic Humpty Dumpty declaration as to the meaning of words in the interpretation of the Ontario legislation.

[1534] *Misko v. John Doe*, *supra*, and *Martin v. Listowel Memorial Hospital*; *supra*. I suggested in "Allocating" that *Martin* probably did not intend this consequence as apportionment on account of contributory fault of the injured person was not an issue in the action. However, a literal reading of s. 3 of the Ontario Negligence Act – the section dealing with the consequences of the injured person's contributory fault – also seems also seems to dictate this result.

> plaintiff who contributes to his or her loss. His or her responsibility for the loss is accounted for in the apportionment of fault. *There is no reason to account for it again by denying him or her the benefit of a scheme of joint and several liability when the wording of the legislation does not intend it to be so.*[1535] (emphasis added)

Which multiple wrongdoers are joint wrongdoers? What is the difference between joint wrongdoers and all other forms of concurrent wrongdoers whose conduct causes the same injury? What is the meaning of "same injury"? There can be very fine disputes about the meaning of same injury, or same damage, or same damages. In the Ontario, the statute reference is to the same "damages". There is a distinction between "damage" – the injury sustained by the injured person – and "damages" – the amount of money the injured person is awarded for the injury. That distinction is rarely relevant as between injured person and wrongdoer. It may be relevant as between wrongdoers seeking contribution from one another, with sometimes hard to follow results.[1536]

Both joint wrongdoers and two or more wrongdoers whose conduct causes the same injury are concurrent wrongdoer.[1537] There are joint wrongdoers where the multiple wrongdoers have a pre-existing joint obligation to the injured person or, absent that joint obligation, act for a common purpose.[1538] "Concurrent tortfeasors (wrongdoers) are regarded as "joint" when there is concurrence not only in the causal sequence leading to the single damage, but also in some common enterprise; they are several or independent when the concurrence is exclusively in the realm of causation. The former are responsible for the same tort (wrong), the latter only for the same damage."[1539] "Concurrent" does not mean "temporally concurrent" in the sense that actionable conduct has to overlap in time in some meaningful sense. "Concurrent" means nothing more than that the injury has been caused by the conduct of two or more wrongdoers.[1540] I have inserted

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[1535] This passage in *Ingles* probably means that the reason(s) the Ontario Court of Appeal gave in *Misko* for affirming the dismissal of the third party claim are wrong, are *per incuriam*. However, that does not matter to the result, which was correct, albeit for a reason that the Court forgot to mention. The defendant could never be liable to the plaintiff for the damages claimed because of s. 5.7.(2) of the Ontario OAP (1) which is based on section 2(1)(c) of Ontario Regulation 676/00. Since the defendant could never be liable for to the plaintiff for the damages claimed, it did not have any basis for, or any need to for the third party claim for contribution. That should have been the end of the matter.

[1536] The phrasing of the legislation in common law jurisdictions other than Ontario tends to have "damage" not "damages". I do not intend to discuss the consequences of that distinction between "damage" and "damages" beyond mentioning that it can result in a finding that contribution is not available under the applicable apportionment statute.

[1537] Cheifetz, *Apportionment*, at pp. 5-6.

[1538] Williams, *Joint Obligations*, at1. See, *inter alia*, *Tucker (Guardian of) v. Asleson* (1993), 102 D.L.R. (4th) 518; [1993] 6 W.W.R. 45, 1993 CanLII 2782 at para. 107-108 (B.C.C.A.)

[1539] Fleming, *The Law of Torts*, at _____ [5th. ed. Australia, The Law Book Co. Ltd., 1977, at 237] (Internal quotation marks omitted) and Cheifetz, *Apportionment*, at pp. 5-8, Klar, *Tort Law* (3d), at pp. 487-91.

[1540] The motion decision in *Misko v. John Doe*, 2006 CanLII 31300 (S.C.J.) is wrong on this point. The motion judge did not refer to any authority (other than an Oxford dictionary) for the decision that "concurrent" means temporal contemporaneity – that it means "existing or happening at the same time". The Court of Appeal did not discuss the motion judge's analysis of any of the issues. It affirmed the dismissal of the third party claim "for somewhat different reasons". (*Misko*, 2007 ONCA 660, at para. 9.)

"wrongdoers" and "wrong" in brackets because the explanation is generally applicable to all wrongs, not just torts. Older descriptions of the commonality feature are of "a concerted purpose to a common end";[1541] and, that the joint wrongdoers have "mentally combined together for some purpose".[1542] The agreed upon common course of action must be wrongful, in itself, for the subsequent wrongful act of one of the parties to be imputed to the others. If the common course is lawful, and one of the parties commits a wrong in furtherance of the agreement, the wrongful act will not be imputed to the other parties merely by reason of the agreement.[1543]

Multiple wrongdoers who do not have the required common purpose and whose conduct causes *different* injury are not concurrent wrongdoers. They could be described as concurrent wrongdoers causing separate damage if it happens that their misconduct overlaps in (was concurrent in) time, but nothing would follow in law from that description. It would be better to not describe them as concurrent tortfeasors to avoid any confusion with concurrent tortfeasors whose conduct causes the same injury. These wrongdoers are liable only for the separate (different) injury each causes, even if the injuries are to the same person. The distinction between wrongdoers causing the same injury and wrongdoers causing separate injury to one person is a question of fact, depending on whether the facts are such that it is sensible for the judge or jury to divide the "overall" harm into separate injuries.[1544]

Joint liability may also result from some aspect of a relationship between the wrongdoers, rather than the fact that their *separate* conduct is held to have actually caused (or is deemed to have actually caused) the same damage (or damages). There are two categories of relationship that will produce joint liability. The same relationship may fit in both categories. As mentioned, wrongdoers whose conduct has a common purpose are joint wrongdoers. Where the conduct is tortious, the wrongdoers are joint tortfeasors. Joint tortfeasors have joint liability. Where wrongdoers are joint tortfeasors as a result of a conduct of this sort, the conduct of any one wrongdoer is the conduct of all. This sort of joint liability is direct liability because each of the wrongdoers is deemed to have committed the actionable conduct.[1545]

Another judge of the Ontario Superior Court refused to follow *Misko* on this point: see, *Veffer v. Feldman*, 2007 CanLII 15798 (ON S.C.J), leave to appeal refused Sept. 10, 2007 (Ont. Div. Ct.).

[1541] Cheifetz, *Apportionment* at pp 5-6; *The 'Koursk'*, [1924] P. 140 at 156 (C.A.), *Keough v. Henderson Branch No. 215 of the Royal Canadian Legion* (1978), 91 D.L.R. (3d) 507, [1978] 6 W.W.R. 335 (Man. C.A.), varying 80 D.L.R. (3d) 326 (Man. Q.B.) and Lewis Klar, *Annotation*, 7 C.C.L.T. 146 (1978) at pp. 147- 48 and 1 C.C.L.T. 331 (1976) at 332.

[1542] Williams, *Joint Torts*, at 1.

[1543] *Keough v. Henderson Branch No. 215*, supra.

[1544] See, *Mizzi v. Hopkins* (2003), 64 O.R. (3d) 365, 2003 CanLII 52145 (C.A.); *Alderson v. Callaghan* (1998), 40 O.R. (3d) 136, 21 C.P.C. (4th) 224 (C.A.); *O'Neil v. Van Horne* (2002), 59 O.R. (3d) 384, [2002] O.J. No. 1528 (QL) (C.A.); *Reeves v. Arsenault* (1995), 136 Nfld. & P.E.I.R. 91, 423 A.P.R. 91, 423 A.P.R. 91 (P.E.I. S.C.); Klar, *Tort Law* (3d) at 487-491; OLRC, *Report* at 8-9 (quoting from a number of treatises).

[1545] Vicarious liability is discussed in Klar, *Tort Law* (3d) at pp. 579-597. See, also, G. Williams, *Joint Torts*, and P.S. Atiyah, *Vicarious Liability in the Law of Torts (*London, Butterworths, 1967*).*

In addition, persons who are part of a relationship that is subject to vicarious liability relationship are also jointly liable. That is, where X is vicariously liable for injury caused by the conduct of Y, X and Y are jointly liable. This type of joint liability is not direct liability. Joint liability which is the result of vicarious liability is not based on the premise that the conduct of both X and Y caused the injury. X's liability is not based on misconduct by X. Rather, it is based on the premise that there is something about the relationship between X and Y that requires the conclusion that X should also be liable for actionable injury caused by the misconduct of Y, even if X has not acted in an improper manner. So, in this case, X has not committed an act that is wrong. Nonetheless, X is held liable for certain consequences of Y's misconduct.[1546]

As persons in a vicarious liability relationship have joint liability, the common law called them joint tortfeasor where the liability arose out of tort.[1547] It may be important to understand, in each case, why the multiple wrongdoers are characterized as joint wrongdoers in a particular case. For example, where the multiple wrongdoers are joint tortfeasors because the tort involves a common purpose, the general rule was (and still is) that each of the wrongdoers is liable for all of the damages that any of them is liable for. However, there are now exceptions in Canada. Consider the situation where the actionable conduct of some, but not all, of the joint tortfeasors merits the imposition of punitive damages. Each of the other "common purpose" joint tortfeasors – those who did not actually commit the conduct that justifies the punitive damages award – will *not* be liable for punitive damages merely because one or more of the others are liable for punitive damages. The rationale that the conduct of any one "common purpose" joint tortfeasor is deemed to be the conduct of all is not imported into punitive damages jurisprudence.

Under current Canada theory, joint liability which results only from vicarious liability is not based in any way whatsoever on the imputation of the wrongful conduct to the person who did not commit the impugned act but is nonetheless held liable for certain consequences of that act.[1548] Accordingly, Canadian jurisprudence no longer recognizes vicarious liability for punitive damages.[1549] Defendants who are only vicariously liable for injury or loss caused by another will not be liable for the punitive damages that the other might be liable for.

[1546] *Bazley v Curry* [1999] 2 S.C.R. 534, 174 D.L.R. (4th) 45, [1999] 8 W.W.R. 197; *Jacobi v. Griffiths*, [1999] 2 S.C.R. 570, 174 D.L.R. (4th) 71, [1999] 9 W.W.R. 1 (S.C.C.)

[1547] A joint tort occurs where one person is vicariously liable for the tort committed by another: see, generally, Klar, *Tort Law* (3d) at pp. 579-97.

[1548] *Blackwater v. Plint, supra*, footnote 34, *671122 Ontario Ltd. v Sagaz Industries Canada Inc 2001 SCC 59*, [2001] 2 S.C.R 983, *Bazley* and *Jacobi*, *supra*, footnote 31 , *Harroun v. Turiff* (2000), 50 O.R. (3d) 634, 190 D.L.R. (4th) 39 (Ont. C.A.); *Bluebird Cabs Ltd. v. Guardian Insurance Co. of Canada* 1999 BCCA 195, 173 D.L.R. (4th) 318, 66 B.C.L.R. (3d) 86 (B.C.C.A.)

[1549] See, for example, *Blackwater v. Plint*, 2005 SCC 58 at para. 91, [2005] 3 S.C.R. 3. There are other decisions to the same effect from the Supreme Court and lower courts.

Several (Proportional) Liability[1550]

As indicated, several liability is the term that describes the extent of liability a wrongdoer has in the situation where the same injury is caused by the misconduct of two or more wrongdoers but each wrongdoer is not liable for the entire injury. Instead, each wrongdoer is liable for only that wrongdoer's "proportion" [share, portion] of the injury. That proportion is determined by some formula under which the court decides what each wrongdoer's portion of the injury should be. That portion represents the limit of the wrongdoer's liability to the injured person. The proportions have to add up to 100% (of all of the fault if the injured person is not at fault, or 100% including the injured person if the injured person is also at fault.)[1551]

Several liability, then, is a synonym for proportional liability. Under proportionate liability, then, each wrongdoer's extent of liability is limited, based on some formula for assessing the extent that each should bear responsibility for the injured person's injury. Broadly, there are two approaches for determining the extent of that liability: (1) in the amount the judge considers just or equitable, in accordance with the extent of the wrongdoer's responsibility; or (2) the portion that corresponds to the wrongdoer's degree of fault.

Until the Ontario Court of Appeal's decision in *Misko v John Doe*, several liability, in its modern meaning of proportional liability for the damages resulting from the same injury, did not exist in Canadian obligations' law, except as a result of statute or some relevant pre-or post-incident agreement of the parties. Statutory examples are: provisions such as those found in the various provincial workers' compensation statutes that, where they apply, prevent employees injured in the course of employment from recovering from wrongdoers who may be sued the "shares' of at fault employers or employees who cannot be sued, leaving the wrongdoers responsible only for the remainder;[1552] and, provisions such as now exist in the *Canada Business Corporations Act*[1553] which applies to claims for "financial loss arising out of an error, omission or

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[1550] Judicial authority recognizing and affirming, explicitly through use, the use of proportional (or proportionate) liability as a synonym for several liability includes: *J. M. v. Bradley*, 2004 CanLII 8541 at paras. 33, 54, 56, 68-70 (Ont. C.A.); *Martin v. Listowel Memorial Hospital* at para. 43-44; *Amoco Canada Petroleum Co. Ltd. v. Propak Systems Ltd*., 2001 ABCA 110 at para. 16 and elsewhere, 200 D.L.R. (4th) 667,[2001] 6 W.W.R. 628; and, *Barker v. Corus*, [2006] UKHL 20 at paras. 44-47, 86, [2006] 2 WLR 1027, [2006] 2 AC 572. The discussion in *R. v. Drady*, 2007 CanLII 27970 (Ont. S.J.C.) about the meaning of "several liability" should not be understood to hold otherwise. In addition, this is the terminology adopted by Commonwealth law reform commissions for at least the past two decades.

[1551] Cheifetz, *Apportionment*.

[1552] For example, in Ontario, the *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c. 16, Sched. A, ss. 29(2), 29(3) and 29(4). This a partial form of proportional liability (class proportional liability?) as the wrongdoers who may be sued are still jointly liable for the balance.

[1553] R.S.C. 1985, c. C-44, s. 237.3 (1): "Subject to this section and sections 237.4 to 237.6, every defendant or third party who has been found responsible for a financial loss is liable to the plaintiff only for the portion of the damages that corresponds to their degree of responsibility for the loss." Another example is some aspects of the liability of "non-protected" defendants in actions arising out of motor vehicle accidents in Ontario under the Insurance Act, R.S.O. 1990, c. I.8, s. 267.7(1), dealing with what the statute calls

misstatement in financial information concerning a corporation that is required under this Act or the regulations."[1554]

Agreement examples include: (1) an enforceable pre-incident agreement between injured person and wrongdoer that limit the injured person's recovery from the wrongdoer to some portion of the injured person's damages;[1555] and (2) a post-incident settlement between the injured person and one or more of the multiple wrongdoers, but not all of them, that results in the injured person claiming against the remaining (non-settling) wrongdoers for only each of those wrongdoer's individual "shares" of the remainder of the injured person's damages.[1556]

X. Proof of Damages, Failure to Mitigate and Contributory Fault, Briefly

Proof of Damages

I now digress, briefly, to deal with aspects of some causation-related issues created by a statement in *Blackwater v. Plint*. The issues arise from a puzzling statement in paragraph 78 of *Blackwater* (quoted in paragraph 22 of *Resurfice*) which is tangential (although necessarily connected to) the morass discussed in this article. The first aspect is what is colloquially called "causation of *damages*" as opposed to causation of *damage*. McLachlin CJ wrote: "[t]he rules of causation consider generally whether 'but for' the defendant's acts, the plaintiff's damages would have been incurred on a balance of probabilities." The statement is puzzling because, given the balance of paragraph 78 of *Blackwater*, it is unlikely that McLachlin C.J. mistakenly used "damages" when she intended to say "damage".

This is made clearer by the context in which the quoted statement appears, in particular the first sentence of the paragraph. The first two sentences are:

> It is important to distinguish between causation as the source of the loss and the rules of damage assessment in tort. The rules of causation consider generally whether "but for" the defendant's acts, the plaintiff's damages would have been incurred on a balance of probabilities.

(incorrectly) "Joint and several liability with other tortfeasors" as a result of which only the non-protected class are made liable for a portion of the damages. This is partial several liability only as between protected and non-protected defendants as classes. The non-protected defendants are still jointly liable to the plaintiffs for the amounts for the loss for which they may be held liable. The "other tortfeasors" are, of course, the "protected" defendants.

[1554] R.S.C 1985, c. C-44, s. 237.1

[1555] *PDC 3 Limited Partership v. Bregman + Hamann Architects* (2001), 52 O.R. (3d) 533, [2001] O.J. No. 422 (QL) (C.A.), reversing 49 O.R. (3d) 722 (S.C.J.).

[1556] See *J. M. v. Bradley* (2004), 240 D.L.R. (4th) 435, 2004 CanLII 8541, reversing 2003 CarswellOnt 6052 (C.A.), *Amoco Canada Petroleum Co. v. Propak Systems Ltd*. (2001), 200 D.L.R. (4th) 667, 4 C.P.C. (5th) 20 (Alta. C.A.); *British Columbia Ferry Corp. v. T&N plc*. (1995), 16 B.C.L.R. (3d) 115, [1996] 4 W.W.R. 161, 27 C.C.L.T. (2d) 287 (B.C.C.A.)

The complete text of para. 78 of *Blackwater* should end any argument. The paragraph was intended to deal with damages, specifically the rules of damage assessment in tort.

> [78] It is important to distinguish between causation as the source of the loss and the rules of damage assessment in tort. The rules of causation consider generally whether "but for" the defendant's acts, the plaintiff's damages would have been incurred on a balance of probabilities. Even though there may be several tortious and non-tortious causes of injury, so long as the defendant's act is a cause of the plaintiff's damage, the defendant is fully liable for that damage. The rules of damages then consider what the original position of the plaintiff would have been. The governing principle is that the defendant need not put the plaintiff in a better position than his original position and should not compensate the plaintiff for any damages he would have suffered anyway: *Athey*. Mr. Barney's submissions that injury from traumas other than the sexual assault should not be excluded amount to the contention that once a tortious act has been found to be a material cause of injury, the defendant becomes liable for all damages complained of after, whether or not the defendant was responsible for those damages.

The distinction between "damages" and "damages" is well-known. "Damage" is the harm, the injury. "Damages" is the compensation awarded on account of damage, so as to put the injured person back in the injured person's original position (the pre-wrong position) as best as money allows.

It is entirely wrong to say that the rules of causation are at all concerned with proof of the injured person's *damages* on the balance of probability (or probabilities). The defence bar would no doubt love this to be true. The plaintiffs' bar would be aghast were this to become the law of Canada. McLachlin CJ could not have intended to suggest that damages are assessed on the "balance of probabilities". What McLachlin CJ undoubtedly meant was the damages are assessed in terms of their probabilities: a statement which should be understood to use "probabilities" as a synonym for "possibilities" or "likelihood" – to use "probabilities" to represent any mathematical value from 0% and 100%. "The standard of proof in relation to future events is simple probability, not the balance of probabilities, and hypothetical events are to be given weight according to their relative likelihood."[1557] The rules of causation consider the injured person's damage (injury, harm – the condition which results in the damages) were caused by the wrongdoer's acts. Once it is established, appropriately, that that actionable conduct caused the injury – where the but-for test is involved on a balance of probability basis – then, and only then, does one go to proof of damages. Proof of damages, which deals with what may happen in the future, not what has happened in the past, is on a possibility basis and not a certainty basis: *Athey*.[1558]

That principle is both long established and explicitly clear in *Athey*, which conveniently sets out the principles and cases.

> [26] The respondents argued that the trial judge's assessment of probabilities in causation was similar to the assessment of probabilities routinely undertaken by courts in

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[1557] *Reilly v. Lynn* 2003 BCCA 49 at para. 101, 10 B.C.L.R. (4th) 16 quoting *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para. 27.

[1558] For example, *Athey v. Leonati*, at paras. 26-30.

> adjusting damages to reflect contingencies. This argument overlooks the fundamental distinction between the way in which courts deal with alleged past events and the way in which courts deal with potential future or hypothetical events.
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> [27] Hypothetical events (such as how the plaintiff's life would have proceeded without the tortious injury) or future events need not be proven on a balance of probabilities. Instead, they are simply given weight according to their relative likelihood: *Mallett v. McMonagle*, [1970] A.C. 166 (H.L.); *Malec v. J. C. Hutton Proprietary Ltd.* (1990), 169 C.L.R. 638 (Aust. H.C.); *Janiak v. Ippolito*, [1985] 1 S.C.R. 146. For example, if there is a 30 percent chance that the plaintiff's injuries will worsen, then the damage award may be increased by 30 percent of the anticipated extra damages to reflect that risk. A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation: *Schrump v. Koot* (1977), 18 O.R. (2d) 337 (C.A.); *Graham v. Rourke* (1990), 74 D.L.R. (4th) 1 (Ont. C.A.).
>
> [28] By contrast, past events must be proven, and once proven they are treated as certainties. In a negligence action, the court must declare whether the defendant was negligent, and that conclusion cannot be couched in terms of probabilities. Likewise, the negligent conduct either was or was not a cause of the injury. The court must decide, on the available evidence, whether the thing alleged has been proven; if it has, it is accepted as a certainty: *Mallett v. McMonagle*, *supra*; *Malec v. J. C. Hutton Proprietary Ltd.*, *supra*, Cooper-Stephenson, *supra*, at pp. 67-81.

It is wrong to assume the *Blackwater* court (and similarly the *Resurfice* court, because the Chief Justice explicitly quotes the *Blackwater* statement), intended to upset this long settled aspect of the requirement for proof of recoverable damages, once actionable damage (harm, injury) has been established. The discussion of "loss of future earning opportunity" appears in *Blackwater*.[1559] The only issue discussed was whether the British Columbia Court of Appeal was correct to award a "conventional amount" in the face of inadequate evidence "to specifically quantify any future loss of earnings". The Supreme Court held that it was.[1560]

The law on this issue had not changed after *Athey* and before *Resurfice*, let alone earlier before *Blackwater*. And, *Blackwater* did not change the law. As a courtesy to my west coast colleagues, here is the British Columbia Court of Appeal statement in 2003, in *Reilly v. Lynn,*[1561] of the principles applicable to the assessment of lost earning capacity (loss of future earning ability).

> [101] The relevant principles may be briefly summarized. The standard of proof in relation to future events is simple probability, not the balance of probabilities, and hypothetical events are to be given weight according to their relative likelihood: *Athey v. Leonati*, 1996 CanLII 183 (S.C.C.), [1996] 3 S.C.R. 458 at para. 27. A plaintiff is entitled to compensation for real and substantial possibilities of loss, which are to be quantified by estimating the chance of the loss occurring: *Athey v. Leonati, supra*, at para. 27,

[1559] *Blackwater*, at paras. 93-96.
[1560] *Blackwater*, at para. 96.
[1561] 2003 BCCA 49, 10 B.C.L.R. (4th) 16 (B.C. C.A.).

> *Steenblok v. Funk* 1990 CanLII 3812 (B.C. C.A.), (1990), 46 B.C.L.R. (2d) 133 at 135 (C.A.). The valuation of the loss of earning capacity may involve a comparison of what the plaintiff would probably have earned but for the accident with what he will probably earn in his injured condition: *Milina v. Bartsch* 1985 CanLII 179 (B.C S.C.), (1985), 49 B.C.L.R. (2d) 33 at 93 (S.C.). However, that is not the end of the inquiry; the overall fairness and reasonableness of the award must be considered: *Rosvold v. Dunlop* 2001 BCCA 1, (2001), 84 B.C.L.R. (3d) 158, 2001 BCCA 1 at para. 11; *Ryder v. Paquette*, [1995] B.C.J. No. 644 (C.A.). Moreover, the task of the Court is to assess the losses, not to calculate them mathematically: *Mulholland (Guardian ad litem of) v. Riley Estate* 1995 CanLII 1971 (BC C.A.), (1995), 12 B.C.L.R. (3d) 248 (C.A.). Finally, since the course of future events is unknown, allowance must be made for the contingency that the assumptions upon which the award is based may prove to be wrong: *Milina v. Bartsch*, *supra*, at 79.[1562]

Some 15 years earlier in *Houwelling Nurseries Ltd. v. Fisone Western Corporation*,[1563] McLachlin C.J., while still on the B.C.C.A., had made similar points dealing with claims for future loss of opportunity where the cause of action was breach of contract.

> [25] The matter may be put another way. Even though the plaintiff may not be able to prove with certainty that it would have obtained specific contracts but for the breach, it may be able to establish that the defendant's breach of contract deprived it of the opportunity to obtain such business. The plaintiff is entitled to compensation for the loss of that opportunity. But it would be wrong to assess the damages for that lost opportunity as though it were a certainty.[1564]

We should ask this question. Does the rationale in the last sentence of quotation from *Houwelling* apply to the assessment of damages under the *Resurfice* possibility-based doctrine of causation? Is it not wrong to assess the damages awarded against a defendant held liable where causation has been established on a possibility, basis, only, as if the damage were a certainty? If it is not wrong, then why not? It does not make sense to say that a defendant found to have "legally caused" damage under an application of the *Resurfice* material-contribution-to risk test has deprived the injured person of an opportunity to avoid that damage. However, increasing the possibility of damage is, in practice, the same thing as depriving the injured person of a less than probable chance of something valuable. This is exactly what the House of Lords recognized in *Barker v. Corus* in holding that the measure of liability under the *Fairchild-Barker* version of material contribution is proportional, not *in solidum*.

[1562] 2003 BCCA 49 at para. 101, 10 B.C.L.R. (4th) 16. See, also, *Houwelling Nurseries Ltd. v. Fisone Western Corporation*, [1988] B.C.J. No. 306, 49 D.L.R. (4th) 205 at paras. 24-25, 37 B.C.L.R.(2d) 2 (C.A.); leave to appeal refused, [1988] S.C.C.A. No. 200, 37 B.C.L.R. (2d) 2n.

[1563] [1988] B.C.J. No. 306, 49 D.L.R. (4th) 205 at paras 24-25, 37 B.C.L.R.(2d) 2 (C.A.); [leave to appeal refused, [1988] S.C.C.A. No. 200, 37 B.C.L.R. (2d) 2n.].

[1564] *Houwelling*, at para. 25.

Failure to Mitigate and Contributory Fault

Another causation-related issue that could be affected by McLachlin CJ's statement, if we read it for what it seems to assert, is the manner in which failure to mitigate is handled.

Failure to mitigate is relevant only where the injured person has some actionable damage resulting in actionable damages. The issue, then, is whether additional damage or damages resulting from a failure to mitigate should be treated analogously to contributory fault, so there is apportionment, or as breaking the chain of causation which provides the defendant a complete defence. Current orthodoxy is failure to mitigate provides a complete defence for any damages held to be caused by the failure to mitigate. Conduct of the injured person found to amount to breach of the injured person's obligation to mitigate losses – that is, causative conduct – provides the defendant with a complete defence in relation to those damages (losses) which result from the failure to mitigate. The law treats any losses flowing from the failure to mitigate – indeed any additional injury to: exacerbation or even new injury – as having been caused only by the conduct of the injured person, rather than as contributory fault which provides only a partial defence.[1565]

However, this is a "policy" decision because the wrongful conduct of the defendant was and is, in fact, part of the historical (the scientific) set of facts that are together are a factual cause of the additional injury or additional losses. Indeed, the obligation to mitigate is relevant only if the plaintiff has been injured by some actionable conduct of the defendant. Failure to mitigate, then, is treated as a damages issue not a causation of the damage issue: see, *inter alia*, Waddams, *Damages*, *ibid*. So, the statement by McLachlin CJ that "[t]he rules of causation consider generally whether 'but for' the defendant's acts, the plaintiff's damages would have been incurred on a balance of probabilities" by connection causation and damages, not causation and damage, could be seen to invite us to reconsider how failure to mitigate is handled.[1566]

[1565] Stephen Waddams, *The Law of Damages*, (Looseleaf ed.) at pp. 15-3 – 15-4 (ss. 15.70).

[1566] Whatever the distinction is, it is not one of principle. Failure to mitigate is, by definition, causative conduct, just as is conduct that is held to amount to contributory fault. This is not just me purporting to speak *ex cathedra*. Waddams, *Damages*, at s. 15.70, states: "A plaintiff is not entitled to recover compensation for loss that could, by taking reasonable action, have been avoided. This rule rests partly on the principle of causation: losses that could reasonably have been avoided are caused by the plaintiff's inaction rather than by the defendant's wrong and partly on a policy of avoiding economic waste. As McCormick points out, the causation explanation is not entirely satisfactory, standing alone, because 'it is obvious that the defendant's wrongdoing *is* an active and substantial factor in producing the plaintiff's loss' but the plaintiff cannot recover compensation if the loss could reasonably have been avoided." (emphasis in original, footnotes omitted). Waddams goes on to discuss why the McCormick explanation is also not entirely adequate. He suggests that the policy issue is summarized as the principle that the plaintiff can be wasteful, but not at the defendant's expense, using an almost century-old judicial statement to make the point: the plaintiff "has no privilege to sit with his arms folded, as it were, and incur all the damage possible." Waddams, *Damages*, *ibid.*, footnotes omitted.

XI. Fact or Fiction

Vaughan Black and I wrote in "Through the Looking Glass, Darkly: *Resurfice v. Hanke*":[1567]

> In recent years, especially in the United Kingdom, judges have expended much effort wrestling with the question of when, in the interests of justice, courts may depart from the traditional but-for test for causation and employ a more easily satisfied test. The House of Lords has issued four long, complex judgments on the matter since 2003, each with considered references to both United Kingdom and other Commonwealth case law. *Hanke* grapples with the same difficult issues as did the House of Lords. Unlike the House of Lords decisions, *Hanke* does so in bare-bones fashion. The Supreme Court's curt reasons mention no cases other than its own and no scholarly writing on the causation issues beyond an acknowledgment that some exists. That, on its own, is not necessarily cause for concern. Many will prefer the brevity of the Supreme Court's approach in *Hanke* to the alternative of wading through lengthy judicial dilations. But, even if the pithy, headnote-like nature of the *Hanke* judgment is not reason for concern, its content is.

The "scholarly writing" the Supreme Court acknowledges has nothing to do with causation. It seems, at least to this writer, that the reason the Court mentioned its own jurisprudence (to the limited extent it did) was to imply that that its jurisprudence in the area is clear and consistent. It is not. I attempted to show why in *Snark*.

What might we find elsewhere?

The House of Lords has shown in number of recent decisions that even lawyers and judges can be intellectually honest about the existence of arbitrary choices, contradictions, and inconsistencies in aspects of the law. *White v. Chief Constable of South Yorkshire Police*[1568] is searingly honest about this. The House of Lords recognized that it may not be practicable or even desirable to attempt to eliminate all inconsistencies. Lord Hoffmann wrote: "Consequently your Lordships are now engaged, not in the bold development of principle, but in a practical attempt, under adverse conditions, to preserve the general perception of the law as system of rules which is fair between one citizen and another."[1569]

White is a psychiatric injury action. The House of Lords attempted to deal with prior decisions' attempts to rationalize the law applicable to claims based on psychiatric injury alleged to have been caused by negligent conduct. The context leading up to the sentence I have quoted is worth repeating. Lord Hoffmann wrote:

> But the moment passed and when the question next came before your Lordships' House in *Alcock v. Chief Constable of South Yorkshire* [1992] 1 A.C. 310, judicial attitudes had changed. The view which had for some time been in the ascendancy, that the law of torts should, in principle aspire to provide a comprehensive system of corrective justice, giving

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[1567] (2007), 45 Alta. L. Rev.241 at 242 (footnotes omitted).
[1568] [1998] UKHL 45, [1999] 2 AC 455, [1999] 1 All ER 1.
[1569] [1999] 2 AC 455 at 511.

> legal sanction to a moral obligation on the part of anyone who has caused injury to another without justification to offer restitution or compensation, had been abandoned in favour of a cautious pragmatism. The House decided that liability for psychiatric injury should be restricted by what Lord Lloyd of Berwick (in Page v. Smith [1996] A.C. 155, 189) afterwards called "control mechanisms", that is to say, more or less arbitrary conditions which a plaintiff had to satisfy and which were intended to keep liability within what was regarded as acceptable bounds.[1570]
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> …
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> My Lords, this story of the ebb and flow of tort liability for psychiatric injury has often been told and I have recounted it again at some length only because I think it must be borne in mind when we come to deal with the authorities. In order to give due weight to the earlier decisions, particularly at first instance, it is necessary to have regard to their historical context. They cannot simply be laid out flat and pieced together to form a timeless mosaic of legal rules. Some contained the embryonic forms of later developments; others are based on theories of liability which had respectable support at the time but have since been left stranded by the shifting tides.[1571]
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> …
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> The appeal of these two opposing proposals rather depends upon where one starts from. If one starts from the proposition that in principle the law of torts is there to give legal force to an Aristotelian system of corrective justice, then there is obviously no valid distinction to be drawn between physical and psychiatric injury. On this view, the control mechanisms merely reflect a vulgar scepticism about the reality of psychiatric injury or a belief that it is less worthy of compensation than physical injury: therein the patient must minister to himself. On the other hand, if one starts from the imperfect reality of the way the law of torts actually works, in which the vast majority of cases of injury and disability, both physical and psychiatric, go uncompensated because the persons (if any) who caused the damage were not negligent, or because the plaintiff lacks the evidence or the resources to prove to a court that they were negligent, or because the potential defendants happen to have no money, then questions of distributive justice tend to intrude themselves. Why should X receive generous compensation for his injury when Y receives nothing? Is the administration of so arbitrary and imperfect a system of compensation worth the very considerable cost? On this view, a uniform refusal to provide compensation for psychiatric injury adds little to the existing stock of anomaly in the law of torts and at least provides a rule which is easy to understand and cheap to administer.[1572]

Lord Hoffmann's review culminates, at 511 with the remarkable passage that contains the sentence previously quoted.

> It may be said that the common law should not pay attention these feelings about the relative merits of different classes of claimants. It should stick to principle and not concern itself with distributive justice. An extension of liability to rescuers and helpers would be a modest incremental development in the common law tradition and, as

[1570] [1999] 2 AC 455 at 502.
[1571] [1999] 2 AC 455 at 503.
[1572] [1999] 2 AC 455 at 503-04.

> between these plaintiffs and these defendants, produce a just result. My Lords, I disagree. It seems to me that in this area of the law, the search for principle was called off in *Alcock v. Chief Constable of South Yorkshire* [1992] 1 A.C. 310. No one can pretend that the existing law, which your Lordships have to accept, is founded upon principle. I agree with Jane Stapleton's remark that: (see *The Frontiers of Liability* ed. Peter Birks, O.U.P. (1994) Volume 2, p. 87.
>
> > "once the law has taken a wrong turning or otherwise fallen into an unsatisfactory internal state in relation to a particular case of action, incrementalism cannot provide the answer."
>
> Consequently your Lordships are now engaged, not in the bold development of principle, but in a practical attempt, under adverse conditions, to preserve the general perception of the law as system of rules which is fair between one citizen and another.

The House of Lords has been similarly candid about the frailties in the logic of causation jurisprudence in a *tour de force* quartet of decisions in which the speeches, together, total over 200 pages: *Fairchild v. Glenhaven*;[1573] *Barker v. Corus*;[1574] Chester v. Afshar;[1575] and, *Gregg v. Scott*.[1576] And, in *National Westminster Bank plc v. Spectrum Plus Limited*[1577] – the "never say never" about prospective over-ruling decision – the House of Lords capped its decades-old admission that the "declaratory theory" of the common law is a fairy tale by the formal statement that it would be prepared, in an appropriate case, to introduce "prospective overruling" into English common law.

Fairchild and *Barker* are explicit that the material-contribution test, in the United Kingdom, is a doctrine which is based on the possibility of factual causation, not the probability of factual causation, and is used only in exceptional circumstances where, because of these circumstances, it is not possible for anyone to validly establish factual causation on a probability basis. The House of Lords went to extensive lengths to make clear the policy (normative) choices underlying this decision to depart from over 400 years of common law to create a cause of action in tort where the causation-requirement was only possibility.

Lord Bingham commented on legal fictions and causation in *Fairchild*.

> For reasons given above, I cannot accept the view (considered in the opinion of my noble and learned friend Lord Hutton) that the decision in *McGhee* was based on the drawing of a factual inference. Nor, in my opinion, was the decision based on the drawing of a legal inference. Whether, in certain limited and specific circumstances, a legal inference is drawn or a different legal approach is taken to the proof of causation, may not make very much practical difference. But Lord Wilberforce, in one of the passages of his opinion in *McGhee* quoted in paragraph 20 above, wisely deprecated resort to fictions and it seems to me preferable, in the interests of transparency, that the courts' response to the special problem presented by cases such as these should be stated explicitly. I prefer to recognise

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[1573] [2002] UKHL 22, [2003] 1 A.C. 32.
[1574] [2006] UKHL 20, [2006] 2 A.C. 572.
[1575] [2004] UKHL 41, [2005] 1 A.C. 134.
[1576] [2005] UKHL 2, [2005] 2 A.C. 176.
[1577] [2005] UKHL 41, [2005] 3 WLR 58.

> that the ordinary approach to proof of causation is varied than to resort to the drawing of legal inferences inconsistent with the proven facts.[1578]

Lord Hoffmann wrote, commenting on better interpretation of *McGhee*:

> There are also passages in the speeches which suggest that materially increasing the risk of disease is being treated as equivalent to materially contributing to the injury - making the illness worse than it would otherwise have been. But this, as Lord Wilberforce pointed out (at p. 7), is precisely what the doctors did not say. They refused to say that it was more likely than not that the absence of washing facilities had had any effect at all. So when some members of the House said that in the circumstances there was no distinction between materially increasing the risk of disease and materially contributing to the disease, what I think they meant was that, in the particular circumstances, a breach of duty which materially increased the risk should be treated as if it had materially contributed to the disease. I would respectfully prefer not resort to legal fictions and to say that the House treated a material increase in risk as sufficient in the circumstances to satisfy the causal requirements for liability. That this was the effect of the decision seems to me inescapable.[1579]

Lord Rodger wrote, with poignant relevance to Canadian jurisprudence:

> In my respectful opinion, therefore, despite the criticism of Sopinka J in *Snell v Farrell* [1990] 2 SCR 311, 331f - g, Lord Wilberforce was right to say that using inference to bridge the evidential gap in *McGhee* would have been something of a fiction since it was precisely that inference which the medical expert had declined to make ([1973] 1 WLR 1, 7E). In any event, the gloss added by the House in *Wilsher*, highly influential though it has subsequently proved to be, cannot in itself supplant the reasoning of the judges in *McGhee*. In the circumstances I too take the view that these observations in *Wilsher* should no longer be regarded as authoritative.[1580]

Lord Reid had written, in *McGhee*:

> From a broad and practical viewpoint I can see no substantial difference between saying that what the defender did materially increased the risk of injury to the pursuer and saying that what the defender did made a material contribution to his injury.[1581]

Lord Salmon had written, in *McGhee*:

> In the circumstances of the present case, the possibility of a distinction existing between (a) having materially increased the risk of contracting the disease, and (b) having materially contributed to causing the disease may no doubt be a fruitful source of interesting academic discussions between students of philosophy. Such a distinction is, however, too unreal to be recognised by the common law.[1582]

[1578] *Fairchild*, at para. 35.
[1579] *Fairchild*, at para. 65.
[1580] *Fairchild*, at para. 150.
[1581] *McGhee*, [1973] 1 W.L.R. 1 at 5.
[1582] *McGhee*, [1973] 1 W.L.R. 1 at 12.

This equation of the material increase in risk and material contribution as cause was adopted by the Manitoba Court of Appeal in *Webster v. Chapman*[1583] and both the concurring reasons of Smith J.A. and the dissenting reasons of Donald J.A. in *Mooney v. British Columbia (Attorney General)*.[1584] In *Webster*, the Man. Court of Appeal held:

> Relying on those statements, *and not the reverse onus advocated by Lord Wilberforce in the same case* (at p. 7), I am of the view that no distinction should be made in the present case between materially increasing the risk of damage and materially contributing to the damage. In reaching this conclusion, I am fortified by the evidence that it would be wrong to assume that anomalies always result from a single event. If the taking of Coumadin during the critical period is the cause of the damage, as I think it must be found to be in the present state of medical knowledge, then the negligent administration of Coumadin during part of that period must, at a practical level, be seen as a materially contributing factor."[1585]

In *Mooney*, Smith J.A. wrote: "In my view, the *McGhee* risk principle and the inference principle, which is also derived from *McGhee* (as Mr. Justice Donald explains beginning above at para. 70), are the same principle stated differently."[1586] I suggest that the statement that the "inference principle … is also derived from *McGhee*" has to be understood as meaning "derived from *McGhee* as it was explained by the House of Lords in *Wilsher*, which is an interpretation of *McGhee* which the House of Lords rejected in *Fairchild*."[1587] In any event, it is clear that Smith J.A. was not suggesting that the inference interpretation of *McGhee* is still the judicially-sanctioned interpretation. He wrote: "However, the use of inference terminology to characterize the decision in *McGhee* was expressly rejected as a fiction by the House of Lords in *Fairchild*."[1588] I wrote in *Snark* that a "legal fiction is something assumed in law to be fact regardless of the truth or accuracy of that assumption, even where the assumption is known to be false. The stated purpose for such a device is 'that some difficulty may be overcome, and substantial justice secured'. … A literary fiction has no existence apart from the paper it is written on. A legal fiction, however, has existence and consequences. The consequences are sometimes undesirable."[1589]

[1583] (1997), 155 D.L.R. (4th) 82, [1998] 4 W.W.R. 335, 1997 CanLII 3108 (Man. C.A.)

[1584] *Supra*. Smith J.A., para, 153; Donald J.A., para. 78-80.

[1585] *Webster v. Chapman,* at 93 (emphasis added).

[1586] *Mooney* at para. 153.

[1587] The wordings beginning with "derived from" to the end of the sentence are my paraphrase, not a quotation from anything written by Smith J.A.

[1588] *Mooney*, at para. 162 per Smith J.A.

[1589] Cheifetz, "Allocating", at 165 (internal footnotes omitted) quoting *Merriam-Webster Dictionary of Law* (1996); Jowitt's *Dictionary of English Law* (London: Sweet & Maxwell, 1977), p. 787 and *Stoner v. Skene* (1918), 44 O.L.R. 609 (S.C.) at 617 ('Legal fictions are not always set up for the advancement of justice, to wit, in this case. Fiction must stop somewhere".)

XII. Do It Right, Get It Right

The integrity of the legal system is depends on both process and content. It is not enough for the judge just to get to the right decision. Justice must not only be done but must be seen to be done.[1590] "[T]he three functions of reasons for judgment at the trial level … are: 1) explaining to the losing party why he or she lost; 2) enabling informed consideration as to whether to appeal; and 3) enabling interested members of the public to see whether justice has been done. A shorthand way of describing reasons that fulfill these functional requirements is to say that the reasons permit meaningful appellate review": *Diamond Auto Collision Inc. v. The Economical Insurance Group*.[1591] A "failure to provide a reasoned decision tends to undermine confidence in the administration of justice as the absence of reasons may give the appearance of an arbitrary decision": *Smyth v. Waterfall*.[1592] "In order for the court to determine whether there has been a proper application of legal principles, the pathway to the result is necessary": *Diamond Auto Collision*.[1593] "The standard for measuring the adequacy of reasons is derived from the decision of the Supreme Court of Canada in *R. v. Sheppard* … Its ratio is equally applicable, with necessary modifications, in the civil context": *Diamond Auto Collision*.[1594]

In determining whether the reasons are adequate, the trial judge's reasons are to be "read as a whole"; therefore, the mere fact that the trial judge misstates the relevant law is not conclusive that the reasons are deficient: *R. v. Rhyason*.[1595] The Ont. C.A. wrote in *Diamond Auto Collision*:

> [12] The determination as to whether reasons permit meaningful appellate review is a contextual one which takes into consideration a number of factors including the positions of the parties, implicit findings, and the extent to which the reason for the trial judge's conclusion is patent on the record. … Standing alone, conclusory and generic reasons, in the sense that they could apply equally to any other case, do not permit appellate review.

[1590] Or, at least, be seen to be done, seemingly as best it can be seen to be done: *White v. Chief Constable of South Yorkshire Police*, [1998] UKHL 45 at para. 48, [1999] 2 A.C. 455 at 511 per Lord Hoffman: "No one can pretend that the existing law, which your Lordships have to accept, is founded upon principle. I agree with Jane Stapleton's remark that … 'once the law has taken a wrong turning or otherwise fallen into an unsatisfactory internal state in relation to a particular case of action, incrementalism cannot provide the answer.' Consequently your Lordships are now engaged, not in the bold development of principle, but in a practical attempt, under adverse conditions, to preserve the general perception of the law as system of rules which is fair between one citizen and another." There are similar comments in *Gregg v. Scott*, [2005] UKHL 2.

[1591] 2007 ONCA 487 at para. 11 citing *R. v. Sheppard*, [2002] 1 S.C.R. 869 at para 24.

[1592] (2000), 17 O.R. (2d) 557 at para. 13, 80 D.L.R. (3d) 766 (C.A.).

[1593] 2007 ONCA 487 at para. 12.

[1594] 2007 ONCA 487 at para. 10

[1595] 2007 SCC 39 at paras. 9, 14, and 20. The 5-4 majority held that other portions of the reasons permitted the conclusion that the trial judge applied the correct law even though he misstated it. The dissenting judges held that there was nothing in the balance of the reasons that permitted a valid conclusion that the judge applied the law properly, even though he stated it incorrectly: *Rhyason*, paras. 26, 27.

> In order for the court to determine whether there has been a proper application of legal principles, the pathway to the result is necessary: …[1596]

It is true that appeals are from the facts and the results, and the appellate courts have the power to correct miscarriages and justice and make the decision that should have been made, but consider the cost. Do you want your clients to have to live the consequences in Ontario's *Grass v Women's College Hospital*, a case that was tried twice in a decade on causation issues and was headed for a third trial until it was settled?[1597]

The Canadian common law system is supposed to function on the basis of the logical application of precedent using precedents themselves decided based on the logical application of precedent.[1598] The cases discussed above show that in the area of proof of causation notwithstanding *Resurfice* – indeed, because of, too – there are far too many trains running in opposite directions on the same tracks, on parallel tracks, on at-an-angle tracks, and on orthogonal tracks. The conflicting mass produces more confusion as new cases arise. The Alberta Court of Appeal wrote in *R. v. Kusk*: "To a person untrained in law and evidence, these false trains of reasoning are highly meretricious. Once that poison is injected into his or her brain, there is probably no antidote. They even lure some with training."[1599] The court was, of course, speaking *only* about counsel … or was it? Consider these earlier paragraphs.

> [9] The second reason not to apply the [no miscarriage of justice, curative] proviso is that many appellate courts have condemned such cross-examination, especially by prosecutors questioning the accused, since at least 1925. We are not aware of any modern authority allowing it. Yet it keeps happening, as the number of modern decided cases shows. In one province (not Alberta), there are so many appellate decisions condemning the practice, but not ordering a new trial, that one wonders whether the prosecutors there think that it is a matter of "Do as I say, not as I do." Maybe that is why they keep asking the forbidden question. The practice should stop at once, and there is an obvious way to stop it.
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> [10] The third reason is this. Here the Crown prosecutor, instead of checking some law, unrepentantly made this very error the peroration of her address to the jury. It was the last thing which the jury heard from the lawyers. The jury was invited to convict on this very ground. Nor did the trial judge really do much to cure the suggestion which the prosecutor had twice planted and the trial judge already once blessed. We are told that the trial was only about two days long, and the facts are simple, yet the jury deliberated about

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[1596] 2007 ONCA 487 at para 12 (citations omitted).

[1597] I am advised that the case has settled. Each side had succeeded once at trial and once at appeal. The stakes had become significantly greater for the CMPA. The child's claim was no longer bound by the agreement as to damages entered into prior to the first trial. The rationale was that the agreement was based on assumptions as to the child's life expectancy which had proven to be wrong, since the child was still alive. See 2007 CanLII 9882 (Ont. S.C.J.) aff'd 2007 ONCA 542.

[1598] Lord Halsbury's dictum about law's 'illogic' or 'alogic'in *Quinn v. Leathem*, [1901] A.C. 495 at 506 (H.L.) has not been taken literally for at least the last century, assuming it ever was.

[1599] 1999 ABCA 49 at para. 13, [1999] 7 W.W.R. 339 ,132 C.C.C. (3d) 559 (Alta. C.A.)

> 10-12 hours before convicting. One cannot possibly say with any confidence that this error did not cause the conviction.[1600]

In *Zacharias v. Leys*, Southin J.A. wrote: "The first is the learned trial judge's approach to the issue of liability. The appellants have not asserted any error in that approach, but I would not wish it thought that by this judgment I accept it. Before the practice developed of posting all judgments of the court below on the internet and thereby saving them for posterity, I would not have considered it necessary to express such a caveat, as the reasons for judgment below would have disappeared into obscurity."[1601] There seems to be a different perception of reality in *Payne v. Wilson*.[1602] The Ontario Court of Appeal wrote: "Nothing in the reasons of . . . [the motion judge] that could be read as a departure from the approach announced in several recent decisions of the Supreme Court of Canada, could possibly create any uncertainty in the law."[1603] It would have been far more accurate for the Court to have written "should be read". Speaking from the trenches, there is at least a trace of naiveté, or wilful blindness, in the suggestion that uncorrected motion and trial decisions (even questionable appellate decisions) do not create uncertainty as to what the law actually is amongst ordinary litigators, especially when the next appellate level refuses to say they are wrong.

Exactly what are litigators to make of the state of the law in a situation where a second panel of an appellate court writes, approximately two years after an earlier decision by a different panel:

> [1] There is arguable merit to the appellants' claim that the result and reasoning in *Karakas et al. v. General Motors of Canada Ltd*. (2004), 74 O.R. (3d) 273, aff'd, [2005] O.J. No. 24621 (C.A.) is at odds with the principles enunciated in *Heredi v. Fensom*, [2004] 2 S.C.R. 741. We are not, however, asked to overrule *Karakas*.
>
> [2] We cannot agree with the appellants' valiant attempts to distinguish *Karakas*. Nor do we agree that the motion judge found that the automobile was "ancillary" to the damage caused. The motion judge found that he was bound by *Karakas*. We agree. This case cannot be distinguished from *Karakas*. Appeal dismissed.[1604]

[1600] *R v. Kusk*, 1999 ABCA 49, paras 9, 10.

[1601] 2005 BCCA 560 at paras. 34-35. (I have combined the two paragraphs into one paragraph but made no other change.)

[1602] 2002 CanLII 45002, 162 O.A.C. 48, [2002] O.J. No. 2566 (Ont. C.A.).

[1603] 2002 CanLII 45002 at para. 28.

[1604] *Guarantee Company of North America v. Mercedes-Benz Canada Inc.*, 2006 CanLII 19485 (ON C.A.). Another example is contained in the Ontario Court of Appeal's recent Misko v. Doe, 2007 ONCA 660 (released September 29, 2007) in which footnote 4 seems to cast doubts on the comments made in *Barker v. Montfort Hospital* (released April 18, 2007) that *Resurfice* did not change causation law, only clarified it. Footnote 4 is: "I need not decide whether the plaintiff in this case must demonstrate causation based on the "but for" or "material contribution" test. That question is not material to the issues before us on this appeal. The trial judge will have to consider the impact of the recent decisions in *Hanke v. Resurfice Corp*. (2007), 278 D.L.R. (4th) 643 (S.C.C.) and *Barker v. Montfort Hospital* (2007), 278 D.L.R. (4th) 215 Ont. (C.A.)."

It will not come as a surprise to some of you that a motion judge picked up on the hint and refused to apply *Karakas*, on a motion by the defendant to dismiss.[1605] Will it be significant, when and if the new decision is appealed, that the judge who decided Karakas at first instance is now also a member of the Ontario Court of Appeal? Does that make it 4 to 3 against the second panel's view? Will it matter that the comments on causation in the recent Supreme Court of Canada decisions in *Vytlingam* and *Herbison* seem to support the analysis in *Karakas*?[1606]

It is, of course, true that the ambiguity and vagueness of Supreme Court's statements in *Resurfice* on material-contribution should not be seen as the only reason for some of the more startling pronouncements by the inferior courts. Nonetheless, it is exquisitely clear that *Resurfice* is causing some problems for some judges. For example, fifteen months after *Resurfice*, we still have decisions discussing factual causation that mention only "material contribution" and *Athey* and do so in a way that suggests the trial judge and lawyers either had not heard of *Resurfice* or the trial judge went out of his or her way to avoid mentioning *Resurfice*. In addition, while these decisions contain explicit conclusions that, on the balance of probability, the accident was a factual cause, these decisions do not tell us what test the trial judge applied or even what the judge's understanding was of the meaning of but-for or material contribution.

For example, the trial judge wrote in *Jensen v. Felker*[1607]:

> In summary, I find that the plaintiff suffered a mild cervical strain from the accident and more severe lower back strain. The former resolved within a couple of months and the latter continued for approximately 18 months. To the extent the plaintiff continues to experience pain, I am not satisfied on a balance of probabilities that it is causally related to the motor vehicle accident as that notion is explained in *Athey v. Leonati*, 1996 CanLII 183 (S.C.C.), [1996] 3 S.C.R 458.[1608]

The trial judge did not explain whether that causal relationship was but-for or material-contribution. The literal meaning of the quotation is that the plaintiff failed to establish causation under either but-for or *Athey* material-contribution. The tenor of the reasons suggests that the trial judge found there was not even sufficient evidence for an *Athey*-

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[1605] See, *Giustini v. Poppa*, 2007 CanLII 33983 at paras. 15-18 (Ont. S.C.J) where the motion judge declined to apply *Karakas* based on *GCNA v. Mercedez-Benz*, 2006 CanLII 19485 (Ont. C.A.). Para 18 of *Giustini* is: "Given the *Heredi* decision and the statements of the Court of Appeal in the *Guarantee* decision, I am of the view that this action should not be dismissed at this stage and that it is open to the trial judge to characterize this action as a negligent manufacture case on the facts and to apply the six-year limitation period." I suppose this is proof of one or both of two truths. I was not persuasive enough at both levels in *Karakas*, or I was unlucky enough to have the wrong judges both times. The alternative, of course, is that *Karakas* was correct. I suggest that the latter alternative is a very likely implication of the discussions of causation in the recent Supreme Court decisions in *Citadel General Assurance Co. v. Vytlingam*, 2007 SCC 46 and *Lumbermens Mutual Casualty Co. v. Herbison*, 2007 SCC 47. I expand on this suggestion in my comments on the Cavanagh Williams Update (Insurance and Litigation News) Blog.

[1606] See additional comments at footnotes ___ and ___ (notes 11, 283, Jan 20/08 version).

[1607] 2008 BCSC 541(tried in August and September 2007, reasons released on April 30, 2008).

[1608] 2008 BCSC 541 at para. 40.

version material contribution finding in favour of the plaintiff. The trial judge does not seem to have applied the but-for test. This is significant because the trial judge found that the plaintiff's major complaints were not caused by the accident, in case where liability was admitted so the issue was only the extent of damages.[1609] The plaintiff might be able to complain on appeal about the trial judge's *understanding* of the evidence; but not about the trial judge's conclusion that causation was not established, at all, if that understanding was supported by the evidence. Nonetheless, a plaintiff with nothing to lose (and no reason to be concerned about costs exposure) might appeal alleging that the trial judge applied but-for, or, at least, it is not clear whether the trial judge did and, if so, the case should go back for a new trial. That ground of appeal could force the appellate court to review the trial evidence in detail.[1610]

O'Scolai v. Antrajenda[1611] is a a personal injury claim where the trial judge cited only *Athey* and decided the causation issue in favour of the plaintiff on the basis that the accident "caused or materially contributed" to the plaintiff's post-accident condition.[1612] Worse yet, regardless of whether the trial judge's conclusion that the accident caused the symptoms is correct, the trial judge's statement of the applicable law could only be correct before *Resurfice*. The trial judge cited Athey for the propositions that: "a. The plaintiff must prove that the injury would not have occurred but for the defendant's negligent accident" and "b. An alternative formulation of this principle is that the plaintiff must prove that the defendant's negligence materially contributed to the injury".[1613] The trial judge did not explain what she meant by "an alternative formulation". The form of the trial judge's reasons invite appeal.[1614] *O'Scalia* is an ordinary motor vehicle accident case where the plaintiff sustained some soft-tissue injuries, had some pre-existing problems, and the issue of fact was to sort out which symptoms were caused by the accident and which were not. In the trial judge'w own words: "The Plaintiff was injured when her vehicle was rear-ended by the Defendant's vehicle. Although the accident appeared to be minor, four years post-accident when the matter came to trial, the Plaintiff, who had not returned to work, said she was still suffering from the effects of the accident, was still unable to work, and doubted she would ever work again. Her husband made a claim for loss of consortium. The Defendants admitted fault in the accident but disputed the quantum of the Plaintiff's claim and questioned the causation of her injuries and her credibility."[1615] As ever, the plaintiff called medical expert evidence that her symptoms probably were caused by the accident. The defence called medical expert evidence that they probably were not. The trial judge ought to have applied the but-for test. In order to affirm the result, the Alberta Court of Appeal will have to decide whether it is prepared to say that what the trial judge did, despite what she wrote, amounted to the

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[1609] 2008 BCSC 541 at paras.1, 38-39, and 52.
[1610] Fortunately, the case is short enough: 4 days in total with probably no more than 3 days of evidence.
[1611] 2008 ABQB 257 (tried Jan.-Feb. 2008, reasons May 1, 2008)
[1612] 2008 ABQB 257 at paras. 54, 61, 89
[1613] 2008 ABQB 257 at para 54.
[1614] As does the amount of the award, about $200,000 before interest, given the reasons.
[1615] 2008 ABQB 257 at para. 1. Ultimately, the trial judge held that some of the plaintiff's symptoms were caused by the accident and some were not: paras. 159-162, 165.

use of the *but-for test* as explained in *Resurfice* and *Athey* or conclude that, on the evidence, the decision is correct when the but-for test is applied.

Similarly, what explanation other than confusion engendered by *Resurfice* is there for a trial judge stating that the but-for test was the applicable test by referring to the two requirements of *Resurfice* material-contribution this way – "Neither requirement is met in this case" – in a case were fault had been admitted, the only issue is whether the accidents were a factual cause of the alleged injury and if so the value of the losses. There is no doubt that the trial judge realized that there was negligence and that negligence was required for liability. However, the trial judge did not explain how it could be that the second requirement of *Resurfice* – the breach of duty requirement and injury within ambit of risk – was not satisfied by the admission of liability. The trial judge did not suggest that, somehow, the particular losses flowing from the injury were too remote or unforeseeable, or that, somehow, there was something else about the manner in which the injury or loss flowing from the injury occurred that precluded recovery. The action was an ordinary claim for damages alleged to be the result of injuries sustained in motor vehicle accidents: *Ghataurah v. Fike*.[1616] One explanation might be that the trial judge was not referred to *Sam v. Wilson*. On the other hand, the trial judge cited the B.C. C.A. decision in *Bohun v. Segal*.

O'Scolai and *Ghataurah* show that we should not assume that the next set of lawyers and judges will just happen to find the right cases not the wrong ones. The judge might, sometimes, even if the lawyers do not. "Since neither counsel cited the binding decisions of the Court of Appeal (or indeed, any authority at all), neither party is entitled to costs of this motion."[1617] On the other hand, the lawyers and judge may miss the governing case or cases, and the lawyers send the judge off on a wild-goose chase.[1618] So much for the "purifying ordeal of skilled argument".[1619] A judge *is entitled to expect* the

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[1616] 2008 BCSC 533.

[1617] *Wilson v. Bobbie*, 2006 ABQB 22 at para 42.

[1618] *Veffer v. Feldman*, 2007 CanLII 15798 (ON S.C.J), leave to appeal refused Sept 10, 2007 (Ont. Div. Ct.) is a one current example of a decision containing well-crafted reasons that are correct in every aspect except the result. That is not because the judge missed the consequences of his analysis. It is because the issue was not what counsel and the judges thought that it was. Had counsel identified the correct issue, the motion would never have been brought or the judge would have made the opposite order. Veffer was a motion to dismiss the a crossclaim for contribution. The cross-claim is for damages for which the crossclaim defendant can never be liable, *as a matter of law*, even if that person was at fault. P's action against the crossclaim defendant had been dismissed for that very reason, on consent, earlier in the proceedings. There are binding appellate decisions – Ontario and the Supreme Court of Canada – that require the dismissal of the crossclaim. One of them is *Giffels Assoc. Ltd. v Eastern Const. Co*. [1978] 2 S.C.R. 1346, 84 D.L.R. (3d) 344 (S.C.C.). None of them were cited to the motion judge. The result is that the motion judge refused to dismiss a crossclaim that has to fail as a matter of law, and the leave judge declined to grant leave to appeal a decision allowing the continuation of a proceeding which has to fail as a matter of law. The only conclusion one can draw from the reasons is that neither judge realized this. *Veffer*, at least at the motion stage, should have produced a conclusion containing a comment about costs matching that in *Wilson v Bobbie*: no costs to the successful party.

[1619] See, *Heward v. Eli Lilly & Company*, 2007 CanLII 2651 at para. 25 (Ont. S.C.J); *Commerzbank Ag v Price-Jones*, [2003] EWCA Civ 1663 at para. 48 (Eng. C.A.); and, *Cordell v. Second Clanfield Properties Ltd*., [1969] 2 Ch. 9 at 16 (Ch. D.).

lawyers to at least present the governing decisions in their jurisdiction, even if the lawyers do not agree on what the decisions mean or how they will apply to the facts. Whether a judge should assume that the lawyers have fulfilled that expectation is an issue for another day. I suppose the basic answer is that it depends on who the lawyers are.[1620]

It was the fiction, once upon a time, that the courts of last resort in Commonwealth countries were infallible. Apparent inconsistencies in the decisions of the highest court were only that: apparent. Lord Hope of the House of Lords reminded us of that in a recent article, by quoting a passage (which he noted had "perhaps just a touch of sarcasm") from a 1932 Scottish judgment.

> The House of Lords has a perfect legal mind. Learned Lords may come or go, but the House of Lords never makes a mistake. That the House of Lords should make a mistake is as unthinkable as that Colonel Bogey should be bunkered twice and take 8 to the hole. Occasionally, to some of us two decisions of the House of Lords may seem inconsistent. But that is only a seeming. It is our frail vision that is at fault.[1621]

Nobody, not even Canadian judges, formally professes that belief any more.[1622] I will return to the "infallibility" point in a bit more detail in the conclusion.

[1620] See 2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corporation, 2008 CanLII 5978 at para 7 (Ont. S.C.J.).

[1621] Lord Hope of Craighead, "'Decision Overrruled" – Facing Up to Judicial Fallibility" (2003), 14 K.C.L.J. 121 at 122 quoting from *Assessor v. Collie,* 1932 SC 304 at 311-12. This passage might remind some of Antony's "The fault, dear Brutus, is not in our stars, / But in ourselves, that we are underlings." Shakespeare, *Julius Caesar*, Act I, scene ii, lines 140–142.

[1622] That belief was part of the declaratory model of common-law judicial decision-making. It was also part of the rationale against prospective overruling: the technique by which a judicial decision changing the common law governs only cases arising out of events occurring after the change in the law. The Supreme Court of Canada implicitly declined to foreclose prospective overruling, for Canada, in *British Columbia v. Imperial Tobacco Canada Ltd.*, [2005] 2 S.C.R. 473, 2005 SCC 49. All it held was that retrospectivity is part of the rule of law in Canada without discussing prospective overruling at all, even though it referred to *Spectrum Plus* as authority for the proposition that retrospectivity is part of the rule of law. *Spectrum Plus* is, of course, *National Westminster Bank plc v. Spectrum Plus Limited*, [2005] UKHL 41, [2005] 3 W.L.R. 58 (H.L.). In *Spectrum Plus*, the House of Lords said "never say never" on the issue of whether the prospective overruling doctrine could become part of England's common law. ([2005] UKHL 41 at para. 41.) Prospective overruling is currently not part of Canadian common law *private-law* jurisprudence. At present, the best of the Canadian judicial considerations on the private law side are *Edward v. Edward*, (1987), 39 D.L.R. (4th) 654, [1987] 5 W.W.R. 289, 57 Sask. R. 67 (C.A.); *Fleming v. Hanna*, [1994] N.J. No. 364 (QL), 124 Nfld. & P.E.I.R. 30, 32 C.P.C. (3d) 371 (Nfld. S.C.);*Stewart v. Stewart*, Stewart v. Stewart, [1997] B.C.J. No. 636 (QL), 145 D.L.R. (4th) 228, [1997] 5 W.W.R. 353 (B.C.C.A.); and, *Michalski v. Owen*, [1997] M.J. No. 569 (QL), [1998] 3 W.W.R. 672 (Man C.A.), leave to appeal to S.C.C. refused [1998] S.C.C.A. No. 12 (QL). In light of *Imperial Tobacco*, whatever else it might mean, the Supreme Court of Canada's sentence in *Friedmann Equity Developments Inc. v. Final Note Ltd*. [2000] 1 S.C.R. 842, 188 D.L.R. (4th) 269 at para 51 – "Only the Legislature has the power to create a prospective change in the law." – arguably foreclosing prospective overruling by the judiciary should not be read as an affirmation of the fairy tale that was the declaratory model of the common-law judicial decision-making. Whether it might have been intended to foreclose prospective overruling is considered in G.R. Hall, "Preserving The Clavicle In The Cat: Stunted Reform Of Common Law Rules In The Supreme Court Of Canada" (2002), 36 Can. Bus. L. J. 89 at 104-05, 113-14, 118 and Duggan and Roach, "A Further Note on Final Note: The Scope and Limits of Judicial Law-Making", (2002) 36 Can. Bus. L.J. 115 at 134. I suggest

The Supreme Court of Canada recently wrote, in another context: "Bad law, fixed up on a case-by-case basis by the courts, does not accord with the role and responsibility of Parliament to enact constitutional laws for the people of Canada."[1623] That statement is seems equally applicable to the role of the courts, and the Supreme Court in particular, as creators and guardians of the common law. In that context, we would have: Bad law, fixed up on a case-by-case basis by the courts, does not accord with the role and responsibility of the courts for the better administration of the laws of Canada. The complete passage from which the sentence is taken is:

> [73] A final cost of constitutional exemptions from mandatory minimum sentence laws is to the institutional value of effective law making and the proper roles of Parliament and the courts. Allowing unconstitutional laws to remain on the books deprives Parliament of certainty as to the constitutionality of the law in question and thus of the opportunity to remedy it. Legislatures need clear guidance from the courts as to what is constitutionally permissible and what must be done to remedy legislation that is found to be constitutionally infirm. In granting constitutional exemptions, courts would be altering the state of the law on constitutional grounds without giving clear guidance to Parliament as to what the Constitution requires in the circumstances: Rosenberg and Perrault, at p. 391. Bad law, fixed up on a case-by-case basis by the courts, does not accord with the role and responsibility of Parliament to enact constitutional laws for the people of Canada.[1624]

The substitution of the inferior courts and the common law for Parliament (legislatures, generally) and legislation is obvious and the meaning indisputable Just as the "legislatures need clear guidance from the courts as to what is constitutionally permissible and what must be done to remedy legislation that is found to be constitutionally infirm", so the inferior courts need guidance from the appellate and ultimately the Supreme Court as to what is permissible under common law principles and what must be done to remedy common law that is found to be infirm.

If the premise that judges have an obligation to get to the right decision the right way is not part of the procedural aspect of the Canadian principles of fundamental justice, then it should be. Procedural validity is an aspect of due process which falls within the concept of the "fundamental principles of justice", in Canada (or at least, Ontario): *Beals v. Saldanha*;[1625] "procedure is but the formal manifestation of commonly held fundamental principles of justice": *Beals v. Saldanha*;[1626] and, *Re B.C. Motor Vehicle Act*: "In other words, the principles of fundamental justice are to be found in the basic

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that the implications of *Friedman Equity* on prospective overruling, whatever they might be, have been overtaken by *BC Tobacco.* **NEEDS TO BE UPDATED SEE CASES VIA EMAIL**

[1623] *R.v. Ferguson*, 2008 SCC 6 at para. 73, per McLachin CJ writing for a unanimous court of 9. The context was a constitutional challenge to mandatory minimum sentence provisions in the *Criminal Code*.

[1624] *R v. Ferguson,* at para. 73.

[1625] 2003 SCC 72, [2003] 3 S.C.R. 416 at para. 64, 234 D.L.R. (4th) 1.

[1626] (2001), 54 O.R. (3d) 641 at paras. 125 and 131, 202 D.L.R. (4th) 630, per Weiler J.A. (dissenting on other grounds).

tenets of our legal system. They do not lie in the realm of general public policy but in the inherent domain of the judiciary as guardian of the justice system."[1627]

The enactment of the *Canadian Charter of Rights and Freedoms*[1628] profoundly changed one aspect of the interrelationship between Canadian common law and statutory law.. The common law, whether provincial or federal, is no longer free to develop unrestricted by statute so long as the judges stay away from areas regulated by statute. The common law must now develop in a manner that is consistent with *Charter* principles. The *Charter* will always hover in the background, limiting what the common law may do and where the common law may go. The Supreme Court wrote, in 1995: "It is clear from *Dolphin Delivery, supra*, that the common law must be interpreted in a manner which is consistent with *Charter* principles. This obligation is simply a manifestation of the inherent jurisdiction of the courts to modify or extend the common law in order to comply with prevailing social conditions and values."[1629]

The courts must consider *Charter* values or principles in developing the common law. "Where the principles underlying a common law rule are out of step with the values enshrined in the *Charter*, the courts should scrutinize the rule closely. If it is possible to change the common law rule so as to make it consistent with *Charter* values, without upsetting the proper balance between judicial and legislative action . . . then the rule ought to be changed."[1630] "Established common law rules should not . . . lightly be assumed to violate the *Charter*. As a repository of our traditional values they may . . . assist in defining its norms. But when a common law rule is found to infringe upon a right or freedom guaranteed by the *Charter*, it must be justified in the same way as legislative rules."[1631] The Supreme Court first wrote about 17 years ago, and has repeated since: "The courts are the custodians of the common law, and it is their duty to see that the common law reflects the emerging needs and values of our society."[1632]

[1627] [1985] 2 S.C.R. 486 at para: 31.

[1628] Part 1 (sections 1-34) of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

[1629] *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 at 1164-72 – quotation at para. 91, 126 D.L.R. (4th) 129, citing *R.W.D.S.U., Local 580 v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, 33 D.L.R. (4th) 174, [1987] 1 W.W.R. 577 and quoting from *R. v. Salituro*, [1991] 3 S.C.R. 654 at p. 678, 63 C.C.C. (3d) 239. See also *Oniel v. Toronto (Metropolitan) Police Force*, [2001] O.J. No. 90 (QL) at para. 72 (C.A.); and, *Lalonde v. Ontario (Commission de Restructuration des Services de Sante)* (2001), 56 O.R. (3d) 505 at para. 173-75, 208 D.L.R. (4th) 577(C.A.).

[1630] *Hill v. Church of Scientology, ibid.,* at para. 85; *R. v. Salituro*, [1991] 3 S.C.R. 654 at p. 675, 63 C.C.C. (3d) 239.

[1631] *R. v. Bernard*, [1988] 2 S.C.R. 833 at p. 892, 45 C.C.C. (3d) 1, 67 C.R. (3d) 113.

[1632] *Hill v. Church Scientology*, at para. 91 (in 1995) quoting *R.v. Salituro*, at p. 678. (in 1991).

XIII. Possibilistic Causation In The SCC: Not Quite A Blank Slate[1633]

Laferrière v. Lawson[1634] has a passage that expressly disclaims possibilistic, as opposed to probabilistic, causation. Justice Gonthier wrote:

> while I concede that loss of chance analysis is less objectionable when used to evaluate damages in cases where the defendant's responsibility is otherwise clearly established or, perhaps, where no other causal factors can be identified, this type of analysis must be viewed with extreme caution in cases where there are serious doubts as to the defendant's causal role in the face of other identifiable causal factors.[1635]

The context of that statement is set by its paragraph and the two subsequent paragraphs.

> As I have stated earlier, I am inclined to favour an approach which focusses on the actual damage which the doctor can be said to have caused to the patient by his or her fault, and to compensate accordingly. First, as I have said, I can see no basis for treating acts and omissions differently. Accordingly, there is no theoretical imperative directing courts to abandon traditional causal analysis and to adopt instead an essentially artificial loss of chance analysis. Secondly, while I concede that loss of chance analysis is less objectionable when used to evaluate damages in cases where the defendant's responsibility is otherwise clearly established or, perhaps, where no other causal factors can be identified, this type of analysis must be viewed with extreme caution in cases where there are serious doubts as to the defendant's causal role in the face of other identifiable causal factors. Even though our understanding of medical matters is often limited, I am not prepared to conclude that particular medical conditions should be treated for purposes of causation as the equivalent of diffuse elements of pure chance, analogous to the non-specific factors of fate or fortune which influence the outcome of a lottery. Thirdly, as has been pointed out frequently, in the medical context the damage has usually occurred, manifesting itself in sickness or death. In Savatier and Penneau's terms, the chance is not suspended or crystallized as is the case in the classical loss of chance examples; it has been realized, and the morbid scenario has necessarily played itself out. It can and should be analyzed by means of the generally applicable rules regarding causation.
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> Overall, then, not only do I question the independent recognition of a lost chance in all but the exceptional classical cases (such as the case of the lottery ticket), but I can certainly see no reason to extend such an artificial form of analysis to the medical context where faults of omission or commission must be considered alongside other identifiable causal factors in determining that which has produced the particular result in the form of sickness or death. As far as possible, the court must consider the question of responsibility with the particular facts of the case in mind, as they relate concretely to the

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[1633] For more, Cheifetz, "Materially Increasing The Risk of Injury As Factual Cause of Injury: Fairchild v. Glenhaven Funeral Services Ltd. In Canada" (2004) 29 Adv. Q. 253 and Cheifetz, "The Snell Inference And Material Contribution: Defining The Indefinable And Hunting The Causative *Snark* – A Not Excessively Subtle and Theoretical Examination of Proof of Factual Causation in Canadian Tort Law" (2005), 30 Adv. Q. 1.

[1634] [1991] 1 S.C.R. 541.

[1635] *Laferrière v. Lawson*, [1991] 1 S.C.R. 541 at 605.

> fault, causation and actual damage alleged in the case. While probabilities are unquestionably a part of the assessment of these elements in the finding of responsibility, I am very reluctant to remove the analysis from the concrete to the probabilistic plane.
>
> It is important to recognize that, in cases where the proof indicates that a particular procedure or treatment would probably (though not certainly) have produced a positive result, the patient will usually be able to recover damages under both of the methods described above. *If the chance itself is compensated, however, damages will only be measured according to the level of probability. If the actual damage which has been caused is compensated, then the full value of the actual damage will be accorded.*[1636]

XIV. *Post Hoc, Ergo Propter Hoc*

The fact that night follows day (or day follows night, depending one one's perspective), does not mean that one is a cause of the other. After this, because of this – the English translation of the Latin phrase – is not valid logic. It is a well-known logical fallacy. I would call it a well-known philosophical error, but some might see philosophy but hear metaphysics, and I have been trying to avoid metaphysics.

The *Resurfice-Fairchild* proposition that "increased risk caused by fault" is sufficient for legal factual exists – for the conclusion that, for law, the impugned conduct of a defendant will be treated as a cause of the harm suffered by a plaintiff – so that that finding of causation may be used as part of the process of deciding whether to impose liability on the defendant as a person who created the risk, is an example of "post hoc" reasoning.[1637] That does not mean that law's decision to use the fiction of the causal relationship to satisfy one of the requirements for liability cannot be justified normatively. What it does mean is that judges must recognize that the alleged causal relationship been harm and conduct does not, in fact, exist so that, if fault causing increased risk is to be part of the basis for the imposition of liability, then that conclusion should be justified in accordance with the principles governing civil actions for harm.

XV. [reserved]

[1636] [1991] 1 S.C.R. 541 at 605-06 (emphasis added). The italicized sentences are a recognition that liability under possibilistic causation should be proportional, not solidary.

[1637] J. Stapleton 'Lords A'leaping Evidentiary Gaps', (2002) 10 Torts LJ 276.

XVI. Material Contribution as Enterprise Liability

> The ability to pay "is not an appropriate basis for the determination of tort liability between litigating parties." *Dobson (Litigation Guardian of) v. Dobson*, [1999] 2 S.C.R. 753 at para. 74.

Consider this assertion. *Making a finding of factual causation using material contribution on the basis of the general principles stated in Resurfice* is arguably fair in this sense. *A person or organization carries on and puts in the community* an enterprise which carries with it certain risks *or increases the risks already associated with enterprise*. *When those risks* materialize and cause injury to a member of the public *because of the person or organization's fault,* it is fair that the person or organization that creates the enterprise and hence the risk should bear the loss. This accords with the notion that it is right and just that the person or organization who creates a risk bear the loss when the risk ripens into harm. While the fairness of this proposition is capable of standing alone, it is buttressed by the fact that the *person or organization who creates or increases the risk* is often in the best position to spread the losses through mechanisms like insurance and higher prices, thus minimizing the dislocative effect of the tort within society.

Does that very sound familiar? It should. It is, with the necessary changes – the italicized words – quoted from *Bazley v Curry*.[1638] It is the justification and rationale, in Bazley, for the recasting of vicarious liability. This is the *Bazley* passage, without the addition and changes.

> Vicarious liability is arguably fair in this sense. The employer puts in the community an enterprise which carries with it certain risks. When those risks materialize and cause injury to a member of the public despite the employer's reasonable efforts, it is fair that the person or organization that creates the enterprise and hence the risk should bear the loss. This accords with the notion that it is right and just that the person who creates a risk bear the loss when the risk ripens into harm. While *the fairness of this proposition* is capable of standing alone, it is buttressed by the fact that the employer is often in the best position to spread the losses through mechanisms like insurance and higher prices, thus minimizing the dislocative effect of the tort within society.[1639]

You will recall that, earlier, I denied that one can find the *Resurfice* material-contribution "general principles" in prior authoritative Canadian case law. That remains true. However, what one does find, in *Bazley*, is what might well be the Supreme Court's justification. Consider the rationale and justification from *Resurfice*. It is a sentence which I have quoted before. "In those exceptional cases where these two requirements are satisfied, liability may be imposed, even though the "but for" test is not satisfied, because

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[1638] *Bazley v. Curry*, [1999] 2 S.C.R. 534, 174 D.L.R. (4th) 45. I am continuing the discussion I began in Part III where I first discussed the source of the "fairness and justice" rationale or justification in *Resurfice*. See, Part III, Introduction, currently at _____ and following.

[1639] *Bazley*, at para. 31 (emphasis added).

it would offend basic notions of fairness and justice to deny liability by applying a "but for" approach."[1640]

In *Resurfice*, the Supreme Court quoted *Snell's* justification for the but-for test and reason for rejecting certain broader interpretations of the meaning of *McGhee*:

> The "but for" test recognizes that compensation for negligent conduct should only be made "where a substantial connection between the injury and 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": *Snell v. Farrell*, at p. 327, per Sopinka J.[1641]

It should be obvious – indeed, it was essentially conceded it *Fairchild* – that a test for causation based on increased risk and possibility may well result in a defendant being held liable for a plaintiff's injuries due to factors unconnected to that defendant and not due to the fault of that defendant. That was not, in one sense, the situation in *Fairchild.* The mesothelioma could have been caused by only an exposure at one of the three employment sites. However, a way to connect the fault of the other employers to the injury is to argue that the connection lies in the fact that their fault, which resulted in the plaintiff being exposed to asbestos, made it impossible for the plaintiff to prove whose conduct it was that injured him.[1642]

The "fairness and justice" justification is at the heart of *Fairchild,* too. What is clear is that the House of Lords was not prepared to send the plaintiffs home uncompensated.[1643] *Fairchild* contains this passage:

> [55] In the law of negligence, for example, it has long been recognised that the imposition of a duty of care in respect of particular conduct depends upon whether it is just and reasonable to impose it. Over vast areas of conduct one can generalise about the circumstances in which it will be considered just and reasonable to impose a duty of care: that is a consequence of *Donaghue v Stevenson* [1932] AC 562. But there are still situations in which Lord Atkin's generalisation cannot fairly be applied and in which it is necessary to return to the underlying principle and inquire whether it would be just and reasonable to impose liability and what its nature and extent should be: see *Caparo Industries plc v Dickman* [1990] 2 AC 605.
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> [56] The same is true of causation. The *concepts of fairness, justice and reason* underlie the rules which state the causal requirements of liability for a particular form of conduct (or non-causal limits on that liability) just as much as they underlie the rules

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[1640] *Resurfice*, at para. 25 (emphasis added).

[1641] *Resurfice*, at para. 23.

[1642] This is the explanation for *Cook v. Lewis* suggested by Alan Beever in "Cause-In-Fact: Two Steps Out Of The Mire" (2001), 51 U.T.L.J. 327 at pp. 354-57 and is explicit enough in the reasons for judgment of Rand, J. See, also, Klar, *Tort Law* (3d) at 407-408 citing Beever. See, also, A. Porat, S. Stein and S. Cohen, "Indeterminate Causation and Apportionment of Damages: An Essay on *Holtby*, *Allen* and *Fairchild*" (2003), 23 O.J.L.S 667. The Porat article is also available on the SSRN web site.

[1643] *Fairchild* is the collective name used for three cases heard and decided concurrently by the House of Lords. There had been a huge outcry in the press and public as a result of the Court of Appeal's reversal of the plaintiffs' trial judgments in two of the cases and affirmation of the dismissal of the third.

> which determine that conduct to be tortious. And the two are inextricably linked together: the purpose of the causal requirement rules is to produce a just result by delimiting the scope of liability in a way which relates to the reasons why liability for the conduct in question exists in the first place. [1644]

I will end this section by quoting the concluding sentences from my case comment on *Fairchild*, published in 2004.

> It may be that support for the *Fairchild* use of increased risk as sufficient proof of factual causation can be found in the *Bazley* rationale for vicarious liability and particularly the italicized words, subject to the meaning to be given to "ripens into harm". It remains true, no matter what, that in *Fairchild* the conduct of one of the two employers *did not*, in fact, ripen into harm, based on current scientific knowledge. *Fairchild* holds, nonetheless, that the conduct of that employer is to be treated as if it did.[1645]

Welcome to a brave new world.

XVII. Controlling Material Contribution

The heading raises the question of whether there could be normative controls on the scope of *Resurfice* possibilistic causation –policy reasons open to a defendant to raise as to why possibilistic causation should not be – whose existence would be determined at second stage inquiry, which would occur only if the plaintiff satisfies the requirements the requirements that *Resurfice* imposes on the plaintiff. Is there a current basis, or basis by analogy, in tort law for suggesting that sort of control could exist? It is, at least by analogy, the second stage of the *Cooper-Kamloops-Anns* duty of care inquiry. Recall that the statement of the second stage test, as adopted into Canadian jurisprudence by *Kamloops* is "are there any considerations which ought to negative or limit (a) the scope of the duty and (b) the class of persons to whom it is owed or (c) the damages to which a breach of it may give rise."[1646] Put more generally, it has become "whether there are residual policy considerations outside the relationship of the parties that may negative the imposition of a duty of care."[1647]

> There is good reason for such controls. Lord Nicholls wrote, in *Fairchild*:
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> I need hardly add that considerable restraint is called for in any relaxation of the threshold 'but for' test of causal connection. The principle applied on these appeals is emphatically not intended to lead to such a relaxation whenever a plaintiff has difficulty,

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[1644] *Fairchild*, para. 55-56 per Lord Hoffmann (emphasis added in para. 56). Lord Rodger wrote, at para 165: "The Commonwealth cases were supplemented, at your Lordships' suggestion, by certain amount of material describing the position in European legal systems. … The material provides a check, from outside the common law world, that the problem identified in these appeals is genuine and is one that requires to be remedied." The problem indentified in the *Fairchild* appeals was that of the indeterminate defendant. That issue did not exist in *Resurfice*, whatever other issues did.

[1645] Cheifetz, "Materially Increasing The Risk Of Injury As Factual Cause Of Injury: *Fairchild v. Glenhaven Funeral Services Ltd*. In Canada" (2004), 29 Adv. Q. 1 at 23.

[1646] *Kamloops v. Nielsen*, [1984] 2 S.C.R. 2 at 10-11

[1647] *Cooper v. Hobart*, [2001] 3 S.C.R. 537 at para. 30, 2001 SCC 79, 206 D.L.R. (4th) 193.

> perhaps understandable difficulty, in discharging the burden of proof resting on him. Unless closely confined in its application this principle could become a source of injustice to defendants. There must be good reason for departing from the normal threshold 'but for' test. The reason must be sufficiently weighty to justify depriving the defendant of the protection this test normally and rightly affords him, and it must be plain and obvious that this is so. Policy questions will loom large when a court has to decide whether the difficulties of proof confronting the plaintiff justify taking this exceptional course. It is impossible to be more specific.[1648]

The general requirements set out in *Resurfice* are inadequate for the purpose of determining when there is good reason to depart from the but-for test. I suggest that it is appropriate to apply an analogous two-stage approach to *Resurfice* possibilistic causation, paraphrasing the question to: are there residual policy considerations outside the relationship of the parties that negate the imposition of causation? This particularly so given that *Resufice* possibilistic causation – that is, the use of the *Resurfice* material-contribution test – is not significantly limited as is the United Kingdom's *Fairchild-Barker* version. I have outlined the explained why *Resurfice* is not, earlier. Before looking at the English version it is instructive to recall what the Ontario Court of Appeal said about the scope of the *Athey* version of the material-contribution test in *Cottrelle*, a case decided after *Fairchild* and before *Resurfice,* in which leave to appeal was refused before *Resurfice*, and then in *Aristorenas*, a case also decided after Fairchild and before *Resurfice*, but in which leave to appeal was refused after *Resurfice*.

The Ontario Court of Appeal wrote in *Cottrelle*:

> The "but for" test has been relaxed as "unworkable" in cases where, practically speaking, it is impossible to determine the precise cause of the injury. In *Athey*, for example, the Supreme Court affirmed the "material contribution" test as a qualification to the strict "but for" test only when used in cases similar to *Bonnington Castings Ltd. v. Wardlaw*, *supra*, and *McGhee v. National Coal Board*, *supra*. The more recent House of Lords decision in *Fairchild* . . . also reflects this same tendency to depart from the "but for" standard*, but only where the precise cause of the injury is unknown*.[1649]

Aristorenas is a rather curious application of *Cottrelle*.[1650] The Ontario Court of Appeal referred to *Cottrelle* and then explained that the material-contribution test "is applied to cases that involve multiple inputs that all have harmed the plaintiff. The test is invoked because of logical or structural difficulties in establishing "but for" causation, not because of practical difficulties in establishing that the negligent act was a part of the causal chain."[1651] The problem in *Aristorenas* was that the plaintiff had contracted the infection called necrotizing fasciitis. Medicine knows enough about the aetiology of necrotizing fasciitis to know that it is caused by various strains of bacteria. What

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[1648] *Fairchild*, at para. 43.

[1649] *Cottrelle*,at para. 30. (emphasis added). Ironically, no doubt, this (if we assume *Cottrelle* to be an accurate statement of *Athey* as it was) means that the *Athey* version of material contribution would not have been applicable to the facts of *Bowes v. Edmonton* or *Mainland Sawmillls*. In both cases, whatever else was not known, the precise cause of the injury alleged was known.

[1650] I have discussed *Aristorenas* in detail earlier in this article.

[1651] *Aristorenas*, at par. 53.

medicine does not know is "why the bacteria that cause necrotizing fasciitis in some people cause only minor infections in other people."[1652] That should have led to the dismissal of the action at trial and appeal on the basis that, regardless of the test used, it was impossible to prove that on any valid basis whatsoever that there was any connection between the negligence of the health care providers and the fact that the plaintiff contracted necrotizing fasciitis.

As mentioned earlier, that is not quite how the case played out, even though the case was dismissed on appeal.[1653] The plaintiff succeeded at trial, seemingly on the application of the trial judge's understanding of the Snell "robust and pragmatic inference approach, rather than the *Athey* material-contribution test as explained by *Cottrelle*.[1654] The Court of Appeal, by a 2-1 majority, allowed the defendants' appeal on the basis that there was no admissible evidence showing any possible connection between the defendants' negligence (delay in diagnosing or treating an infection the plaintiff had) and the plaintiff developing the necrotizing fasciitis.[1655] Indeed, it seems that one point that the entire Court of Appeal panel agreed on was that the trial decision was based on *Snell*.[1656]. Accordingly, the majority held that neither the but-for test (using the Snell

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[1652] See, for example, http://www.phac-aspc.gc.ca/publicat/info/necro_e.html (accessed February 15, 2008.). The sentence is quoted from Black and Cheifetz, *Material Contribution and Quantum Uncertainty*, *supra*, at 167, footnote 62. The reference is to a publication of the Public Health Agency of Canada. The document states: "Scientists do not know exactly why group A streptococcus causes only minor infections for some people, but poses a serious threat to others. However, some risk factors have been identified, including: ….". The publication then lists some of the risk factors.

[1653] *Aristorenas*, trial reasons, supra, para 70.

[1654] The Court of Appeal said it was the *Snell* but-for test: see, *Aristorenas*, para. 47.However, the trial reasons conflate the *Snell* but-for test and the *Athey* material-contribution test. While the trial judge specifically wrote he was deciding the case by applying Snell's robust and pragmatic approach (*Aristorenas*, trial reasons, para 71) his summary is pure *Athey* material-contribution, unless all he meant by using "materially contributed" was probable cause: "I conclude that the plaintiff has established, on a balance of probabilities, that the defendants' negligence materially contributed to the injury." (*Aristorenas*, trial, para. 73) See, also, footnote ____ below.

[1655] *Aristorenas*, Ont. CA, para. 71-72. The dissenting judge essentially held that there was sufficient expert evidence to support the trial decision on the basis of no palpable and over-riding of fact, that the trial judge had correctly applied *Snell* and *Athey*, and therefore the decision was not subject to appellate reversal: paras. 29-31, 45. Remarkably, the majority and minority judgments this disagreement between the judges over the proper interpretation of the evidence.

[1656] Aristroneas, para. 47. This is almost an accurate description of the trial decision. I saw almost because while the trial judge purported to decide the case using but-for applying *Snell*'s robust and pragmatic inference, his explanation of the law combined *Athey*'s "unworkable" proposition and with *Snell*.. The trial judge first cited *Cottrelle* for the proposition that the but-for test "has been relaxed as 'unworkable' in cases where, practically speaking, it is impossible to determine the precise cause of the injury." (*Aristorenas*, trial reasons , para. 70). One would expect the trial judge to have segued from that into the use of *Athey*'s material-contribution test. However, the trial judge did not. He wrote: "This is an appropriate case to apply the principles set out in *Snell*, *supra*. Necrotizing fasciitis still remains a mystery to the medical profession. No evidence was called to establish precisely what caused it in the plaintiff. And accordingly, the "but for" test should be relaxed in this case." (para. 71). He had written, a few paragraphs earlier: "It is not in every case that experts will be prepared to offer a scientific opinion on causation. That may be so because science has not reached the stage where anything definitive can be said about the disease that has resulted. In such cases, the absence of such scientific opinion does not necessarily mean that the plaintiff cannot

robust and pragmatic inference) nor the *Athey* material-contribution test did the plaintiff any good.[1657] The majority wrote

> One cannot help but have sympathy for the plight of the plaintiff. She suffered grievous injuries and proved serious acts of negligence on the part of professionals in providing what should have been basic routine wound care. But, on the current state of the law she did not make out causation. If the law were otherwise and if it were sufficient to show merely loss of a chance, or to treat an increase in risk as equivalent to a material contribution, then the plaintiff might have succeeded. However, those propositions have not been adopted in this country. See *Cottrelle* at para. 36 and *Snell* at pp. 326-27.[1658]
>
> In addition to there being an absence of evidence that could support a finding of causation on a balance of probabilities, there were no other factors that could aid in determining causation under the "robust and pragmatic" approach. The defendants did not have superior knowledge regarding the development of necrotizing fasciitis in the wound. Further, the defendants did not create a situation where the plaintiff was unable to prove causation; the difficulty in proving causation came from the nature of the illness itself.[1659]

So, even if the *Fairchild* version of the material-contribution test was not yet the law of Canada at the time of *Cottrelle* and *Aristorenas*, the *Athey* material-contribution test, at least in Ontario, was limited to "cases similar to *Bonnington Castings Ltd. v. Wardlaw*, *supra*, and *McGhee v. National Coal Board*, … where the precise cause of the injury is unknown."[1660] The problem in *Bonnington* and *McGhee*, as we know, was a problem of science.

The other leading Canadian appellate case, prior to *Resurfice*, discussing *Fairchild* and the material-contribution test was the British Columbia Court of Appeal's *Mooney v. British Columbia (Attorney-General)*.[1661] The problem in *Mooney* was not an issue of science. It was that, while there was of course a possibility, there was no reason to believe that proper conduct by the police – indeed anything that that the police could have done that was legal – *would* have made any difference to the end result; would have prevented what happened. Nonetheless, the dissenting judge would have applied the *Athey* material contribution test on the basis that possibility was the best the plaintiff could show and otherwise she would be remediless notwithstanding the policy

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succeed. Where science cannot assist, then a "robust and pragmatic approach" adopted by Justice Sopinka in *Snell v. Farrell*, *supra*, may be appropriate." (para. 68.)

[1657] *Aristorenas*, para. 74-79.

[1658] *Aristorenas*, para. 78.

[1659] *Aristorenas*, para. 79. The majority also quoted from *Cottrelle*'s summary of the law that it said "was fatal" to the *Aristorenas* claim: "if, on a balance of probabilities, the plaintiff fails to prove that the unfavourable outcome would have been avoided with prompt diagnosis and treatment, then the plaintiff's claim must fail. It is not sufficient to prove that adequate diagnosis and treatment would have afforded a chance of avoiding the unfavourable outcome unless that chance surpasses the threshold of 'more likely than not'". See, *Aristorenas*, para. 80, quoting from *Cottrelle*, at para. 25.

[1660] *Cottrelle*, para. 30

[1661] *Mooney* 2004 BCCA 402, supra. This is an prescient echo of the rationale used by the majority in the House of Lords in *Chester v. Afshar*. I discuss the material-contribution aspect of .*Mooney* in *Snark* at 78-80, 88 and 93-96.

negligence.[1662]. Smith J.A., who concurred in the decision dismissing Mooney's appeal from the dismissal of her action, spotted that the *Fairchild* version of material-contribution was based on creation of risk, not causation of injury. He wrote:

> In my view, the *McGhee* risk principle and the inference principle, which is also derived from *McGhee* (as Mr. Justice Donald explains beginning above at para. 70), are the same principle stated differently. It is my view, as well, that the principle is restricted to rare cases where it is clear that the defendant(s) controlled all possible physical agents of harm and it is impossible to identify scientifically the pathogenesis of the harm and, therefore, to attribute precise responsibility for the harm as between the tortious acts of several defendants or as between one defendant's tortious and non-tortious acts.
>
> This is not such a case. Proof of causation is not precluded by the limits of scientific knowledge, and there was an independent risk that Mr. R.K. would choose to harm the appellants despite anything Constable Andrichuk might do.[1663]

Smith J.A. then wrote, to connect *McGhee* to *Fairchild*:

> In *Wilsher v. Essex Area Health Authority*, *supra*, the House of Lords retreated from the McGhee view that a material increase in risk will be sufficient to establish causation if the injury is a materialization of the risk. However, the principle has since resurfaced in *Fairchild v. Glenhaven Funeral Services*, *supra*.
>
> The effect of the risk principle is, in the circumstances where it applies, to dispense as a matter of law with proof of causation. …[1664]

Smith J.A. added that "elimina[ting] causation as an element of negligence is a radical step that goes against the fundamental principle[s]" of negligence law[1665] and that the "care with which the Law Lords in *Fairchild* drew out the unusual features of that case, discussed below, so as to confine future application of the risk principle, speaks to the centrality of causation in negligence."[1666] So it is reasonably clear that, whatever the Supreme Court had intended the *Athey* version of material-contribution to mean, some provincial appellate courts, immediately before *Resurfice*, had adopted or were moving towards the position that *Athey*'s "unworkable" referred to the situation where the facts were such that that it was inherently impossible, due to limitations of science, to prove or disprove causation using but-for.

That too long build-up to takes us to the limits that the House of Lords has established for the *Fairchild-Barker* version of material contribution test. The fence

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[1662] *Mooney*, reasons of Donald, J.A. Donald JA. would have allowed Mooney's appeal and granted her judgment. He held that this was necessary so that justice would be done: Mooney, paras. 9-10, 94.
[1663] *Mooney*, para 153-154.
[1664] *Mooney*, para 155-156.
[1665] *Mooney*, para 157
[1666] *Mooney*, para 159. Smith J.A. then went on to discuss *Fairchild* and the limitations on the use of the material – contribution test as set out in *Fairchild.*

around the *Fairchild-Barker* version of the English material-contribution test is high and the entrance tightly guarded. *Barker* sets out the purpose that test:

> The purpose of the *Fairchild* exception is to provide a cause of action against a defendant who has materially increased the risk that the claimant will suffer damage and may have caused that damage, but cannot be proved to have done so because it is impossible to show, on a balance of probability, that some other exposure to the same risk may not have caused it instead.[1667]

Barker also summarizes the essential requirement condition of the English version of material contribution.

> In my opinion it is an essential condition for the operation of the exception that the impossibility of proving that the defendant caused the damage arises out of the existence of another potential causative agent which operated in the same way. It may have been different in some causally irrelevant respect, as in Lord Rodger's example of the different kinds of dust, but the mechanism by which it caused the damage, whatever it was, must have been the same. So, for example, I do not think that the exception applies when the claimant suffers lung cancer which may have been caused by exposure to asbestos or some other carcinogenic matter but may also have been caused by smoking and it cannot be proved which is more likely to have been the causative agent.[1668]

In *Fairchild*, the members of the panel went to great pains to set out the specific criteria that had to be satisfied: see, for example, Lord Hoffmann's and Lord Rodger's lists. [1669] Both lists merit quotation, here, to show how tightly the test is circumscribed. Lord Bingham's list, which I do not quote, is slightly different but similarly specific.[1670] Lord Hoffmann wrote:

> What are the significant features of the present case? First, we are dealing with a duty specifically intended to protect employees against being unnecessarily exposed to the risk of (among other things) a particular disease. Secondly, the duty is one intended to create a civil right to compensation for injury relevantly connected with its breach. Thirdly, it is established that the greater the exposure to asbestos, the greater the risk of contracting that disease. Fourthly, except in the case in which there has been only one significant exposure to asbestos, medical science cannot prove whose asbestos is more likely than not to have produced the cell mutation which caused the disease. Fifthly, the employee has contracted the disease against which he should have been protected.[1671]

Lord Rodger wrote:

> First, the principle is designed to resolve the difficulty that arises where it is inherently impossible for the claimant to prove exactly how his injury was caused. It applies, therefore, where the claimant has proved all that he possibly can, but the causal link

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[1667] *Barker*, at para. 17, per Lord Hoffmann.
[1668] *Barker*, at para. 24, per Lord Hoffmann.
[1669] *Fairchild*, at paras. 61 and 170, respectively.
[1670] *Fairchild*, at paras, 2, 34.
[1671] *Fairchild*, at para. 61.

> could only ever be established by scientific investigation and the current state of the relevant science leaves it uncertain exactly how the injury was caused and, so, who caused it. . . . Secondly, part of the underlying rationale of the principle is that the defendant's wrongdoing has materially increased the risk that the claimant will suffer injury. It is therefore essential not just that the defendant's conduct created a material risk of injury to a class of persons but that it actually created a material risk of injury to the claimant himself. Thirdly, it follows that the defendant's conduct must have been capable of causing the claimant's injury. Fourthly, the claimant must prove that his injury was caused by the eventuation of the kind of risk created by the defendant's wrongdoing. . . . By contrast, the principle does not apply where the claimant has merely proved that his injury could have been caused by a number of different events, only one of which is the eventuation of the risk created by the defendant's wrongful act or omission. . . . Fifthly, this will usually mean that the claimant must prove that his injury was caused, if not by exactly the same agency as was involved in the defendant's wrongdoing, at least by an agency that operated in substantially the same way. A possible example would be where a workman suffered injury from exposure to dusts coming from two sources, the dusts being particles of different substances each of which, however, could have caused his injury in the same way. . . . Sixthly, the principle applies where the other possible source of the claimant's injury is a similar wrongful act or omission of another person, but it can also apply where … the other possible source of the injury is a similar, but lawful, act or omission of the same defendant. I reserve my opinion as to whether the principle applies where the other possible source of injury is a similar but lawful act or omission of someone else or a natural occurrence.[1672]

There are at least six preconditions set out in the speeches in *Fairchild*, at least four of which are general preconditions and not case-specific requirements. These preconditions are thoroughly discussed in Jane Stapleton, "Lords a'leaping evidentiary gaps" (2002), 10 Torts L.J. 276 at pp. 50-67. Stapleton identifies at least four common factual features identified in the *Fairchild* speeches as seemingly necessary pre-conditions to the use of the *Fairchild-Barker* principle (she calls it *McGhee/Fairchild* – the article predates *Barker*) principle and two which were common features of the cases but will likely not be preconditions. (1) "A gap in medical knowledge of aetiology such that it cannot be said that the cause-in-fact of a disease was more likely to be one source of risk of the outcome than another source of risk, howsoever trivial." (2) "[A]ll defendants … were acting in pursuit of commercial profit when they carelessly exposed the victim to the risk of the relevant disease." (3) "[T]he diseases affecting the claimants were grave. (4) "[T]he disease from which the victim suffered could only have resulted from exposures to a single type of agent" or at least multiple agents "operating in substantially the same way". The two features unlikely to become preconditions are: (5) "the defendant knowingly and explicitly required the victim to work with the dangerous agent" and (6) "the victim was exposed while at work."

It is not clear whether the *Resurfice* version is limited to a single (i.e., the same type of) causal agents situation, applies to multiple (i.e., different) agent situations whether or not the agents operate in substantially the same way of different ways. In "Looking Glass", Vaughan Black and I described the single-agent or multiple-agent issue

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[1672] *Fairchild*, at para. 170.

this way. "Consider a key aspect of the test adopted by the House of Lords in *Barker*. It was suggested that the material-contribution test should be available when the other candidate causal agents – those candidate caused agents other than the one set in motion by the defendant's negligence – operated the same way as did the agent attributable to the defendant's carelessness. The test was applicable in *Barker* because there the causal agent attributable to the defendant (asbestos dust) was the same as the other potential causal agents in play (asbestos dust from sources other than the defendant). However, the test would not be available when different candidate causal agents were involved."[1673] It is not even clear that the *Stewart v. Pettie* conditions for when the "burden facing a plaintiff in trying to prove that the defendant's actions actually caused the loss complained of" might be relaxed are necessarily applicable to *Resurfice* material-contribution. *Stewart* mentions, at paras 65-66: "some inherent difficulty in proving causation with scientific accuracy"; "where the facts surrounding causation lie uniquely within the knowledge of the defendant"; something "unusual or difficult in this case about proving causation"; where the "facts lie particularly within the knowledge of the defendant".

XVIII Material-Contribution: Miscellaneous Issues

Property Damage, Successive Accidents

The issue is whether the *Resurfice* material-contribution test applies to overdetermined (duplicative) property damage claims arising out of successive tortious incidents. By successive, I mean incidents that are sufficiently separable, whether or not they overlap in part or in whole (occur concurrently), so that one tortious event may be said to be the first and any other tortious incident a later incident. I will use two tortious incidents to minimize the complications.

I will look at two scenarios. For the first, I assume that both events cause damage to different areas of some chattel; however, the work required to properly repair the damage caused by the second incident necessitates the repair of the area damaged in the first incident. That is, if we assume the chattel is a vehicle, and the first area damage is to the body, that area damaged in the first incident would necessarily be "damaged" and then repaired by the work required to repair the damage caused by the second incident. In the second, I will assume the vehicle is a truck or a ship that is used to transport cargo, so that it will be out of commission while the repairs are done. I assume, this time, that the body (or hull) damage areas are entirely distinct and that the repairs to one area of damage do not do not overlap with the repairs to the other area. Finally, I assume: (1) the time required for repairs to the first area 27; the time required for the repairs to the second area is 14 days; and (3) the repairs start at the same time, because that is reasonable, so that at the end of the 2 weeks the second area repairs are done. The truck, or boat, is not ready yet, of course, as the first area repairs are still not complete. They take the scheduled 13 more days to complete. Then the ship or truck is back in business.

[1673] "Looking Glass", at 253 (footnotes omitted).

In addition to the cost of the repairs, themselves, the truck or ship has had to pay for 27 days rental on the dry-dock and has lost 27 days of income since the ship was not available to be rented out.

The questions are: (1) In the first example where the repairs to the second area of damage required the repair of the first area in order to properly carry out the repairs required by the later damage, is there apportionment of some portion of the repair costs – say what the cost of the first area repair would have been in any event – as between the two wrongdoers? (2) In the second example, is there any apportionment of the dry-dock rental charges for the first 14 days, or the loss of revenue for the first 14 days? In either example, does the *Resurfice* material-contribution test apply? After all, attempting to apply but-for produces the answer that neither incident is a but-for cause of the need to repair the first area, in the first example, or of the first 14 days of dry-dock rental and loss of revenue in the second example. Does that mean that it is impossible to apply the but-for test for factors outside of the plaintiff's control? We will assume that, in both examples, the damage to the body of the vehicle, and the hull of the ship, was the type of damage that was within the ambit of the risk of the negligent conduct that caused the damage. Does it matter whether the later incident is tortious or not?

I assume, by now, that some people have spotted where I am going: to the Supreme Court of Canada's decision in *Sunrise Co. v. the Lake Winnipeg*.[1674] *Sunrise* is the second example, albeit the second incident was not tortious, nor was the injured person at fault. The Supreme Court held, by a 5-2 majority, that it did not matter whether the second incident was or was not tortious.[1675] There was no apportionment between the first and second incidents. The first tortfeasor was responsible for all 27 days worth of dry-dock rental and loss of income. The rationale was that the first 14 days worth of expense had, in effect, already, necessarily been caused by the time the second event occurred, so it could not be caused again. Since it could not be caused again, it was not caused by the second incident. Therefore, the second tortfeasor was not liable for any portion of it, since causation is required for liability in tort. The dissenting position – the reasons were written by McLachlin, J., as she then was – was that there should be apportionment of the first loss of income (and implicitly the dry-dock charges) because, by analogy to apportionment statutes for cases where the second incident was the fault of a tortfeasor, or of the plaintiff, the damages would be apportioned.

Is there a conflict between *Sunrise* and *Resurfice*? Does it matter to the answer to this question that, in *Sunrise*, the majority declared that personal injury damage is inherently different from property damage so that the principles applicable to personal injury claims do not necessarily apply, or apply in the same way if the apply at all, to property damage claims. *Resurfice*, you will recall, is a personal injury claim. Is it significant that the Supreme Court did not mention *Sunrise* in *Resurfice*? There is nothing in *Resurfice* that necessarily restricts the material-contribution test to personal injury claims and it is more than likely that the Court did not intend it to be so restricted;

[1674] [1991] 1 S.C.R. 3.

[1675] McLachlin J., as she then was, and Gonthier J. dissented.

however, the two examples of material-contribution cases provided by the Court were both personal injury actions. And, as we know, despite the Supreme Court's silence, the material-contribution as increase in risk principle has its primary source in a personal injury claim: *McGhee*.[1676]

As mentioned, *Athey* states that there cannot be apportionment between tortious and non-tortious wrongs. *Sunrise*, as we have seen says the same thing in respect of tortious and non-tortious events. And, in respect of property damage claims, the majority in *Sunrise* asserted that there is no apportionment event between tortious events. That dictum was obiter since the second event in *Sunrise* was not tortious. In addition since *Sunrise* was a federal maritime common law decision, it is unlikely to he held to override provincial apportionment statutes both for constitutional reasons[1677] and because the statutes specifically provide for apportionment where damage is caused by two or more tortfeasors.[1678] This would trump the *Sunrise* holding that the overlapping part of damages in property damage actions where there are successive tortious events is deemed, by law, to have been caused by only the first tortfeasor. Somebody in the "damage" statute jurisdictions might decide to try to argue that the distinction between "damage" and "damages" means that *Sunrise* still applies. I expect that argument would not prevail.[1679]

The effect of the *Resurfice* material-contribution test is, in practice, a form of apportionment. Where it applies, it may result in more than one person – certainly two or more wrongdoers, perhaps the injured person too where there is relevant contributory fault – sharing responsibility for the plaintiff's damages. That is apportionment if they all have money and agree to share in some formula. It is apportionment if there is solidary liability and the court orders contribution between the two or more wrongdoers. It is apportionment if there is contributory fault and the plaintiff's damages award is reduced in accordance with the plaintiff's degree of fault. And, it will be apportionment if proportional liability is adopted as the extent of liability under the *Resurfice* material-contribution test. Is *Resurfice*, then, inconsistent with *Sunrise*?

I will now examine *Sunrise*, in some detail, before returning to these questions.

Sunrise was a claim for damages by the owner of the ship the *Kalliopi L* against the owners of the ship the *Lake Winnipeg*. The hull of the *Kalliopi L* was damaged in two groundings. The first was due to the fault of the *Lake Winnipeg*. The second was not. It

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[1676] *Bowes v. Edmonton (City)* (Alta. C.A.) and *Adams v. Borrel* (N.B. Q.B.) are property damage claims. *Bowes* applies the material-contribution test and *Adams* rejects its use, both without considering whether the test was intended to apply to property damage claims.

[1677] Under the *Constitution Act, 1867*, s. 92 (13), property and civil rights are within provincial jurisdiction.

[1678] Except Ontario's Negligence Act, which uses "damages" not damage. That might be another basis for eliding *Sunrise* and apportioning. Some of the other provinces also use Ontario's form.

[1679] On the other hand, the "damage" and "damages" distinction has been approved in England as the basis for holding that its apportionment statute, which requires the same damage be caused by the wrongdoers, did not apply were the was different damage even though the resulting damages were the same. See Royal Brompton Hospital National Health Service Trust v. Hammond, [2002] UKHL 14, [2002] 2 All ER 801.

occurred as the *Kalliopi L* was on her way to dry-dock for repairs. The *Kalliopi L* was out of commission for the period required to do the repairs. The repairs were done concurrently. The time required to repair the damage caused by the first grounding was 27 days. The time that would have been required to repair the damage caused by the second grounding, even if the first had not occurred, was 14 days. The owner of the *Kalliopi L* sued for the loss of revenue for the period the ship was out of commission for repairs, for the cost of the dry-dock at which the repairs were done, and for the cost of the repairs for the damage to the hull caused by the first grounding. The significant issue was whether the owner of the *Lake Winnipeg* was "liable for the loss sustained as a result of the [*Kalliopi L's*] being out of commission the whole period of 27 days, or whether the defendants are entitled to have deducted the 14 days which would have been required in any event to repair the damage caused by the second incident. The trial judge awarded the plaintiffs damages against the defendants for the full 27 days. The Federal Court of Appeal deducted the 14 days from this on account of delay attributed to the second incident." [1680]

The Supreme Court, by a 5-2 majority, reinstated the trial award.[1681] The majority held that there was not to be apportionment of the losses between the first tortious cause and the later non-tortious cause. The majority held that there would not have been apportionment even if the *Kalliopi L* had been at fault in respect of the later event.[1682] It was not.

The dissent called for apportionment of the plaintiff's loss between the parties – the allocation of the losses between the first and second groundings; that is, between the tortious and non-tortious causes – by analogy to contributory fault even where there was no contributory fault. The dissent did not accept the proposition that property damage was inherently different from bodily injury for the purposes of the apportionment of damages. *Athey*, as mentioned, denied that such apportionment is permissible, in a personal injury action, as between tortious causes and non-tortious causes of the injured person's damages. *Athey*, of course, does not say that contributory fault apportionment is barred. It could not, of course, even though the plaintiff's contributory fault is not a "tortious cause". *Athey* also does not does not mention *Sunrise*. We have to assume that *Athey* was not intended to overrule *Sunrise*, so *Athey* has to be limited to actions by people, for damages based on physical or psychological injury.[1683]

The *Kalliopi L and* the *Lake Winnipeg* were approaching each other while travelling in opposite directions in the St. Lawrence Seaway. The *Lake Winnipeg*'s pilot did not do what he was supposed to do. The *Kalliopi L* had to take evasive manoeuvres.

[1680] *Sunrise*, [1991] 1 S.C.R. 3, at 21 per McLachlin J (as she then was). All three levels of court held that only the *Lake Winnipeg* was to blame for the first grounding. That meant that her owner was liable for all of the repair cost, apart from the dry-dock expense and loss of use claim.

[1681] McLachlin J., as she then was, and Gonthier J dissented on the issue of the allocation of the loss.

[1682] [1991] 1 S.C.R. 3, at 19-20.

[1683] Just as we have to assume that *Resurfice* was not intended to overrule the SCC decisions that it did not mention, such *as Lawson v. Laferriere* and *St-Jean v. Mercier,* right?

As a result, she grounded and damaged her hull.[1684] On her way to port for repairs, she grounded, again, causing additional damage to a different area of her hull. The two events were not connected in the sense that the damage to her hull in the first incident was not the cause of the later grounding. The repairs were performed concurrently. The first incident repairs required 27 days. The second incident repairs required 14 day and would have required 14 days even if the first grounding damage had not occurred. Similarly, the *Kalliopi L* was out of service for the time required to perform the first-incident repairs, just as if the second had never occurred.

The majority of the Supreme Court held that the owner of the *Kalliopi L* could recover all 27 days of loss of income from the owner of the *Lake Winnipeg*. There was to be no apportionment. The 27 days of downtime, since that was the time that was required to do the repairs required as a result of the first grounding, was considered, in law, to have been caused (sustained) before the second grounding. Therefore, it could not be caused again. Therefore, the *Lake Winnipeg* was liable for the entire amount. It would not have mattered if the second grounding had been the *Kalliopi L*'s fault. There would still not have been apportionment. The majority wrote: "there is no causal link between the second incident and the loss of profit suffered by the owners of the *Kalliopi L*, such damage being merely coincidental. The *Lake Winnipeg* must, as a consequence bear the responsibility for the full 27 days detention in dry dock."[1685]

There was no evidence that the second grounding was the *Kalliopi L*'s fault but it would not have mattered to the majority if it was.[1686] The majority wrote: "[t]he nature of the second casualty, whether tortious or otherwise, was irrelevant in any determination as to profit-earning capacity. The link between the second incident and the loss of profit suffered by the *Kalliopi L* was merely coincidental, not causal."[1687] The majority asserted that their conclusion was required by principle and was consistent with precedent. There was precedent.

> The necessary result is that the *Lake Winnipeg*, which was solely responsible for the first incident which required 27 days in dry dock, is wholly responsible for the profit loss due to this detention. It is not sufficient in this case merely to determine that the damage caused by the second incident was a cause of the detention. Notwithstanding an affirmative answer to this question, one must, on the principles set out above, answer the further and more important question of liability for loss of profit. While the second incident caused time in dry dock it did not have as a consequence any loss of profit. This conclusion is necessitated both on principle and on the clear reasons on this point offered by the House of Lords. The profit-making enterprise was brought to a halt by the meeting with the *Lake Winnipeg.* Repairs due to the second incident were completed within the 27 days

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[1684] All three levels of court held that the *Kalliope L* grounding was entirely the fault of the *Lake Winnipeg.* The majority in the Supreme Court did not comment on the question of whether there might have been fault. McLachlin J stated there was no evidence of any fault: *Sunrise*, [1991] 1 S.C.R. 3, at 44-46.

[1685] *Sunrise*, [1991] 1 S.C.R. 3, at 19, 20 (penultimate para., majority reasons).

[1686] The entire panel agreed that the first incident was entirely the fault of the *Lake Winnipeg*.

[1687] *Sunrise*, [1991] 1 S.C.R. 3, at 19 and 20.

> detention required by the first incident. The second incident did not therefore, have as a consequence a diminution in profit−earning. Thus this further question in the determination of liability must be answered in the negative.[1688]

This passage can only mean that, as matter of policy, the entire loss of revenue resulting from the length of time that the repairs should take was to be deemed to have occurred immediately on the occurrence of the hull damage. The Court did not explain what the "principle" was that necessitated this conclusion although it purported to. The majority cited, as explanation, this statement from the speech of Viscount Jowitt in *The Carslogie*,[1689] a House of Lords decision that the majority held should be followed.

> [D]amages are payable for the detention of a ship because she is 'a profit-earning machine'. If she ceases to be a profit-earning machine it follows that she can sustain no damage from being detained until she again becomes capable of earning profit. In other words, it is not enough to consider whether the ship was detained by the wrongful act of the defendant. It is essential to consider whether damages were caused to the plaintiff by reason of such detention. [Emphasis added.][1690]

For additional "explanation", or justification, the majority cited a non-maritime property damage case *Performance Cars Ltd. v. Abraham*.[1691] In *Performance Cars*, a vehicle was damaged in two separate collisions. The repairs to the damage from the first incident required that the lower part of the body of the vehicle be repainted. The damage from the second collision was to a different part of the vehicle; however, the repairs would have also included repainting the same portion of the vehicle as the first incident repairs. The first wrongdoer did not have assets to pay for the repairs. The actual damage was slight. The owner attempted to recover the complete repainting cost from the second tortfeasor. It failed. The rationale was that the portion of the cost of the painting relating to the lower part of the vehicle represented damage already done to the vehicle, so it could not be caused again. *Performance Cars* states: "in the present case the defendant should be taken to have injured a motor-car that was already in certain respects (that is, in respect of the need for respraying) injured; with the result that to the extent of that need or injury the damage claimed did not flow from the defendant's wrongdoing. (Emphasis added.)"[1692]

The majority also stated that a summary of the law contained in the *Sunrise factum* was correct and quoted it. "[I]if the first casualty directly prevented the vessel from continuing her profit-making venture and the length of the period of repairs arising from the first casualty exceeded that of any repairs resulting from any other cause, such as a second accident, then the detention and dry docking expenses fall upon the party responsible for the first accident, whether the second accident was caused by the fault of the ship owner, the fault of a third party or the fault of no one, such as heavy

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[1688] *Sunrise*, [1991] 1 S.C.R. 3, at 18-19.
[1689] Carslogie Steamship Co. v. Royal Norwegian Government, [1952] A.C. 292.
[1690] *Sunrise*, [1991] 1 S.C.R. 3, at 14,quoting *The Carslogie,* at 300-301 (emphasis in original).
[1691] [1962] 1 Q.B. 33
[1692] See *Sunrise*, [1991] 1 S.C.R. 3, at 15 **CHECK** (emphasis added by SCC) quoting [1962] 1 Q.B. 33 at 40.

weather."[1693] The Supreme Court agreed that the dry-dock engagement costs were also not subject to apportionment between the two incidents, even though the repairs for the second incident damage could not have been carried without docking and incurring that expense.

As mentioned, the majority had explained their position by stating that "[t]he nature of the second casualty, whether tortious or otherwise, was irrelevant in any determination as to profit-earning capacity. The link between the second incident and the loss of profit suffered by the *Kalliopi L* was merely coincidental, not causal."[1694] The majority summarized and concluded their analysis by stating: "In summary, there is no causal link between the second incident and the loss of profit suffered by the owners of the *Kalliopi L*, such damage being merely coincidental. The *Lake Winnipeg* must, as a consequence bear the responsibility for the full 27 days detention in dry dock."[1695] That may well be what the law was (and still is, if *Sunrise* is still good law[1696]) but it does not explain why that should be the law for actions based on damage to property when it is not the law for personal injury actions. The assertion that there was no causal link between the second accident and the loss of profit from the overlapping days in dry-dock is a statement of law (of policy) not a statement of historical, of scientific, truth. The truth is that both incidents were related the 14 days of overlap and both caused those 14 days. The conclusion that there was no casual connection between the second grounding and the losses is legal conclusion is not a statement about causal reality. It is a statement about legal relevance. Factually, historically, scientifically – for causal reality outside of law – the second grounding was not a factual coincidence. It was a necessary part of one set of events that led to the *Kalliopi L* being out of commission for 14 days and its owners incurring 14 days worth of dry-dock engagement expense.

The majority judgment, in referring to coincidences, reveals that the majority analysis is about factual cause as defined by law, not actual causal links as they existed. It is historically true that it is possible that the second grounding would not have occurred but for the first incident. However, the fact is that it did occur so that first incident is a necessary part of the complete causal picture of what happened. What the court meant by coincidence was that the second grounding was too remote as a matter of law because one cannot say that it was necessarily, or even probably, caused by the first grounding; that there were too many "what ifs between the first grounding and the second; so that the second was not a legally compensable contingency resulting from the first grounding. I suspect that the majority's willingness to decide as they did was increased by the fact that, in practical terms, the damage that the *Kalliopi L* sustained in the first incident was not, in ship navigation terms, any part any part of the reason for the second grounding. There is no suggestion in the reasons that the fist incident hull damage affected the steering or, more generally, the manoeuvrability of the *Kalliopi L*.

[1693] *Sunrise*, [1991] 1 S.C.R. 3, at 18.
[1694] *Sunrise*, [1991] 1 S.C.R. 3, at 19, 20.
[1695] *Sunrise*, [1991] 1 S.C.R. 3, at 20.
[1696] An argument can be made that *Sunrise* has been overruled, in substance, by *Bow Valley Husky v. Saint John Shipbuilding*, even though *Sunrise* was not referred to in Bow Valley. An argument can also be made that *Sunrise* is inconsistent with *Resurfice*. See, below ___.

The second grounding – the non-tortious cause – might have happened to be the *Kalliopi L's* contributory fault; however, there was no evidence it was. The dissent specifically proceeded on the basis that there was no contributory fault, but the result was justified by analogy to the apportionment that would have occurred, as between the parties, had the *Kalliopi L* also been at fault for any portion of the damage or down-time and loss of income. The rationale of the dissent is that the later, second event necessarily reduced diminished the loss caused the earlier tortious event, so that awarding the plaintiff loss of income for the entire period of down-time put the plaintiff in a better position than it would have been had the tortious event (the first incident) never occurred.[1697]

Both the majority and the dissent cannot be squared with the orthodox Canadian position in personal injury actions, where the first tortfeasor cannot ask for a reduced award merely because of the intervention of a later tortious or natural event would have been sufficient to cause the injured person to sustain the particular damage (or damages) in issue, even if the first event had not occurred.[1698] The majority in Sunrise *denied* that there was any inconsistency, claiming that the two types of injury were so distinct as to not be comparable on this issue, so that different treatment in seemingly analogous situations was not inconsistency with personal injury law. While "the general principles may be the same, their application is of necessity different. Inherent differences in the nature of the injuries sustained militate against any meaningful comparisons between the two areas."[1699] Put colloquially, the Supreme Court claimed that any comparison amounted to the apocryphal attempt to compare apples and oranges.

The Supreme Court did not explain what the inherent differences are. I suggest that the Court conflated the injury (the damage) and the losses (the damages) that flow from the injury. While it is undoubtedly true that an injury to a person is different than an injury to an inanimate object, that does not mean that all of the damage claims that flow from the injury (the damage) are not comparable. It is questionable whether there are any necessarily inherent differences in some of the damages that can be said to result from the

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[1697] *Sunrise*, [1991] 1 S.C.R. 3, at 35 ("I take the general principles to which I have alluded as requiring that, to the extent that an event occurring after the tort and independently of the tort diminishes the loss caused by the tortious event, that diminution must be reflected in the award for damages."), 38-39. At 38, McLachlin J. (as she then was) suggested the following rules for apportionment in cases where damage is caused to profit-earning property by successive events, the first of which is tortious and the second not. "The rule of apportionment might be summarized as follows: (1) where there are two or more contributing causes to the loss of use of the vessel as a profit-earning machine; and (2) where each cause, considered independently, makes it necessary to detain the vessel to effect repairs, which are made concurrently; (3) then, to the extent that the two or more sets of repairs are effected concurrently, the loss due to detention is equally allotted between the causes; and (4), to the extent that the time is not used concurrently to repair both sets of damage, the resultant losses are borne solely by the party that caused those losses." (emphasis in original)

[1698] Putting aside events such as death which, as matter of common law case law, or legislation, terminate some or all of any claim for damages.

[1699] *Sunrise*, [1991] 1 S.C.R. 3, at 17. The majority in *Sunrise* notes, at 17, that the Alberta Court of Appeal expressed the same opinion in *Stene and Lakeman Construction v. Evans and Thibault* (1958), 24 W.W.R. 592 at 597 (Alta. C.A.).

injury. I suggest that, in principle, the claim for future loss of income (or impaired earning capacity) by a person is comparable to the claim for loss of revenue or profit as a result of damage to a building.

Klar points out that both conclusions are inconsistent with the law as set out in *Athey* and offend the restoration (original position) principle.[1700] Beever states:

> The restoration principle has two branches. The first is that the plaintiff should not be left in a worse position than she would have been in had the defendant not acted wrongly; the second, that the plaintiff should not be put in a better position than she would have been in had the defendant not acted wrongly. … The plaintiff's claims will be negatived if they are inconsistent with the second branch of the restoration principle, the defendant's if they are incompatible with the first.[1701]

Again, the point is that the second grounding was not, in any relevant sense, a legal consequence of the first grounding. Therefore, giving the owner of the *Kalliopi L* full recovery or any portion of the loss from the first 14 days – the period when the vessel would have been in dry-dock for both sets of repairs – put the owner of the *Kalliopi L* in a better position that it would have been had the first grounding (the wrong) not occurred; that is in a better position that if the *Lake Winnipeg* had not acted wrongly. The *Kalliopi L*'s response might be that we have to assume that the second grounding would not have occurred because the *Kalliopi L* would not have been travelling to that port to dry dock, but still on her original route. The response to that is that we cannot assume that the later event would not have occurred in some other fashion; that is, we cannot assume that there would not have been another, different, "coincidence".

Ironically, the dissenting judges also asserted that putting the owner of the *Kalliopi L* back in its original position – as if the wrong never happened – was the justification for their approach and that apportionment was the rule required to bring this about. McLachlin C.J. wrote:

> I see no reason, however, why the general principle of apportionment … should not apply. This approach would recognize that there were two causes for the detention of the ship and the consequent loss of earning capacity – the defendants' tortious act and the subsequent grounding incident. The question then is this: what in fairness is required to restore the plaintiffs to the position they would have been in had the first incident not occurred? The answer must be that 13 days alone is solely attributable to the defendants' fault and the defendants must bear the full amount of the loss resulting from detention for this period. The remaining 14 days of detention were used to repair damages caused by the defendants' tort as well as damages caused by the intervening incident. Fairness suggests that the loss flowing from this period be divided equally between the two causes of detention. In the result, the defendants would be required to pay damages for 20 days of detention.[1702]

[1700] Klar, Tort Law (3d) at pp. 410-11. See, also, Allan Beever, "Cause-In-Fact: Two Steps out of the Mire" (2001), 51 U.T.L.J. 327.

[1701] Allan Beever, "Cause-In-Fact: Two Steps out of the Mire", at p ____ at the text associated with fn 66.

[1702] *Sunrise*, [1991] 1 S.C.R. 3, at 38.

McLachlin C.J. added:

> This rule conforms with the fundamental principle that the plaintiffs are entitled to be placed in the same position as they would have been in had the tort never occurred. It embodies all the subsidiary rules that flow from this principle. It recognizes that the plaintiffs are entitled only to such loss as it can prove to have been caused by the defendants' act. It permits recognition of diminution of the loss of use claim due to intervening causes. It restricts the extent of any such diminution to other factors which can be shown to have actually caused the particular detention in question. It accords with the modern philosophy of apportioning damages between successive causes of loss. It avoids intricate arguments about factors such as the order of accidents, their impact on the use of the ship, and causation. *And it has the advantage of being generally applicable to all causes and producing a fairer result than the all-or-nothing approach …*"[1703]

The issue is how to handle the situation where the effects of a later event may be seen as "overtaking" the effects of an earlier culpable incident, or at least capable of having some of the same effect on the injured person as the earlier incident. The inconsistency with personal injury law becomes clear if we assume that the *Kalliopi L* was a person, not a object and the first incident accident broke K's leg, making K unable to work for 27 days. Then, on the way to the hospital, K broke his wrist (through no fault of K's own), so that even without the broken leg, K would not have been able to work for the first 14 days. When K sued W, would K have been awarded 27 days worth of loss of income (the award actually granted to the *Kalliopi L*); 13 days (because that is how long it would have taken the wrist to heal so K would not have been able to go to work, even if K's leg was not broken); or 13 days plus some portion of the 14 days – the apportionment between tortious and non-tortious causes award that the dissent would have awarded the *Kalliopi L*?[1704] If there is to be apportionment, on what basis? K, in this example, is not at fault.[1705]

The answer, according to the case law and the treatise writers is that K gets 13 days, and nothing more, so long as the second event is non-tortious and not K's fault.[1706]

[1703] *Sunrise*, [1991] 1 S.C.R. 3, at 39 (emphasis added).

[1704] See Klar, Tort Law (3d) at 414. Klar lists 7 rules, one or more of which should provide the answer to any successive-incident case. Cooper Stephenson, *Personal Injury Damages in Canada* (2d), has a complete variation-by-variation breakdown of the successive-incident complications in the chapter on causation. See Cooper-Stephenson, at 792-93 and Beever, "Two-Steps Out of the Mire", at 333 discussing possible rationales for the difference between personal injury and property damage rules. See also Cheifetz, "Joint Liability & Several Liability", commencing at 26.

[1705] The dissent in Sunrise did not explain why the allocation was to be one-half of the 14 days to each. This amounted to treating the *Kalliopi L* as if it was equally at fault with the Lake Winnipeg. It was not. It was not at fault, at all. So, the decision to allocate one-half to the Kalliopi L was arbitrary. In fact, any formula would have been arbitrary because contributory fault apportionment – the analogy to which the dissent referred – is based on comparative blameworthiness (cite something?) and the *Kalliopi L* had been held free of blame. Therefore, there was nothing to compare So, once the dissenting judges held that held that a portion of the loss of revenue and dry-dock expense was caused by both groundings, there was no formula for them to use to allocate that loss in any portion other than dividing it equally between the parties.

[1706] See Klar, Tort Law (3d) at pp. 408-415; See also Cooper-Stephenson, *Damages,* at 789-93.

The reason is the *Athey* original position principle. Now, assume, that the second event was tortious. What happens now? The answer is that K gets all 27 days, because, as a matter of policy, W is not permitted to say that somebody else also caused K's damages. Klar explains that the *Jobling and Penner* principle will not be applied "when its application will cause injustice the plaintiff. This will occur where successive *wrongs* produce the same loss". [1707] And, what happens if K was also at fault? Then K's damages are reduced by K's percentage of fault, applied to those damages for which K's misconduct is also a cause.[1708] So, in our example, K would have recovered the 13 days at the back end of the loss of income period – the period after his wrist healed and some portion of the first 14 days. That result is the logic of the dissent in *Sunrise.*

The reason for all of this is the original position principle. As indicated, *Athey*'s blanket assertion that there is no apportionment between tortious and non-tortious causes is stated too broadly. What *Athey* means is that, in personal injury actions, there is no apportionment between tortious and non-tortious causes causing the same damage, so long as the "not-tortious" cause is not the injured person's contributory fault. Why is *Sunrise* different from *Athey*? Does *Sunrise* contradict *Athey*? The answer is "no", because, in *Sunrise* the injury – the damage to the hull – was different. The overlap was in the downtime – the loss of income damages – that was the result of (that were caused by) of the hull damage; that is, in the time that was required to repair that damage which was the time the ship would not be earning income. That downtime damages had already been caused by the first event. It could not be caused, again – that is, it could not be also caused – by the second accident. But, you will say, that analysis applies equally well to the personal injury example. The 27 day of loss of income was already caused by the broken leg. No portion of it could be caused, again, by the broken wrist. You are right. What is the answer in Canadian jurisprudence? It is that the law treats people and objects

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[1707] Klar, Tort law (3d) at 411 (emphasis in original). See, also See also Cooper-Stephenson, *Damages,* at 389-90, 789-92. The principles are reviewed in the recent-enough *Gorman v. Falardeau*, 2005 CanLII 18837, 254 D.L.R. (4th) 347 (Ont. C.A.) affirming 2002 CarswellOnt 2091 (Ont. S.C.J.). The case we studied in law school is *Baker v. Willoughby* [1970] A.C. 467 (H.L.). In *Baker*, "B's leg was injured in the first incident as a result of the negligence of W. The result was permanent injury. The result of the injury would have been permanent life-long pain, loss of income etc. However, before the trial of B's action against W, B was shot in the leg in a robbery. As a result, the leg was amputated. How would that affect the assessment of B's damages against W? The short Canadian answer is that any injury caused by the earlier incident is not also caused by the later incident; that is, the same injury cannot be caused twice. So, had B also sued the robber, the robber would not have been also liable for the loss caused by W. However, and this is a very important however, W's extent of liability is not reduced by the subsequent event. W's liability is assessed on the basis of the likely consequences of B's condition as it was at the time of trial. That is, B's damages are assessed as if the trial of the action against W had occurred immediately before the later incident. The rationale is to avoid injustice to B." Cheifetz, Joint Liability & Several Liability at 30; Klar, Tort Law (3d) at pp. 410-12. See also *Penner v. Mitchell*, (1978) 6 C.C.L.T. 132 (Alta. C.A.) and *Jobling v. Associated Dairies Ltd*., [1981] 2 All E.R. 752 (H.L.).

[1708] Contributory fault apportionment is now required by provincial statutes for tort causes of action; some statutes have been interpreted to also to apply to breach of contract and other causes of action; and the courts of some of the provinces, and the Supreme Court for federal maritime common law, have created a common law doctrine of contributory fault apportionment analogous to the statutory provisions.

differently and, curiously, seem to be more generous with damage to objects than to people.[1709]

Conclusion

We might ask why *Resurfice* did not refer to *Sunrise* as an example of the impossibility of using but-for. The arbitrary nature of the dissent's allocation of the loss attributable to the overlapping 14 days – one half to each of the parties, even though the *Kalliopi L* was not at fault at all – highlights the problem. *Sunrise* is a class example of the overdetermined (duplicative) causation case, if we conclude that the loss attributable to the overlapping 14 days of downtime was caused by both groundings. When the but-for test is applied to each incident, neither satisfies the test in relation to this loss because the other collision is sufficient to produce the 14 days of downtime. The overdetermined (duplicative) causation cases have, historically, been offered as reasons for the need to have another test for factual causation, or a modification of the but-for test.[1710] Yet, the Supreme Court, in 1991, dealt with the *Sunrise* facts under but-for and, in 2007, did not mention *Sunrise* in *Resurfice* despite whatever changes there had been in Canadian common law causation jurisprudence since 1991. The answer may be that the panel in *Resurfice* realized that referring to *Sunrise* as a material-contribution example would require it to either overrule *Sunrise*, or to re-examine its rationale again, or to declare yet another exception in causation law or damages assessment.

I will now look, briefly, at the question of whether *Bow Valley Husky (Bermuda) Ltd v. St. John Shipbuilding Ltd.*[1711] is inconsistent with *Sunrise*, on the issue of apportionment (or allocation) of damages between tortious and non-tortious causes. The detailed facts of the case are set out earlier in this article. In substance, BVHB hired SJSL to build a floating oil-drilling rig to be used in the Atlantic Ocean on the Grand Banks of Newfoundland. What happened, next, is succinctly set out in the SCC headnote:

> A heat trace system was required in order to prevent the rig's pipes from freezing during the winter. BVHB chose the Raychem system, which used Thermaclad wrap to keep moisture from the insulation and heat trace wire. The specifications for the Raychem heat trace system required the installation of a ground fault circuit breaker system to cut off the power in the event of an electrical fault, to prevent arcing of the heat trace wire. A functioning system was not installed until

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[1709] The apparent distinction between the personal injury and property damage cases – one which ties into the majority's comment in *Sunrise* that there was no causal link between the two groundings is connected to the point that this statement make sense only if the Court considered that the loss of income was deemed to have occurred before the second grounding. Klar, Tort Law (3d) at410, fn 105, explains what the thesis (advanced by others) is. It seems to be that all losses from property damage may be considered as occurring immediately upon the event that causes the property damage; therefore subsequent events are irrelevant to the assessment of the loss arising from the earlier event. Personally injury claims for future loss, however, are always considered hypothetical; as potential losses which may never occur and whose value is a function of the likelihood of their occurrence.

[1710] Brown, *Hegemony*, at _____, Black & Cheifetz, Looking Glass at ____; Cheifetz and Black, Quantum Uncertainty at _____, Cheifetz, Snark at _____.

[1711] [1997] 3 S.C.R.1210, 1997 CanLII 307

> after a fire broke out on the rig, causing damage to a tray of electrical and communications cables. As a result of the damage, the rig had to be towed to port for repairs and was out of service for several months. BVHB … commenced an action against SJSL alleging breach of contract and negligence, and an action against Raychem for negligence. BVHB claimed both for the cost of the repairs to the rig and for the revenue lost as a result of the rig being out of service for several months.[1712]

There are a few more essential facts. (1) BHVB was aware that the circuit breaker system had not been installed and knew there were a number of arcing incidents before the fire. (2) The Thermoclad was flammable and but neither of Raychem or SJSL told BHVB, which did not know. (3) The contract between BHVB and SJSL had an exculpatory clause. (4) The flammability of the Thermoclad was at least part of the reason that the fire was as extensive as it was. (5) BVHB alleged failure to warn against Raychem and SJSL, in relation to the flammability of the Thermoclad. (6) The fire started because of arcing in the heat tracing wiring which ignited the Thermoclad – the very situation which the ground fault circuit breaker system was designed to prevent or limit. The absence of the circuit breaker meant that electricity continued to be fed down the lines, so arcing continuing igniting the Thermoclad, until the power was shut off.

When the dust settled at the Supreme Court, BVHB succeeded against RayChem and failed against SJSL. Both Raychem and SJSL were found to have been negligent in failing to warn BVHB about the flammability of the Thermoclad. SJSL breached the construction contract by failing to install the ground fault circuit breaker system. BHVB was negligent in operating the rig knowing that the circuit breaker had not been installed. However, the exculpatory provision in the SJSL contract applied to both the contract and tort claims against it the action against it was dismissed. BVHB's assessed damages were reduced by 60%; that is, the BHVB's percentage of fault was 60%. The other 40% was the combined share of Raychem and SJSL.[1713]

Sunrise is not mentioned in *Bow Valley Husky*. The question is whether the reduction in BVHB's award, on account of its contributory fault, is contrary to *Sunrise*. Recall that, in *Sunrise*, the majority ruled that there would not have been apportionment even if the *Kalliopi L* had been at fault in respect of the second grounding. The obvious response is that *Bow Valley Husky* does not have *two* or more separate, successive, unconnected, incidents causing overlapping damages; or, if it does, have two or more incidents, they are not unrelated in *Sunrise* terms. On the whole, my view at the moment is that that both responses are plausible and sufficient support for the conclusion that Sunrise and BVHB are not in conflict.

The argument that there was only one relevant incident asserts that the fire on the rig is the equivalent of the first *Sunrise* grounding and there was no later event equivalent to the second grounding. On this analysis, of the negligence of BVHB and Raychem was a cumulative cause of the fire, and the resulting property damage and loss of revenue.

[1712] [1997] 3 S.C.R.1210 at 1213 (headnote, first para.).
[1713] [1997] 3 S.C.R.1210.

There was no later event, such as an additional problem of some sort that occurred as the rig was being towed back to port, that would have put the rig out of service for some period of time even if the fire had not occurred.

There is, however, an argument that there was another incident. It was the application of the flammable Thermoclad to the rig. That damaged the rig to the extent it required the removal of the Thermoclad or other repair. That work would have been done before the fire had BHVB known. The tort which was composed of Raychem's conduct of applying the flammable Thermoclad and failing to warn BVHB was complete when the rig was handed over to BVHB, or at least when the rig was put into service. BHVB, had it found out in time, could have fixed the Thermoclad problem and sued Raychem for the cost of the repairs and the downtime loss, if any. If this analysis is correct, so far, then the failure to warn tort is the first incident. It is equivalent to the *Sunrise* first grounding. The fire is the second grounding. We have what seems to be the *Sunrise* matrix, only this time it is the second incident that has the tortfeasor. Why should that matter on the *Sunrise* analysis? If the events are unrelated, then it cannot matter which came first. The duration of the notional overlapping loss of use claim is the time the rig would have been out service had the problem been discovered and repaired appropriately before the fire.[1714].

The only question left is whether the two incidents are connected in some relevant fashion or not. Bear in mind that both the dissent and majority in *Sunrise* called the two groundings "unrelated". I think it is clear that what the judges meant by that was the first incident did not affect the *Kalliopi L's* manoeuverability; nor was a second grounding otherwise a reasonable foreseeable contingency in consequence of the grounding damage In bodily injury terms, it was not analogous to a weak knee which makes one prone to falling even during normal walking. If we have two damage-causing incidents – the use of the flammable Thermoclad and the fire – are the two incidents unrelated events, coincidences, in the *Sunrise* sense? My current conclusion is that the better answer is no, at least because the extent of the fire damage was a consequence of the Thermoclad flammability. I think most judges would agree. The Thermoclad issue was, simply, too wrapped up with the fire and damage from the fire.

This analysis shows, however, that there *was* the potential for a *Sunrise*-type issue lurking in the *Bow Valley Husky* circumstances. It just never materialized. It would have arisen had something "unrelated" to the fire damage and the Raychem negligence happened to the rig as it was being towed back to port, which caused additional damage sufficient to require repairs of a duration at least as long as that already required because of the fire damage. One such possible cause would be a bad storm. That would be a non-tortious event. Another would be a collision with the tug which was due to negligence on the part of the tug. There could also be fault on the part of the rig operator that was also a cause of the storm damage or the collision. That would be an additional tortious event. Would the results of that case have mirrored *Sunrise* in both hypothetical examples? The

[1714] For convenience, I assume the downtime loss would have been about the same at all times before the fire, had BVHB found out about the problem and acted to correct it.

storm example is 'pure' *Sunrise*. But, what about the second hypothetical? Would the tug escape any liability? Based on *Sunrise*, it would for damages to BHVB and contribution to Raychem.[1715] But, then, what if Raychem was insolvent so that BHVB's only recourse was against the tug. Would the Supreme Court have reconsidered the *Sunrise* dictum that it did not matter if the second event was tortious? Would the Supreme Court have reconsidered the effect of the Sunrise dictum which necessarily seems to be that that contributory fault of the injured person which is also a cause of the unrelated later event is to be ignored?

Other

[reserved]

XIX. Damage Causation and Damages Causation[1716]

This article is about causation of damage, not causation of damages. However, a brief discussion of damages causation and damages assessment is appropriate to highlight the differences. "Damages causation" is simply another way of referring to what is involved in the process of assessing damages, once the decision has been made that the plaintiff has satisfied all of the other requirements for a successful cause of action. *Blackwater v. Plint* states:

> It is important to distinguish between causation as the source of the loss and the rules of damage assessment in tort. The rules of causation consider generally whether "but for" the defendant's acts, the plaintiff's damages would have been incurred on a balance of probabilities. Even though there may be several tortious and non-tortious causes of injury, so long as the defendant's act is a cause of the plaintiff's damage, the defendant is fully liable for that damage. The rules of damages then consider what the original position of the plaintiff would have been. The governing principle is that the defendant need not put the plaintiff in a better position than his original position and should not compensate the plaintiff for any damages he would have suffered anyway: *Athey*.[1717]

[1715] No contribution from the tug because, absent agreement or statute, contribution is not available from any person who never would have been liable to the plaintiff for the damages for which the "damages-defendant" claims contribution from the "contribution-defendant". See, *Giffels Assoc. Ltd. v. Eastern Const. Co. Ltd*., [1978] 2 S.C.R. 1346; Cheifetz, For Whom The Bell Tolled" (2007) 33 Adv. Q. 45 at 64-65, 91-100, and 120-121; Cheifetz, *Apportionment of Fault in Tort* (Aurora, Canada Law Book, 1981) at 37-55 and c. 8; and, Klar, *Tort Law* (3d) at ____,

[1716] See, generally, Cooper-Stephenson, *Personal Injury Damages*, _; Waddams, Damages ____. See *Athey*, at paras. 26-30 under the heading "Adjustments for Contingencies" and *Janiak v. Ippolito*, [1985] 1 S.C.R. 146, 16 D.L.R. (4th), 1985 CanLII 62.

[1717] *Blackwater*, at para. 78. McLachlin C.J. described the plaintiff's theory this way. "Mr. Barney's submissions that injury from traumas other than the sexual assault should not be excluded amount to the contention that once a tortious act has been found to be a material cause of injury, the defendant becomes liable for all damages complained of after, whether or not the defendant was responsible for those damages." (para 78.)

The Court had earlier described the trial judge's task in determining what events caused what injury. "Untangling the different sources of damage and loss may be nigh impossible. Yet the law requires that it be done, since at law a plaintiff is entitled only to be compensated for *loss caused by the actionable wrong*."[1718] The Court also described the process of separating overlapping loss caused by tortious and non-tortious causes as the "'daunting task' of untangling multiple interlocking factors and confining damages to only those arising from the actionable torts". [1719]

Athey states: "Hypothetical events (such as how the plaintiff's life would have proceeded without the tortious injury) or future events need not be proven on a balance of probabilities. Instead, they are simply given weight according to their relative likelihood … For example, if there is a 30 percent chance that the plaintiff's injuries will worsen, then the damage award may be increased by 30 percent of the anticipated extra damages to reflect that risk. A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation: …"[1720] *Athey* summarizes, quoting from a House of Lords decision: "The role of the court in making an assessment of damages which depends upon its view as to what will be and what would have been is to be contrasted with its ordinary function in civil actions of determining what was. In determining what did happen in the past a court decides on the balance of probabilities. Anything that is more probable than not it treats as certain. But in assessing damages which depend upon its view as to what will happen in the future or would have happened in the future if something had not happened in the past, the court must make an estimate as to what are the chances that a particular thing will or would have happened and reflect those chances, whether they are more or less than even, in the amount of damages which it awards."[1721]

The two inquiries are often conflated without that error producing a flaw in the final judgment of the court. That is because, as often as not, the facts of the particular case are simple enough that the distinction may be ignored in determining the value of any compensable loss sustained by the injured person. Nonetheless, the distinction is significant. It is most obvious in claims for future loss and even more so where the alleged future loss is the loss of a chance to do something profitable (enter a contest which has a prize), not something that, if done, is (assumed to be) inherently profitable even if only to a small extent (employment).[1722]

Claims for future loss are, by definition, hypothetical, even more so where the alleged loss refers to some activity where there was only a chance that it would be profitable for the plaintiff. The potential loss may be of an opportunity for a future activity which opportunity, if not realized, would necessarily produce some loss because

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[1718] *Blackwater*, at para. 74 (emphasis in original).
[1719] *Blackwater*, at para. 82.
[1720] *Athey*, para. 27 (authorities omitted)
[1721] *Athey*, para. 29 quoting *Mallet v. McMonagle,* [1970] A.C. 166 at 176 (H.L.)
[1722] An example of the conflation, without (in my view) producing an error in the end result, occurred in *Kassian v. Roy*, 2008 ABQB 80, at paras. 132, 138. I discuss *Kassian*, because it is a good example, at what is currently the end of this section.

engaging in it would necessarily produce some sort of financial return. Working for wages in a factory or office is an ordinary example. There may be no certainty that the opportunity to work will be realized, if the opportunity exists then there is an assessable hypothetical loss, however small the amount is after taking into account all of the contingencies. However, there are other activities where the most one can say is that a possibility exists of both the opportunity and gain from the opportunity. Anything more is too speculative. The opportunity to compete in the Olympics or in a contest is no guarantee that one will succeed. Similarly, the opportunity to write a book, for an unknown author, is no guarantee that the book will ever be published (other than vanity press – self publishing) and even less guarantee that the publication would be profitable. The most one can do is discuss the strength of the likelihood.

That likelihood may be very strong or not strong at all. It may be a real and substantial possibility or it might not be. For future loss to be compensable, there must be real and substantial possibility that that loss will occur.[1723] Obviously, if a future loss is probable then it is a real and substantial possibility. However, real and substantial is not equivalent to probable; that is, the possibility of a future loss may be real and substantial even if that level of possibility does not reach probability. The injury sustained by the injured person is not the value of the future loss. That value is merely part of the value of the injury. The injury is why there is the possibility of the future loss.

There is a difference between "damage" and "damages". "Damage" is the harm (the injury). "Damages", generally, is the loss that results from the damage but equating "loss" with "damages" may mislead. More accurately, "damages" is refers to the monetary award, representing the value of the compensable damage, determined by the court (or other authorized tribunal) and ordered by the court to be paid by the person held liable to pay to the person suffering the damage. Not all damage results in damages. Not all loss resulting from damage results in compensable damages.

You may occasionally hear the term "damages causation". It is accurate enough because there cannot be liability for loss (damages) which were not caused by the actionable wrong. So, "damages causation" refers to an inquiry that occurs at the stage of an action in which the court determines if the injured person has sustained loss as a result of an actionable injury and the value of that loss. The court reaches this stage only after the injured person has met all of the other preconditions to success in the cause of action in issue

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[1723] *Athey* at para. 27: "Hypothetical events (such as how the plaintiff's life would have proceeded without the tortious injury) or future events need not be proven on a balance of probabilities. Instead, they are simply given weight according to their relative likelihood … if there is a 30 percent chance that the plaintiff's injuries will worsen, then the damage award may be increased by 30 percent of the anticipated extra damages to reflect that risk. A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation . . .". See Cooper-Stephenson __, Waddams, ___.

Unlike "damage causation" which, until recently, was always determined on a more likely than not, more probable or not probable, basis,[1724] "damages causation" – the assessment of the damages resulting from the damage: the determination of whether the actionable wrong caused any actionable loss and the value of that loss, if any – is possibilistic and has always been possibilistic. Assuming the plaintiff has been able to successfully establish all of the other requirements for the particular cause of action other than the extent of the damages that resulted from the actionable conduct and actionable injury, then the assessment of the damages – the amount of the compensable loss – is on a real and substantial possibility basis. That basis means that the loss is not certain, so the court has take into account the possibility that some or all of the loss will never be sustained at all.[1725]

It does not matter, at the damages assessment stage, whether the causation of actionable harm has been proven on the basis of probability or possibility, unless the gist of the action – the harm, the injury, itself, is an actionable loss. If the actionable harm is loss of chance, then the question of whether the loss is a real and substantial possibility has been answered in the plaintiff's favour if the action gets to the state of assessing the value of that loss of chance.[1726] In loss of chance claims, the plaintiff has to show on the balance of probability that the plaintiff had a chance of success. Assuming the plaintiff is able to meet that threshold, then the compensable injury is the likelihood, expressed as a percentage, that the action would have succeeded. The value of that injury is, then, the value of the chance had it been realized multiplied by the likelihood percentage. So, if the chance was a $100,000 prize, and the plaintiff had a 15% chance of success, the value of the loss of chance is $15,000. The award is not discounted at the damages assessment stage for the possibility that it will not occur because the determination that there was compensable injury took into account future contingencies.[1727]

In *Kassian v. Roy*,[1728] the plaintiff was injured in a car accident. The judge found the accident caused the plaintiff some compensable injury including some back and neck problems and some TMJ problems. She received a general damages award for her pain and suffering and loss of enjoyment of life. The plaintiff alleged that her injuries prevented her from writing another text and having it published profitably. The judge disagreed and dismissed that part of the plaintiff's claim. The evidence outlined by the judge supports the conclusion that the dismissal was correct. The evidence not only did

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[1724] Until recently, in the damage causation inquiry, whether the damage (the harm, the injury) occurred – whether the harm was caused by the defendant's conduct - was a past event that was always determined on a yes/no (probable or not probable) basis. Assuming fault, then either the defendant's conduct was a probable cause of the injury, in which case the action could continue to the assessment of damages stage, or the conduct was not a probable cause, in which case the action had to be dismissed. As a result of *Resurfice*, there are now some situations in which the causation inquiry will be satisfied by mere possibility.

[1725] *Athey* at para. 27.

[1726] *Henderson v. Hagblom*, 2003 SKCA 40, [2003] 7 W.W.R. 590, leave to appeal refused [2003] SCCA No. 45 (Q.L.) and *Folland v. Reardon*, (2005), 74 O.R. (3d) 688, 249 D.L.R. (4th) 167, 2005 CanLII 1403 (C.A).

[1727] *Henderson v. Hagblom*, *Folland v. Reardon*, Cooper-Stephenson __, Waddams, ___.

[1728] 2008 ABQB 80

not show that the plaintiff had sustained any injury capable of interfering with her ability to write the text – she complained that her pain and suffering interfered with her "creative spark[1729] – and it did not show a real and substantial possibility that any hypothetical text she wrote would have been published profitably, even if she had written it.

The trial judge got the distinction right, initially, between proving damage on the balance of probability and assessing the extent of damages on a possibility basis when the trial judge outlined the law.[1730] However, the trial judge later used "but-for" when referring to the absence of evidence that the hypothetical text could have been published profitably.[1731] For example, the trial judge wrote:

> I disagree. The Plaintiff has certainly failed to prove that the injuries she experienced in the accident have undoubtedly resulted in her failing to produce one or more publications and/or curriculum materials. However, that degree of proof is not necessary, the Plaintiff need only first demonstrate that the alleged loss is a real and substantial possibility and not mere speculation. If that prerequisite minimum has been met, the Court should assign an actual probability for that missing publication. What, then, is the evidence to support that proposition?[1732]

However, the trial later wrote:

> In my view, and on the facts in the case before this Court, to find that but for the Accident, the alleged "gap" would have been filled by an additional publication by the Plaintiff is to engage in significant crystal ball gazing. The Plaintiff has not established that there is a reasonable and substantial possibility that Mrs. Kassian would have published an additional text or curriculum material."[1733]

Note the switch from only "real and substantial possibility" in the first quotation[1734] to the need for "but-for" proof in the first sentence of the second quotation,[1735] yet immediately followed by the return to "real and substantial possibility in the second sentence of that quotation. The second quotation, by itself and taken out of context, could be understood to assert that a "real and substantial possibility" must be the consequence of a but-for analysis; that is, an analysis producing a yes/no, probable or not probable, result. That is certainly not what the trial judge meant.

[1729] 2008 ABQB 80 at para. 111, 134
[1730] *Kassian*, at para. 132.
[1731] *Kassian*, at para. 138.
[1732] *Kassian*, at para. 132.
[1733] *Kassian*, at para. 138.
[1734] *Kassian*, at para. 132.
[1735] *Kassian*, at para. 138.

XX. Conclusion

The increased-risk version of material contribution permits liability without factual causation. Vicarious liability permits liability without fault. In *Bazley v Curry*,[1736] the Supreme Court significantly broadened the reach of vicarious liability in Canadian jurisprudence, based on a rationale it called "enterprise liability". Whether or not one agrees with the rationale, *Bazley* at least contains the Court's justification for the rationale. As indicated, the *Resurfice* version of the material-contribution test permits the imposition of liability without proof of causation as between plaintiff and the defendants upon whom liability is imposed (but not, as indicated. liability without proof, on a probability basis, that the harm could have been caused by the faulty conduct.) Whether or not we agree on the necessity for such a doctrine, we should be able to agree that whatever rationale *Resurfice* contains for that doctrine is inadequate. I suggested in Cheifetz, "Materially Increasing The Risk of Injury As Factual Cause of Injury: *Fairchild v. Glenhaven Funeral Services Ltd*. In Canada" (2004) 29 Adv. Q. 253, starting at 273, that the steps from the *Bazley* enterprise liability doctrine to liability without causation to strict liability are not enormous, even though the movement is hardly incremental. Is that where the Supreme Court is taking Canadian jurisprudence? If so, it needs to be done in a frank manner with full discussion of all of the pros and cons. That did not occur in *Resurfice*.

John Keats wrote, in a 21 December 1817 letter to his brothers in which he described what set poets apart from the common person: "I mean Negative Capability, that is when man is capable of being in uncertainties, Mysteries, doubts without any irritable reaching after fact & reason."[1737] The description was meant as a compliment. A few decades later Walt Whitman wrote, in *Leaves of Grass*:

> Do I contradict myself?
> Very well, then, I contradict myself;
> (I am large—I contain multitudes.)[1738]

Less than one century later, George Orwell coined "doublethink", in the dystopia *Nineteen Eighty-Four*. Doublethink is the ability to concurrently and knowingly believe in contradictory, mutually exclusive, concepts.[1739] Doublethink, then, is what somebody does who has "negative capability". What the *Resurfice* morass shows is that some lawyers and judges are also capable of Keatsian-like negative capability and have an Orwellian-like capacity for doublethink when it comes to the issue of causation; however, that is not a compliment.

[1736] [1999] 2 S.C.R. 534.

[1737] http://en.wikipedia.org/wiki/Negative_Capability (accessed August 4, 2007).

[1738] Walt Whitman, *Leaves of Grass* (1855), c. 14, lines 1321-23. An aggrieved litigant might be inclined to alter the last line to "I am Legion – I contain multitudes". This is a play on words on the status of the legal profession as the "Devil's Advocate" and the passage in Mark 5:6-9 where Satan states: "My name is Legion: for we are many"

[1739] Doublethink is the ability "to hold simultaneously two opinions which cancelled out, knowing them to be contradictory and believing in both of them": George Orwell, *Nineteen Eighty-Four* at pp. ____ (softcover).

Internal contradiction may be generally acceptable in poetry and other forms of literature. It should be avoided as much as is reasonably practicable in law.[1740] Of course, what is contradictory often lies in the eyes of the beholder. Lord Hope, of the House of Lords wrote, recently, quoting from an early, sarcastic, passage in a Scottish judgment: "Occasionally, to some of us two decisions of the House of Lords may seem inconsistent. But that is only a seeming. It is our frail vision that is at fault."[1741] And, the Supreme Court has the last word on whether anything it has said in once case is contradictory to something said in another, even if those in the minority in the subsequent case wrote the passage in the prior case.[1742] In the words of Humpty Dumpty, the Supreme Court is the master. But, paraphrasing what a justice of the United States Supreme Court wrote, about 50 years ago, the highest courts "are not final because [they] are infallible, but [they] are infallible only because they are final."[1743]

The *Supreme Court Act*, s. 3, provides: "The court of law and equity in and for Canada now existing under the name of the Supreme Court of Canada is hereby continued under that name, as a general court of appeal for Canada, and as an additional court for the better administration of the laws of Canada, and shall continue to be a court of record."[1744] The "better administration of the laws of Canada" includes eliminating inconsistencies in the law where appropriate and practicable. It does not include making a bad situation worse. Many academic lawyers (and others) are less than impressed with the manner in which the Supreme Court of Canada has dealt with the law relating to fiduciary duties over at least the past decade. In 1998, in *C.A. v. Critchley*, McEachern C.J.B.C. wrote that the Supreme Court had "extended [the law] … not predictably or incrementally but in quantum leaps so that judges, lawyers and citizens alike are often unable to know whether a given situation is governed by the usual laws of contract, negligence or other torts, or by fiduciary obligations whose limits are difficult to discern. Many lawyers plead cases in the alternative not knowing where the line should be drawn."[1745] He added that the Court had "failed to make the law as clear as it should be."[1746]

Professor Brown wrote, in *Material Contribution's Expanding Hegemony*, about the current status of the Canadian law on factual causation in tort:

[1740] The House of Lords recognized in *White v. Chief Constable of South Yorkshire Police*, [1999] 2 A.C. 455 at 511 that it is not always practicable or possible for the judiciary to eliminate all inconsistencies in some area of the law, and that sometimes it is not desirable for the judiciary to attempt that.

[1741] Lord Hope of Craighead, "'Decision Overrruled" – Facing Up to Judicial Fallibility" (2003), 14 K.C.L.J. 123 at ____. See, also, McMullin J.A., "Judicial Fallibility and The Appellate Process", [1983] Law Lectures for Practitioners, p. *xvii*.

[1742] *Peda v. The Queen*, [1969] S.C.R. 905, 6 D.L.R. (3d) 177; *Binus v. The Queen*, [1967] S.C.R. 594 [1966] 4 C.C.C. 193.

[1743] *Brown v. Allen* (1953), 344 U.S. 443 at 540 (U.S. Sup. Ct.) per Jackson J: "we are not final because we are infallible, but we are infallible only because we are final."

[1744] R.S.C., 1985, c. S-26.

[1745] *C.A. v. Critchley* (1998), 166 D.L.R. (4th) 475 at para. 75, 1998 CanLII 9129 (BC C.A.). "Quantum leaps" is used with the vernacular meaning of "large and discontinuous".

[1746] *C.A. v. Critchley*, at para. 76.

> [T]he problem is not that we have a test that will always allow the plaintiff to win, it is that we have two approaches with vastly differing ramifications for the parties *inter se*, and with no objective measure for predicting the circumstances in which one will be preferred to the other. On the first approach – the but-for test – the plaintiff's chance of success depends on objectively demonstrating the necessary factual link between the defendant's negligence and harm. Applying this test, some plaintiffs will succeed while some will not, but the result will always be explicable by verifiable reference points. The second approach, however – the material contribution test – guarantees the plaintiff success in cases of evidentiary uncertainty, but is applied only on a purely intuitive basis. Or as McLachlin C.J.C put it, it is applied where "it would offend basic notions of fairness and justice to deny liability by applying a 'but for' approach".[1747]

In *Critchely*, McEachern C.J.B.C. summarized his comments on the Supreme Court's fiduciary duties jurisprudence by writing, in part: "We have no way of knowing how the learned justices of the Supreme Court of Canada might view this case. History suggests they may have a number of different views. … [I]t is time, in my view, for the law to be made more certain and less subjective. Certainly I regard it as part of this Court's responsibility to urge the Supreme Court of Canada to clarify the law as best it can."[1748] I suggest those comments are equally applicable to the Supreme Court's causation jurisprudence. It is worth repeating the penultimate sentence in paragraph 57 of ***R. v. Henry***: "The objective of the exercise is to promote certainty in the law, not to stifle its growth and creativity." I suggest that, whatever else it does, *Resurfice* does not promote certainty in the law. It may create "growth and creativity" in the business of litigation, but that is unlikely to be quite what Binnie J. meant. We have heard any number of speeches, recently, from a number of senior judges, bemoaning the increasing cost of litigation. Some judges have pointed a finger or three at lawyers' fees. Perhaps we, as lawyers, can point our own fingers (being careful as to which we point) at judgments which create inappropriate uncertainty in the law.

Finality is necessary for effective functioning of the forms of legal system with which most of us are acquainted. Finality is a value that is "fundamental to the maintenance of the rule of law and the effective administration of justice."[1749] However, the dark lining in the silver cloud of finality is the possibility of judicial fallibility. Lord Hope summarized the situation very nicely, by comparing law and sport. First, he referred to a passage in an early 1930s Scottish judgment in which the judge had quoted the response of a wicket-keeper to the batsman's complaint about the umpire's ruling, in

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[1747] *Hegemony*, at 446.

[1748] *C.A. v. Critchley*, at para. 82.

[1749] See, *Toronto (City) v. C.U.P.E., Local 79* (2001), 55 O.R. (3d) 541 at para. 33, 205 D.L.R. (4th) 280: "*Res judicata* and related principles which operate to preclude relitigation of decided issues are judge-made doctrines. They reflect a balancing of fairness and finality concerns, both of which are fundamental to the maintenance of the rule of law and the effective administration of justice." The decision was affirmed on slightly different grounds, the Supreme Court stating that finality was not an independent ground: 2003 SCC 63, [2003] 3 S.C.R. 77, 232 D.L.R. (4th) 385. See, also, *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460, 2001 SCC 44.

a cricket match for those who need the context: "It disna' matter if the ba' hit yer neb; if the umpire says yer oot yer oot.'[1750] Lord Hope went on:

> Fallibility is, of course, an escapable part of the human condition. ... In sport, errors of that kind are irretrievable. When the game is over you get no second chance. But that is all very well for sport – which is only a game, after all. When the whistle blows, it really is all over. The law demands something different. If mistakes are made by judges when they say what the law is, their mistakes must be corrected. [1751]

We no longer pretend that judges of the courts of the ultimate court of last resort (in this life) are infallible. Aharon Barak, while President of the Supreme Court of Israel, wrote; "the finality of our decisions is based on our ability to admit our mistakes, and our willingness to do so in appropriate cases".[1752] Even law lords of the House of Lords now candidly acknowledge their fallibility in learned articles: see, for example, Lord Hope "'Decision Overrruled" – Facing Up to Judicial Fallibility".[1753] We no longer think the true law exists out there, somewhere, just waiting to be discovered. That view of the law has been declared a fairy tale.[1754]

In the best of worlds,[1755] judicial decisions would be both logical in analysis, correct in result and just in result. In practice, judges make mistakes. Again, quoting Lord Hope:

> The reasons why appellate judges make undoubted mistakes are fairly simple and fairly obvious. Usually it is because something has been overlooked. A relevant statute or piece of relevant case-law may not have been noticed, or it may have been ignored due to a failure to appreciate its significance. To a great extent appellate judges depend for their information on the advocates. They can and do perform their own research in order to supplement what they already know from experience. But in a busy court the pressure of business gets in the way of this, and most of the judges' information is obtained from counsel in the course of the argument. Judges are also vulnerable to errors of omission due to inadequate argument, especially if litigants choose to argue their appeal in person. In the perfect system errors of this kind ought not to occur, but one has to face the fact that perfection in this filed of human activity is rarely attainable. The closet one comes to perfection in our legal system is when a case reaches the House of Lords. This is not because, as Lord Sands put it, the House has "a perfect legal mind". It is simply because the House has more time to devote to each case, and it is in a position to demand a higher standard of oral and written argument. … Nevertheless, their Lordships are all well aware

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[1750] Lord Hope, "Decision Overrruled" – Facing Up to Judicial Fallibility" (2003), 14 K.C.L.J. 121 at 122.
[1751] Lord Hope, "Decision Overrruled" – Facing Up to Judicial Fallibility" (2003), 14 K.C.L.J. 121 at 122.
[1752] Quoted from Lord Hope, Facing Up … (2003), 14 K.C.L.J. 121 at pp. 135 – original sources there.
[1753] Lord Hope, Facing Up … (2003), 14 K.C.L.J. 121 at pp. 122-23 and throughout
[1754] A Law Lord admitted, in writing, in the early 1970s that the suggestion that theory judges do not change the law and that judges are infallible – the conceits go hand in hand – was a fairy tale: extra-judicially, Lord Reid, **get speech name**___ (1972-73) J.S.P.T.L. 22; more recently, *Kleinwort Benson Ltd v. Lincoln City Council Kleinwort*, [1998] UKHL 38, [1999] 2 AC 349; [1998] 4 All ER 513. See, for example, *National Westminster Bank plc v. Spectrum Plus Limited*, [2005] UKHL 41, [2005] 3 WLR 58
[1755] *Candide*, Voltaire, c. 6, where Candide says to himself: "If this is the best of all possible worlds, what are the others?"

> of Justice Jackson's famous dictum when, speaking of the US Supreme Court, he said: "We are not final because we are infallible, but we are infallible only because we are final".[1756]

Lord Hope's implicit reference to the judge's obtaining of the correct law "from counsel in the course of argument" is no doubt what the judges meant by referring to the "the purifying ordeal of skilled argument" in a number of recent and older cases.[1757]

More recently, we can find judicial statements that justice should trump blinkered adherence to logic, if logic will lead to an unjust result. "But the law's view of causation is less concerned with logical and philosophical considerations than with the need to produce a just result to the parties involved."[1758] We can also find statements that the law should be ignored if it gets in the way of a result the judge considers just on the relevant facts. In *Reilly v. Lynn*,[1759] Southin J.A. (dissenting – the majority specifically disavowed these comments[1760]), discussing the scope of appellate power to review lower court findings of fact, wrote: "So far as I am concerned what underlies my raising this point is that I have concluded that justice, in the broad sense, is served more often by getting the facts right than by worrying about what the law is." It seems, from this, that one corollary is that if, for whatever reason, the result cannot be just it should at least be logical. By logical, I mean consistent with existing law and the result of an analysis that is internally consistent. I leave to another day, and another person, the question of how a decision can be legally just if it is not consistent with the law that should have produced the opposite result, so long as that law is the law of the land. Justice is not served when the Supreme Court too lightly dismisses its obligation to worry about what the law is.

Law is expressed in language. Language is expressed in words. Law expresses words in written text. Law tries for specificity. Language does not necessarily have that specificity. Language is ambiguous outside of context. Deconstructionists argue that language and text have no inherent meaning at all. There are pitfalls hiding in that ambiguity if those involved in crafting reasons for judgment are not careful enough. There be dragons remains true in law's geography. The idea is to chose words that can and do mean only what the words should mean, nothing more.[1761] What one should not

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[1756] Lord Hope, "Facing Up", 14 K.C.L.J. 121 at 123 quoting *Brown v Allen* (1953), 344 US 443 at 450.

[1757] *Heward v. Eli Lilly & Company*, 2007 CanLII 2651 at para. 25 (Ont. S.C.J), *Commerzbank Ag v Price-Jones*, [2003] EWCA Civ 1663 at para. 48 (Eng. C.A.) and *Cordell v. Second Clanfield Properties Ltd*., [1969] 2 Ch. 9 at 16 (Ch. D.). That is not actually the complete purpose of the quoted excerpt. I will leave it to those interested enough to check any one of the cases to get the complete context. I have hyperlinked to *Heward* to make it easy enough.

[1758] *Birkholz v. RJ Gilbertson Pty Ltd*. (1985), 38 SASR 121 at 130 (South Australia S.C.).

[1759] 2003 BCCA 49, at para. 92,

[1760] 2003 BCCA 49, at para. 96.

[1761] *R v Nette*, 2001 SCC 78, [2001] 3 S.C.R. 488 at paras 12-13 per L'Hereux-Dubé, dissenting (McLachlin C.J.,Gonthier and Bastarache JJ concurring) contains these reminders, all which amount to "the court's choice of words matters". In para. 10: "Words have a meaning that should be given to them and different words often convey very different standards to the jury. In my view, describing a contributing cause as having a "significant" impact attaches a greater degree of influence or importance to it than do the words 'not insignificant'." In para 11: "Moreover, it is worth emphasizing that language is the medium

have are very wealthy words that have to work very hard to hold their intended meaning, wealthy for the reason Humpty Dumpty gave in *Through The Looking Glass*: "When I make a word do a lot of work like that ... I always pay it extra."[1762] We should not be able to say, about reasons for judgment, about any portion of the law, paraphrasing Marlow from *Doctor Faustus*: Is this the pen that launched a thousand slips / And fed the bottomless bowers of Bay?[1763] If one has the appropriate knowledge, or the appropriate tools, one can find in classical literature any number of epigrams and snippets of poetry that one can use to dress-up an otherwise bland piece of legal writing, and to make one's point with a sharper edge. For example, there is the Greek saying that is usually translated as "there is many a slip 'twixt the tongue and the lip". A paraphrase of that with a legal twist would be "there is many a slip 'twixt the pen and the writ." Some slips, though, matter more than others.[1764]

Erroneous assertions in reasons for judgment about what the law is contain a significant potential for mischief; all the greater where the decision is from an appellate court. It is naïve to pretend otherwise. Experience has taught too many of us that there is a real risk that, at some point, somewhere, some lawyer and then some judge will latch onto the assertion. That that error is later corrected, or is correctable, on appeal does not restore the lost time and money. It may not be worth the expense to appeal.

Where the circumstances involve what could be a court of last resort, the fewer slips the better. A court of last resort is a body of watchers. If the law has become so complex that statements are made with unintended implications because the particular panel of watchers did not see the unintended connection, or concurrent or almost concurrent panels are tripping over one another's feet for similar reasons, then something needs to be done. If it is not already done, to some extent informally, perhaps a solution is to have one or more appellate judges whose role it is to read judgments within their expertise before release, or that all judgments be circulated before release amongst all

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through which the law finds expression. … 'Morality or custom may be embedded in human behavior, but law – virtually by definition – comes into being through language'." In para. 12: "Language is the outward sign of our legal reasoning. The words we use provide a filter through which we view and acknowledge legal concepts … It is therefore crucial to our analysis that we use exact language." In para. 13: "our reasoning is dictated by the specific words that are used to articulate a legal test or standard".

[1762] Lewis Carroll, *Through The Looking-Glass and What Alice Found There*, c. 6.

[1763] Docket (time) slips, not just vessel berths.

[1764] An example is the too common use of "joint tortfeasors" to describe the relationship between concurrent tortfeasors who are not joint tortfeasors. The misdescription usually does not matter. It would, however, whether the issue is whether some person other than the actual actor is also liable for the harm caused by the actor. Calling the wrongdoers joint tortfeasors answers the question even before the inquiry begins. For example, the issue in *Dixon v. Leggat,* (2003), 64 O.R. (3d) 347, 225 D.L.R. (4th) 84 2003 CanLII 21626 (C.A.) was whether B was also liable harm caused by the fault of A. The answer turned on the interpretation of a statute. The Court of Appeal held that the facts required to trigger the application of the statutory joint liability did not exist. However, the court, throughout, referred to A and B as "joint tortfeasors". They were not. The Court could not have intended that the usage be understood to mean that A and B were joint tortfeasors with the consequences that entails. If, in fact, A and B had been joint tortfeasors, resort to the statute would not have been required. They would have been jointly liable because that is an aspect of being a joint tortfeasor, so B would have been liable for the harm caused by the conduct of A regardless of the statute.

interested members of the Court, or all with relevant expertise in the legal issues, so that more judges have a chance to catch the unintended consequence. Otherwise, who will watch the watchers?[1765] I used a passage from *Through The Looking Glass* early on. I return there for my conclusion. Alice's response to Humpty was: "The question is … whether you can make words mean so many different things." The problem is that judges can and sometimes do: sometimes unintentionally, and sometimes with unintended and unfortunate consequences.

In *Kuwait Airways Corporation v. Iraqi Airways Co*.,[1766] Lord Hoffmann stated, explicitly, that while a valid system of tort liability requires *some* kind of causal relationship between impugned act and harm, the kind of relationship must be case-specific, dependant on the nature of the wrong alleged and the remedy that is sought. He wrote that "it would be an irrational system of tort liability which did not insist upon there being some causal connection between the tortious act and the damage. But causal connections can be of widely differing kinds. … [However], [t]here is therefore no uniform causal requirement for liability in tort. Instead, there are varying causal requirements, depending upon the basis and purpose of liability." The full text of the relevant passage follows.

> [127] My Lords, it would be an irrational system of tort liability which did not insist upon there being *some* causal connection between the tortious act and the damage. But causal connections can be of widely differing kinds. Sometimes the act may have been a necessary condition but followed by a voluntary human act or exceptional natural event (*novus actus interveniens*). Such a causal connection is usually insufficient to found liability in negligence. But in the case of certain kinds of duty, even in negligence, it will be enough. It may be sufficient to show that the act was a necessary condition, even if the subsequent voluntary act of a third party (*Stansbie v Troman* [1948] 2 KB 48) or the plaintiff himself (*Reeves v Commissioner of Police of the Metropolis* [2000] 1 AC 360) was also a necessary condition. And the same may be true when liability is strict: see *Environmental Agency v Empress Car Co (Abertillery) Ltd[1999] 2 AC 22*. Sometimes the act cannot be shown to have been even a necessary condition but only to have added substantially to the probability that the damage would be suffered. But in some situations even this limited causal connection will suffice: see *Bonnington Castings Ltd v Wardlaw* [1956] AC 613; *McGhee v National Coal Board* [1973] 1 WLR 1.
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> [128] There is therefore no uniform causal requirement for liability in tort. Instead, there are varying causal requirements, depending upon the basis and

[1765] Juvenal, Satire, VI, 165: *sed quis custodiet ipsos custodes*. The United States Court of Appeals, for example, has a procedure under which judges of a circuit of that Court "in active service" can make a request which may result in the case being reheard. A majority of the judges may order an appeal to be reheard "en banc" where this "is necessary to secure or maintain uniformity of the court's decisions" or "the proceeding involves a question of exceptional importance". See Rule 35 of the U.S.C.A. *Federal Rules of Appellate Procedure*.

[1766] [2002] UKHL19 at paras. 127-128, [2002] 2 A.C. 883, [2002] 3 All ER 209.

> purpose of liability. One cannot separate questions of liability from questions of causation. They are inextricably connected. One is never simply liable; one is always liable *for* something and the rules which determine what one is liable for are as much part of the substantive law as the rules which determine which acts give rise to liability. It is often said that causation is a question of fact. So it is, but so is the question of liability. Liability involves applying the rules which determine whether an act is tortious to the facts of the case. Likewise, the question of causation is decided by applying the rules which lay down the causal requirements for that form of liability to the facts of the case.[1767]

The last two sentences in paragraph 127 – "Sometimes the act cannot be shown to have been even a necessary condition but only to have added substantially to the probability that the damage would be suffered. But in some situations even this limited causal connection will suffice." – summarize the House of Lords' justification for the decision in *Fairchild* as to what is now the meaning of the material contribution test in English jurisprudence. The House of Lords then explicitly defined the parameters of this new kind of sufficient causal relationship. These two sentences also seem to summarize what must be the Supreme Court of Canada's justification for the new Canadian version of the material-contribution test as declared in *Resurfice*. However, unlike the House of Lords, the Supreme Court did not adequately explain why this new kind of causal relationship will suffice and whatever advice it provided as to the parameters of the new causal relationship is of limited value to anyone who needs to know: the lay public, lawyers in practice, academics teaching or studying law, and other judges.

You will recall that I began the portion of this article dealing specifically with the *Resurfice* material-contribution test by quoting an aphorism from the almost 30 year old Saskatchewan Court of Appeal decision in *Nowsco Well Service Ltd. v. Canadian Propane Gas & Oil Ltd.*: "Ordinarily, exposure to risk goes to duty of care and its breach, but not to cause. Contribution to any injury goes to cause." What *Resurfice* tell us is that there are some situations where "fairness and justice" take the case out of the ordinary. Reasonable people may differ on that. What reasonable people should not differ on is that *Resurfice* does not tell us, adequately, how to identify these extra-ordinary – what *Resurfice* calls "exceptional" – cases. The result is that the application of the *Resurfice* material-contribution test may turn out not be at all exceptional.

In *Canadian National Railway v. Norsk Pacific Steamship Co.*,[1768] the Supreme Court made its first attempt to provide a generalized basis for recovery for pure economic loss. (In *Bow Valley Husky*, the Supreme Court later beat a hasty retreat from its sweeping generalizations of the applicable principles, but that retreat is not germane,

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[1767] 2002] UKHL19 at paras. 127-128.

[1768] [1992] 1 S.C.R. 1021, 91 D.L.R. (4th) 289, reconsideration refused (July 23, 1992), Doc. 21838 (S.C.C.). Majority: L'Heureux-Dubé, Cory and McLachlin JJ, with Stevenson J. concurring only in the result. La Forest, Sopinka and Iacobucci JJ. dissented.

here.[1769]). McLachlin J. (as she then was) wrote: "The second question is whether extension of recovery to this type of loss is desirable from a practical point of view."[1770]

> The second question is whether extension of recovery to this type of loss is desirable from a practical point of view. Recovery serves the purpose of permitting a plaintiff whose position for practical purposes, vis‑à‑vis the tortfeasor, is indistinguishable from that of the owner of the damaged property, to recover what the actual owner could have recovered. This is fair and avoids an anomalous result. Nor does the recovery of economic loss in this case open the floodgates to unlimited liability. The category is a limited one. It has been applied in England and the United States without apparent difficulty. It does not embrace casual users of the property or those secondarily and incidentally affected by the damage done to the property. Potential tortfeasors can gauge in advance the scope of their liability. Businesses are not precluded from self‑insurance or from contracting for indemnity, nor are they `penalized' for not so doing. Finally, frivolous claims are not encouraged.[1771]

The majority all agreed that policy concerns established the limits of the cause of action. The limitation Stevenson J chose was the notion of proximity described as the "known plaintiff" or "ascertained class" limit.[1772] This limitation was rejected by the majority-plurality and the dissent. Stevenson J wrote:

> The line must be drawn by considering the policy concerns which underlie the need to limit the recovery of relational losses. The policy rationale which precludes recovery for most relational losses does not exist if there is no danger of indeterminate liability. There is no danger of indeterminate liability, and thus no policy reason to deny recoverability, when the defendant actually knows or ought to know of a specific individual or individuals, as opposed to a general or unascertained class of the public, who is or are likely to suffer a foreseeable kind of loss as a result of negligence by that defendant. For sake of convenience, this can be called the "known plaintiff" exception to the usual position that relational losses cannot be recovered for the policy reason that indeterminate liability could result.
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> With a known plaintiff, the scope of liability cannot become indeterminate. Liability is kept within a limited and determinate scope.[1773]

McLachlin J. (as she then was), writing for the 3 of the 4 judges in the majority – Stevenson J.'s dissent is at least on this issue, so the Supreme Court either split equally on the point or the McLachlin J. approach is the minority view[1774] – had stated earlier:

[1769] See, R. Brown, "Still Crazy after all these Years: *Anns, Cooper v. Hobart* and Pure Economic Loss" (2003) 36 U.B.C. L. Rev. 159 and R. Brown "Justifying the Impossibility of Recoverable Relational Economic Loss" (2006), 5 Oxford University Commonwealth Law Journal 155.

[1770] [1992] 1 S.C.R. 1021 at 1145.

[1771] [1992] 1 S.C.R. 1021 at 1145.

[1772] [1992] 1 S.C.R. 1021 at 1166- 84, particularly commencing at 1179-82.

[1773] [1992] 1 S.C.R. 1021 at 1179.

[1774] Stevenson J. concurred in the result but not in this analysis: He wrote: "I have read the judgment of my colleague Justice McLachlin and while I agree with her conclusion, I reach it by a somewhat different analysis and characterization." [1992] 1 S.C.R. 1021 at 1116.

> If this approach is followed, as it has been to date in Canada, new categories of cases will from time to time arise. It will not be certain whether economic loss can be recovered in these categories until the courts have pronounced on them. During this period, the law in a small area of negligence may be uncertain. Such uncertainty however is inherent in the common law generally. It is the price the common law pays for flexibility, for the ability to adapt to a changing world. If past experience serves, it is a price we should willingly pay, provided the limits of uncertainty are kept within reasonable bounds.[1775]

The approach she referred to was the "incremental approach", which might just as well be called the "*ad hoc* approach" or, the "trust us, we'll know it when we see it, even if you and your lawyers don't and guess wrong, approach."

> It is my view that the incremental approach of *Kamloops* is to be preferred to the insistence on logical precision of *Murphy*. It is more consistent with the incremental character of the common law. It permits relief to be granted in new situations where it is merited. Finally, it is sensitive to danger of unlimited liability.[1776]

Stevenson J stated, after setting out his preference for the known-plaintiff or ascertained-class limitation:

> Viewed in this way this case becomes somewhat easier to decide in that one cannot readily see a policy reason for excluding liability. The loss was identifiable, the victim identifiable, the damage almost inevitable. The defendants ought to have known that the plaintiff would suffer economic loss as a result of their negligence. In fact, they even had actual knowledge that such a loss would occur. They even knew of the precise manner in which this plaintiff would be harmed. Would we deny recovery in such a case? Liability would in no way be out of proportion with the neglect. There is no danger of indeterminate liability.[1777]

In *Bow Valley Husky*, the Supreme Court retreated to a less *ad hoc* approach; that is, an approach based on discrete categories of relationship within which recovery of pure economic loss is permitted rather than one based solely on broad general principles of neighbourhood, proximity and foreseeability which is the *Anns-Kamloops* approach.[1778]

I suggest that the vagueness of the material-contribution declarations in *Resurfice* necessarily means, at least for the foreseeable future – that is, until the Supreme Court next takes up the cudgel – that liability has not been "kept within a limited and determinate scope." Liability may well be "out of proportion with the neglect"; especially if it is "joint" rather than proportional, and even more so if causation has become irrelevant. It is not correct to assert that "there is no danger of indeterminate liability."

[1775] [1992] 1 S.C.R. 1021 at 1150.
[1776] [1992] 1 S.C.R. 1021 at 1149.
[1777] [1992] 1 S.C.R. 1021 at 1182.
[1778] See, R. Brown "Still Crazy after all these Years: Anns, Cooper v. Hobart and Pure Economic Loss" (2003) 36 U.B.C. L. Rev. 159 and R. Brown "Justifying the Impossibility of Recoverable Relational Economic Loss" (2006) 5 Oxford University Commonwealth Law Journal 155.

The "limits of uncertainty" have not been "kept within reasonable bounds," at least not yet.[1779]

I made the trite, but true, observation at the beginning of this already far-too-long article that litigation is about dispute resolution. Some Canadian jurisdictions still have jury trials in civil actions. All Canadian jurisdictions have jury trials in criminal law prosecutions. In jury trials, the trial judge's obligation is to tell the jury what the applicable law is an a manner that is both correct and clear enough to the lay person that the jury is able to apply the law to the facts as it finds them to be. There is no hope that trial judges will be able to fulfill the "clear enough" part if the law is so confused that the trial judges cannot even instruct themselves, properly, on what the law is; that is, the trial judges cannot even get the law right in actions tried without a jury.

An example of the problem trial judges will face in jury trials is nicely captured in the Australian case *Freidin v St Laurent*, [2007] HCATrans 251 (25 May 2007). *Freidin* is an application for leave to appeal to the Australia High Court. In *Frieden*, P alleged that D's negligence had injured P. The action was tried with a jury. The plaintiff succeed. The appeal was dismissed. The defendant sought leave to appeal to the High Court. The complaint was that the trial judge's charge on causation was wrong because it amounted to telling the jury that P did not have to establish causation at all. D's counsel stated:

> . . . [A]cceptance of the respondent's contentions as exemplified in the directions have the capacity to relieve all plaintiffs in negligence claims of the burden of proving on the balance of probabilities the defendant's negligence was a cause of the plaintiff's injury.
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> . . . [W] what has happened here is the charge wrongly exposed the defendant to a hazard . . . of a verdict for or against him that otherwise might not have been found . . . erroneous guidance which it is not unreasonable to regard as capable of contributing to the result.

The response from one of the judges on the leave panel was:

> Yes, but it is a jury trial. The issue is important, there is no doubt about that, but it is a question of how the jury decided this particular case on the basis of the instructions that were given. If this issue … is to be really tested, it really should be tested in a case where we have a reasoned decision of a judge who decides the facts and a decision of the intermediate court rather than trying to deal with it under the constraints of a jury trial.

D's argument was that the trial judge's charge, considered as a whole, amounted to telling the jury that fault and increased risk resulting from that fault was enough to establish causation on the balance of probability. The trial judge had charged the jury:

> If you conclude that the wrongful omission to carry out an episiotomy results in an increased risk of injury to the plaintiff, and that risk eventuates, then you may come to the view that the defendant's conduct has materially contributed to the injuries that the plaintiff suffers, whether or not other factors also contributed . . .

[1779] Recall that in the "indeterminate defendant" example of the mass tort, it is, by definition, impossible to prove causation on a probability basis with respect to a particular tortfeasor within the group even though it is possible to prove causation on a probability basis with respect to the entire group considered as a whole; that is, it is probably the case that the harm was caused by the conduct of at least one of the group.

D's argument was that the explanation was the problem. D argued that this amounted to the judge telling the jury, correctly, that the plaintiff must establish causation on the balance of probability but, then, erring by explaining to the jury that

> that can be done by simply establishing that a risk was increased and the risk eventuated. What we say, of course, that test reduces to in every case is all that need be shown is that the risk was increased because by definition in every case a risk is eventuated otherwise there would not be injury and there would not a claim for damages.

Not surprisingly, D's response was that there was evidence on which the jury, acting properly, could find that it was satisfied, on the balance of probabilities, that causation had been proven. One of the members of the leave panel said to P's counsel:

> . . . You say that there was evidence on which the jury could by an application of a more stringent probability test have found in favour of the respondent?

In the result leave to appeal was denied. The leave panel held:

> The immediate question which the applicant seeks to agitate in this Court, were special leave granted, is whether the trial judge's instructions to the jury about causation were correct. Those instructions indicated that a particular chain of reasoning was open. We are not persuaded that the indicated chain of reasoning was not open. Whether in the particular circumstances of the case that reasoning was adopted or correctly applied tenders no issue suitable to a grant of special leave.

What the leave panel meant was that, under Australian law, it was open to the judge, on the relevant facts, to tell the jury that the impugned "chain of reasoning was open" to it. And what the leave panel necessarily implied, because ultimately an appeal from a jury decision – just as in a decision by a judge sitting alone – is from the evidence, is that the admissible evidence actually permitted a jury, acting properly, to find that causation had been established on the balance of probability. Putting this in the positive, and in terms used both in Canada and Australia, what the leave panel necessarily meant was that the facts, under Australian law, permitted this jury to infer – to draw the positive conclusion – from all of the evidence, of which fault and increased risk due to fault were but a part, that causation had been shown on the balance of probability. Some other jury might not have, but that did not matter: "Whether in the particular circumstances of the case that reasoning was adopted or correctly applied tenders no issue suitable to a grant of special leave."

Resurfice will provide plenty of work for lawyers in need of billable work and more opportunity for academics and others to spill more ink. The Supreme Court will, ultimately, have the last word on the subject – remember what Humpty Dumpty said to Alice. However, it has seemingly forgotten Twain's reminder about not arguing with those who buy ink by the gallon. And, it has also forgotten that Shakespeare's couplet from *Romeo and Juliet*[1780] "What's in a name? that which we call a rose / By any other name would smell as sweet" is not always true. A blunter way of saying that is that law is whatever the particular judge says it is, at least until he or she is overruled by a higher

[1780] Act II, Scene 2.

authority: a judge of a higher court or by (where it is able to) the legislature. That potential, though, too often creates a problem in the way the lay public regards the legal system: inherent in the image too few realize comes from Dicken's *Oliver Twist.* "If the law supposes that," said Mr. Bumble, squeezing his hat emphatically in both hands, 'the law is a ass – a idiot."[1781]

In 1990, in *Snell*, a unanimous Supreme Court panel of nine judges rejected alternatives to the but-for test for proof of factual causation, including any version of the *McGhee* increased-risk and *possibility* test, because "[a]doption 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."[1782] In 2007, in *Resurfice*, a unanimous Supreme Court panel of nine judges reversed direction and adopted a version of the increased-risk and *possibility* test.[1783] The Court proclaimed, without adequate explanation or discussion, an alternative to the but-for test to be called the material-contribution test. This new test, although the Court did not concede this, is *not* a test for factual causation. It is a test to be used only in certain "exceptional" circumstances where it is *impossible* to establish factual causation. Where its requirements are met, the result of the application of the new material-contribution test will not be a decision that factual causation exists. It will be a decision that "liability may be *imposed*, even though 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."[1784] An adequate explanation of the parameters of the exceptional circumstances was left for future decisions.

The *new* material-contribution test – new, because it is *not* the *Athey* material-contribution test – is based on possibility and risk, not probability. The Supreme Court held that the increased risk of injury – the increased possibility of injury which is still less than the probability of injury – *may* be a sufficiently substantial connection. The Court held that negligent conduct that increases the risk of the type of injury which subsequently manifests, thus creating the possibility of a causal connection between the conduct and the injury, *may* be, in limited circumstances (called "exceptional cases"), a sufficiently substantial connection to allow the *imposition* of liability. In some circumstances, then, a probable causal connection between conduct and injury is not needed. In doing so, the Court overruled *Snell* and all of the Court's subsequent decisions that expressly rejected any version of this new test *without mentioning that Snell and these decisions had rejected the test*, while expressly denying that it was overruling anything. Instead, the Court claimed that the new material-contribution test is based on its prior decisions.

The Supreme Court did this without acknowledging that the new material-contribution test, as explained in *Resurfice*, *necessarily* includes the prospect that circumstances which necessarily create the possibility that there is no causal connection,

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[1781] *Oliver Twist,* c. 51, p. 399

[1782] *Snell*, at 327.

[1783] McLachlin C.J. was part of both panels and is the only judge remaining from the *Snell* court.

[1784] *Resurfice*, at para. 25 (emphasis added).

in respect of a particular defendant, may nonetheless be a sufficiently substantial connection in respect of that defendant – as I wrote in the title to this article, that "nothing *is* now enough".[1785] Is this the death of factual causation? I repeat, again, the succinct summary of the effect of *Resurfice* in Professor Russell Brown's *Material Contribution's Expanding Hegemony*: "if the plaintiff's only obstacle to recovery is causation, then causation is no obstacle".[1786] Vaughan Black and I wrote in "Quantum Uncertainty" that we hoped that the Supreme Court would allow leave to appeal the Alberta Court of Appeal's decision in *Resurfice*, because that "would provide the court with an opportunity to bring much-needed clarity to this field of law".[1787] The result of *Resurfice* is an example of the adage that one should be careful of what one wishes for, lest one get it. Borrowing and paraphrasing from John Fleming's "Probabilistic Causation In Tort Law: A Postscript", *Resurfice* may have settled a narrow issue, but not without stirring larger ones. We – the public, practising lawyers, academic lawyers, and anyone else with a reason to care – await the judiciary's next move in the causality morass.[1788]

XX1. Propositions for Factual Causation Prior To *Resurfice*: from Cheifetz, "The Snell Inference" 30 Adv. Q. 1. – *Snark*

(Bold portions have been added for this article. The material-contribution test referred to here is the *Athey version*)

34. Factual causation is always required for liability in tort. Fault is not enough.

35. Probability, not possibility, is the standard of proof for factual causation in tort, whether the test used is but-for or material contribution.

The material-contribution part of this proposition is no longer entirely correct. Under the *Resurfice* version of material contribution, the *existence* of the faulty conduct which increased the risk must be proven on a probability basis. However, the relationship between that conduct and the materialized harm whose risk of occurrence was increased by the faulty conduct is established, for the particular case, on only the possibility (less than probability) basis. That is because if the evidence permits a valid finding that the relationship is probable, then there would be the basis for the conclusion that the conduct was an actual cause. However, there must be a prior finding, on a probability basis, on the facts of the particular case, that that faulty conduct is capable of causing the materialized harm.

[1785] One of the two hunters in *Cook v. Lewis* could not have shot, and did not shoot, the victim. That is because there one only one bullet (bird-shot pellet) in the eye.

[1786] *Hegemony*, at 445.

[1787] *Quantum Uncertainty*, at 170.

[1788] Fleming, "Probabilistic Causation In Tort Law: A Postscript", at 141. The quotation is: "*Malec* may have settled a narrow issue, but not without stirring a larger one. We are awaiting the next move in the causality game."

This finding is implicit in the conclusion that the faulty conduct increased the risk of the materialization of the harm.

36. The *Snell v. Farrell* common sense approach, which is only a method of analyzing the evidence under which court takes a robust, pragmatic, ordinary common sense approach to factual causation questions, is not supposed to result in findings of factual causation on anything less than the balance of probability. As used, the common sense approach increases the likelihood of a finding of probable cause, even where the evidence does not show a causal connection stronger than possibility.

37. "Material", meaning more than *de minimis*, in the material-contribution test, means probable. "Material" is a descriptive adjective, no different than "significant" or "substantial", which helps describe a quality of the evidence that establishes probability.

38. The material-contribution test, as another method of establishing what events will be found to be factual causes of some injury, has no objective content, and cannot have any objective content if the standard for establishing factual causation is possibility. This is particularly true if the *Snell* inference of factual causation based on a common sense approach to the evidence amounts to licence to find the possibility is sufficiently strong to be a material possibility where (a) the expert evidence in support of a connection does not go beyond "possibility" and (b) where the judge's or jury's sense of justice will be offended if the injured person is not compensated.

39. It is likely that legal factual causation will almost always be found if all the fact finder has to find is some level of connection sufficient to amount to a material possibility in order to have a more than *de minimis* contribution. It is not wrong to assert that the practical effect of this interpretation of the requirements for proof of factual causation amounts to the abolition of factual cause as a precondition to liability in tort.

40. The validity of the doctrinal content of the material-contribution test is questionable no matter the terminology used. "Substantial" is just as inherently vague as "more than *de minimis*", unless all that "substantial" means is conduct that is capable of being held to be a probable cause.

41. Material increase in risk of injury as sufficient evidence of factual causation will not be available to Canadian tort common law, if *stare decisis* governs, until *Snell v. Farrell* is overruled by the Supreme Court or that court limits or distinguishes its blanket rejection, in *Snell* and *St-Jean v. Mercier* of "increased risk of injury" as sufficient, of itself, proof of factual causation. **(*Resurfice* is silent on all of this. Make of that what you will.)**

I do not know what effect *Snark* has or has not had, in fact, on the judicial mind. A I do know that it has, for the most part, escaped judicial citation. "For the most part" means that, as of writing, I have found only one reported judgment that mentions *Snark*: *Whey v. Halifax (Regional Municipality)*.[1789] On the other hand, it seems to be a good reference.[1790] In fact, the trial judge wrote that *Snark* set out "the current state of the law in Canada".

> [12] His article is a complete, if not overly analytical, attempt to reconcile the traditional "but-for" approach, with the newer (and some say alternative) "material contribution" approach, applied in the rare circumstances when the "but-for" analysis is not "workable". His review of the key post-*Snell* decisions of *Athey v. Leonati* 1996 CanLII 183 (S.C.C.), [1996] 3 S.C.R. 458, *Walker Estate v. York-Finch General Hospital* 2001 SCC 23, 2001 SCC 23, *St-Jean v. Mercier* 2002 SCC 15, 2002 SCC 15, *Cottrelle v. Gerrard* 2003 CarswellOnt 4154 (OntCA), and *Mooney v. British Columbia (Attorney General)* 2004 BCCA 402, 2004 BCCA 402 (most recently reaffirmed in *Trinetti v. Hunter* 2005 BCCA 549, 2005 BCCA 549), and his statement of the law, set out in the first two paragraphs of his conclusion, at page 101, is the current state of the law in Canada. His summary of the principles of factual causation, at page 22, and of the *Snell* common sense approach, at pages 27 to 30, are helpful.

I assume that the trial judge's use of "if not overly analytical" was meant to mean "too analytical" rather than "not analytical enough"; however, I suppose I have to take the good with the bad. The first two paragraphs of the conclusion on page 101 of *Snark* are:

> *Snell* and *Athey* require a finding of factual causation on the balance of probability, whether the test used to establish factual causation is but-for or material contribution. *Walker*, whatever it might literally say about material contribution, has to be interpreted to mean the same to avoid creating conflict with *Snell* and *Athey*. The proper interpretation of *Snell*, *Athey*, and *Walker* is that they establish that tortious conduct materially contributes to the occurrence of the injury when the fact finder is able to conclude that the conduct is a cause of the injury on the balance of probability.
>
> In addition, there is now a series of provincial decisions to the same effect. In qualitative terms, what the fact finder is looking for is conduct that can be categorized as creating a substantial connection between the conduct and the injury. Evidence that merely shows increase in risk is not sufficient, even if the injury that is within the scope of that risk subsequently occurs. "Material" means "substantial" in this inquiry to determine factual cause. However, "substantial" and "material" are merely descriptions of the conduct that is held to be a probable cause — nothing more than descriptive terminology that might assist the fact finder in deciding whether conduct is or is not a probable cause.

[1789] 2005 NSSC 348 at paras. 11-14 and 106, 239 N.S.R. (2d) 239.

[1790] Whether it is depends on the meaning one ascribes to the nicely ambiguous phrase "not overly analytical" in para. 12. I would like to belief that the fact that the paragraph ends with the "His summary of the principles of causation … [is] helpful" provides the answer.

XXII *Haag v. Marshall* References In *Fairchild v Glenhaven*

Fairchild v. Glenhaven Funeral Services Ltd., [2002] UKHL 22 at paras. 103, 106, and 115 [2002] 3 WLR 89, [2003] 1 AC 32, [2002] 3 All ER 305, per Lord Hutton

103. The judgment of Lambert JA in the British Columbia Court of Appeal in *Haag v Marshall* (1989) 61 DLR (4th) 371 contains, in my respectful opinion, an illuminating discussion of the decision in *McGhee*. He stated, at pp 378 and 379:

> "*McGhee v National Coal Board* was considered by the House of Lords in *Kay v Ayrshire and Arran Health Board* [1987] 2 All ER 417; *Hotson v East Berkshire Area Health Authority* [1987] 2 All ER 909, and *Wilsher v Essex Area Health Authority* [1988] 1 All ER 871. It is clear from those decisions that *McGhee* is not now, and never was, authority for the legally adventurous proposition that if a breach of duty is shown, and damage is proven within the area of risk that brought about the duty, and if the breach of duty materially increases the risk of damage of that type, then the onus of proof shifts from the plaintiff to the defendant to disprove the causal connection. That proposition could be derived only from the speech of Lord Wilberforce and it is now clear that it was never a binding principle emerging from the *McGhee* case.
>
> But *McGhee* remains a worthwhile study. And there is a somewhat more cautious principle underlying the decision in that case. However, it is not an "onus" principle but an "inference" principle. ….
>
> The "inference" principle derived from *McGhee*, and from the Canadian cases to which I have referred, is this: Where a breach of duty has occurred, and damage is shown to have arisen within the area of risk which brought the duty into being, and where the breach of duty materially increased the risk that damage of that type would occur, and where it is impossible, in a practical sense, for either party to lead evidence which would establish either that the breach of duty caused the loss or that it did not, then it is permissible to infer, as a matter of legal, though not necessarily logical, inference, that the material increase in risk arising from the breach of duty constituted a material contributing cause of the loss and as such a foundation for a finding of liability. ….
>
> Whether the inference of causation should in fact be made in any particular case depends on whether it is in accordance with common sense and justice in that case to say that the breach of duty which materially increased the risk ought reasonably to be considered as having materially contributed to the loss."

. . .

106. As I have stated, I think that there is no clear statement in the speeches in *McGhee* as to the underlying basis of the decision. The preponderance of subsequent judicial opinion has been that the decision was based on an inference from the facts. On the evidence before it in *McGhee* I think that the House was entitled to draw an inference in the way described by Lord Bridge in *Wilsher*. But some authorities suggest that in cases where the claimant can prove that a breach of duty materially increased the risk of the contraction of a particular disease and the disease occurred, the law should treat this as

giving rise to the inference that the breach of duty was a cause of the disease rather than that the judge as the tribunal of fact should draw a factual inference. I think this was the view of Lambert JA in *Haag v Marshall* when he said at p 379, "it is permissible to infer, as a matter of legal, though not necessarily logical, inference, that the material increase in risk arising from the breach of duty constituted a material contributing cause of the loss". I think that King CJ was expressing the same view when he said in *Birkholz v RJ Gilbertson Pty Ltd* at p 130 that "the law treats that increase in risk as a sufficient basis, in the absence of evidence showing how the infection occurred, for an inference that the omission of the precautions materially contributed to the contracting of the disease."

. . .

114. The application of the *McGhee* principle in these cases and in similar cases, where successive employers of an employee have been in breach of duty to take steps to guard against an industrial disease which the employee contracts, may mean that an employer may be held liable when in reality, if medical science were able to be certain as to how the employee's disease started, it was not fibres inhaled during the employment with it which caused the onset of the disease. But if the *McGhee* principle is not applied the consequence will be that an employee who undoubtedly sustained the disease because one or some or all of his employers were in breach of duty to take steps to guard against the onset of the disease, will recover no damages because in the present state of medical knowledge the doctors are unable to say which breach of duty by an employer caused the disease. In these circumstances I have no doubt that justice is better served by requiring an employer, who has been in breach of duty and who has materially increased the risk of its innocent employee incurring the disease, to pay damages than by ruling that the employee who has sustained a grievous disease can recover nothing. Therefore I am in respectful agreement with the opinion of Lord Wilberforce in *McGhee,* at p 6F:

> "And if one asks which of the parties, the workman or the employers, should suffer from this inherent evidential difficulty, the answer as a matter of policy or justice should be that it is the creator of the risk who, *ex hypothesi* must be taken to have foreseen the possibility of damage, who should bear its consequences."

This view is also well put by Lambert JA in *Haag v Marshall,* at p 379:

> "as between an innocent plaintiff and a defendant who has committed a breach of duty to the plaintiff and by so doing materially increased the risk of loss to the plaintiff, in a situation where it is impossible, as a practical matter, to prove whether the breach of duty caused the loss, it is more in keeping with a common sense approach to causation as a tool of justice, to let the liability fall on the defendant."

XXIII CANLII - *RESURFICE* CITATIONS[1791]

1. Glowinski v. Knowlton, 2008 BCSC 662 — 2008-05-28 — Supreme Court of British Columbia – injuries — headaches — shoulder — pain — neck

2. Fullowka v. Royal Oak Ventures Inc., 2008 NWTCA 4 — 2008-05-22 — Court of Appeal for the Northwest Territories – tort — duty — ancillary tortfeasor –vicariously

3. Ghani v. Umran, 2008 BCSC 585 — 2008-05-09 — Supreme Court of British Columbia – pain — third accident — job — mechanic — non-pecuniary damages

4. Martin v. Glaze-Bloc Products Inc., 2008 ONCA 377 — 2008-05-08 — Court of Appeal for Ontario – theory of causation — weaknesses — neural — error — study

5. Nattrass v. Weber, 2008 ABQB 259 — 2008-04-28 – Alberta — Court of Queen's Bench – platelet count — unfractionated — patient — anticoagulant — thrombosis

6. Notenbomer v. Andjelic, 2008 BCSC 509 — 2008-04-25 — British Columbia – Supreme Court of British Columbia – pain — disc herniation — motor vehicle accident — leg — work

7. Randhawa v. Hwang, 2008 BCSC 435 — 2008-04-14 — British Columbia – Supreme Court of British Columbia – disc herniation — motor vehicle — pain — injury — spine

8. Monks v. ING Insurance Company of Canada, 2008 ONCA 269 — 2008-04-14 — Ontario – Court of Appeal for Ontario – accident benefits — causation

9. Huinink v. Oxford (County), 2008 CanLII 14799 (ON S.C.) — 2008-04-07 – Ontario – Ontario Superior Court of Justice – brain tumours — ventricle — neonatal — surgery — paediatric

10. Pelkinen v. Unrau, 2008 BCSC 375 — 2008-03-28 — British Columbia – Supreme Court of British Columbia – panic attacks — pain — accident — injuries — anxiety

11. Dewitt v. Takacs, 2008 BCSC 314 — 2008-03-13 — British Columbia – Supreme Court of British Columbia – depression — accident — soft tissue — low back pain — work

12. Rizzi v. Marvos, 2008 ONCA 172 — 2008-03-11 — Ontario – Court of Appeal for Ontario – jury — non-pecuniary damages — fault — award — apportionment

13. Crane v. Surrey (City), 2008 BCSC 274 — 2008-03-04 – British Columbia – Supreme Court of British Columbia – wet paint — skateboard park — graffiti — bike — tires

14. Moore v. Wienecke, 2008 ONCA 162 – 2008-03-06 – Ontario – Court of Appeal for Ontario – affirming, for other reasons, Moore v. Wienecke, 2006 CanLII 1195 (ON S.C.)

15. Timpano v. Alexander, 2008 CanLII 8270 (ON S.C.) — 2008-03-04 – Ontario — Superior Court of Justice – necrotizing pancreatitis — common bile duct — bile leak — infection

16. Carlson v. Steeves, 2008 BCSC 270 — 2008-03-03 – British Columbia – Supreme Court of British Columbia – pancreatitis — risk — elevated triglyceride levels — test — alcohol

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[1791] As of June 23, 2008, listed in reverse chronological order. A few of the CanLII key word descriptions have been edited. As indicated, this is *not* a complete list. It is only a list of the cases that for some reason currently merit inclusion. For example, there are cases referred to in the article which are *not* in this list because they are merely examples of something for which another case appears and is a better choice.

17. Taylor v. Liong, 2008 BCSC 242 — 2008-02-28 – British Columbia – Supreme Court of British Columbia – trauma — lesions — studies — multiple sclerosis — exacerbation

18. Farrant v. Laktin, 2008 BCSC 234 — 2008-02-27 – British Columbia – Supreme Court of British Columbia – accident — symptoms — chronic pain — soft tissue injury — lumbar

19. Irvine v. Smith, 2008 CanLII 5586 (ON S.C.) — 2008-02-15 – Ontario – Ontario Superior Court of Justice – duty of care — nervous shock — post-traumatic stress disorder — hospital

20. Hisco v. Stitz, 2008 MBQB 45 — 2008-02-08 – Manitoba – Court of Queen's Bench of Manitoba – school — accident — grade — driver — injuries

21. Miller v. Royal Bank of Canada, 2008 NSSC 32 — 2008-02-01 — Nova Scotia – Supreme Court of Nova Scotia – tile — floor — wet — pain — housework

22. Bohun v. Segal, 2008 BCCA 23 reversing 2007 BCSC 269 – 2008-01-22 – British Columbia – British Columbia Court of Appeal – tumour — breast cancer — causation — risk of death — diagnosis

23. Berendsen v. Ontario, 2008 CanLII 1416 (ON S.C.) — 2008-01-18 – Ontario — Superior Court of Justice – water — farm — cattle — roadbed materials — chemicals

24. Anderson v. British Columbia, 2008 BCSC 41 — 2008-01-11 — British Columbia – Supreme Court of British Columbia – road — feet — motorcycle — bike — skid mark

25. Bowes v. Edmonton (City), 2007 ABCA 347 — 2007-12-28 – Alberta — Court of Appeal - report — slide — collapse — risk — caveat

26. Preston v. Chow, 2007 MBQB 318 — 2007-12-20 — Manitoab – Court of Queen's Bench of Manitoba – herpes — vesicles — infection — care — doctor

27. Richards v. McDonalds Restaurants of Canada, 2007 SKQB 460 – 2007-12-18 — Saskatchewan – Court of Queen's Bench for Saskatchewan ingestion — illness — food poisoning — gastroenteritis

28. Sam v. Wilson, 2007 BCCA 622 – 2007-12-17 – British Columbia — Court of Appeal – transplant — monitoring — liver functioning tests — protocol — damage

29. Duley v. Friesen, 2007 BCSC 1723 — 2007-11-29 — British Columbia – Supreme Court of British Columbia – pain — accident — injuries — forearm — shoulder

30. Zazelenchuk v. Kumleben, 2007 ABQB 650 — 2007-10-30 – Alberta — Court of Queen's Bench – chest pain – algorithm – myocardial infarct — standard of care — diagnosis

31. B.(P.) v. V.E.(R.), 2007 BCSC 1568 — 2007-10-25 — British Columbia – Supreme Court of British Columbia – sexual abuse — evidence — father — post-traumatic stress disorder

32. Walford v. Jacuzzi Canada Ltd., 2007 ONCA 729 — 2007-10-23 – Ontario — Court of Appeal for Ontario – pool slides — warn — standard of care — feet — foot pool

33. Ferguson v. Steel, 2007 ABQB 596 — 2007-10-04 - Alberta — Court of Queen's Bench - stroke — migraine — patient — headache — nurses

34. Michaud v. Brodsky, 2007 MBQB 239 — 2007-10-02 Manitoba — Court of Queen's Bench – negligence — evidence — conviction — criminal — lawyer

35. Wainwright (Town of) v. G-M Pearson Environmental Management Ltd., 2007 ABQB 576 — 2007-09-28 – Alberta – Queen's Bench – lacquer dust – incinerator – waste — fire — drums

36. Mainland Sawmills Ltd. v. USW Union Local - 1-3567, 2007 BCSC 1433 — 2007-09-26 British Columbia — Supreme Court – crowd — peavey handles – foreman - assault — picket

37. Misko v. John Doe, 2007 ONCA 660 — 2007-09-25 - Ontario — Court of Appeal for Ontario tortfeasors — accident — damages — fault — third

38. Windsor v. Canadian Pacific Railway Ltd., 2007 ABCA 294 — 2007-09-25 Alberta — Court of Appeal – common polluting substances — class proceeding — causation — property

39. Haj Khalil v. Canada, 2007 FC 923 — 2007-09-18 – Canada — Federal Court of Canada permanent residence — ministerial relief — refugee — inadmissible — application

40. Lane v. Alcock Enterprises, 2007 NLTD 157 — 2007-09-11 – Nfld & Labrador — Supreme Court – Trial Div. - stair geometry – handrail – duty of care — occupier — negligence

41. Whyte v. Morin, 2007 BCSC 1329 — 2007-09-05 — British Columbia – Supreme Court of British Columbia - pain — accident — fibromyalgia — work — neck

42. Naidu v. Mann, 2007 BCSC 1313 — 2007-08-30 — British Columbia – Supreme Court of British Columbia – pain — symptoms — surgery — accident — injuries

43. Hall v. MacDougall, 2007 BCSC 1296 — 2007-08-29 — British Columbia – Supreme Court of British Columbia – sexual assaults — abuse — heroin — psychological

44. Williams v. Thomas Development (1989) Corporation, 2007 NLCA 54 — 2007-08-28 – Nfld. & Labrador — Court of Appeal - pavement — ditch — parking lot — road — golf course

45. Nolet c. Boisclair, 2007 QCCS 4417 — 2007-08-24 - Quebec — Superior Court - responsabilité — témoigne — activité — déclare — révèle

46. Ruffle v. Canada (Correctional Service), 2007 BCSC 1264 — 2007-08-21 - British Columbia — Supreme Court of British Columbia – inmate — loss — injury

47. Graham v. WCB, 2007 NWTSC 54 — 2007-08-01 - Northwest Territories — Supreme Court of the Northwest Territories - rehearing — evidence — standard of review — injury

48. Agno v. Wilson, 2007 BCSC 1160 — 2007-07-31 – British Columbia — Supreme Court of British Columbia – monochorionic — twin — non-stress test — fetal — placenta

49. Hill v. Victoria Hospital Corporation, 2007 CanLII 27582 (ON S.C.) — 2007-07-16 – Ontario — Superior Court of Justice – pessary — mesh — surgery — bladder — osteitis pubis

50. Lyon v. Ridge Meadows Hospital, 2007 BCSC 1000 — 2007-07-09 – British Columbia – Supreme Court – morphine — small bowel obstruction — abdominal pain — serum lactate

51. Vescio v. Garfield, 2007 CanLII 24676 (ON S.C.) — 2007-07-03 – Ontario — Superior Court of Justice – jaundice — bilirubin — baby — kernicterus — hyperbilirubinemia

52. Dey v. Sookram, 2007 CanLII 24077 (ON S.C.) — 2007-06-28 – Ontario — Superior Court of Justice – letter — quantum — adjournment — certificate — reconsider

53. Hawkins v. Mathieson, 2007 MBQB 163 - 2007-06-28 – Manitoba – Court of Queens Bench – aortic aneurysm – occlusion – limb amputation

54. Seatle v. Purvis, 2007 BCCA 349 — 2007-06-27 – British Columbia — Court of Appeal; shoulder dystocia — delivery — baby — traction — infant; leave to appeal refused, 2008 CanLII 1386, (S.C.C.) Jan. 17, 2008.

55. Vasiliopoulos v. Dosanjh, 2007 BCSC 703 — 2007-06-06 – British Columbia – Supreme Court of British Columbia – motor vehicle accident — evidence — testimonial reliability — traumatic brain injury

56. Jackson v. Rooney, 2007 BCSC 761 — 2007-06-01 – British Columbia — Supreme Court of British Columbia – degenerative changes — accident — neck — surgery — disc

57. Barabash v. U-Haul Co. (Canada) Ltd., 2007 BCPC 195 — 2007-05-30 – British Columbia – Provincial Court – hook up the trailer —hitch — manual — user

58. B.S.A. Investors Ltd. v. Douglas Symes & Brissenden, 2007 BCCA 94 — 2007-05-10 – additional reasons 2007 BCCA 556 – British Columbia — Court of Appeal – causation — negligence — breach of duty — second signature — inference; leave to appeal refused, 2008 CanLII 2275 (S.C.C.) Jan. 24, 2008.[1792]

59. Rizzi v. Mavros, 2007 ONCA 350 — 2007-05-08 – Ontario — Court of Appeal for Ontario – cross-appeal — causation — fibromyalgia — test — material contribution

60. Abel v. Hamelin, 2007 CanLII 17185 (ON S.C.) — 2007-04-30 – Ontario — Superior Court of Justice – accident — cognitive deficits — chronic pain syndrome — neuropsychological — injury

61. Nash v. MacDougall and HMTQ, 2007 BCSC 563 — 2007-04-25 – British Columbia – Supreme Court – sexual assault — inmates — evidence — psychological — jail

62. Ashcroft v. Dhaliwal, 2007 BCSC 533 — 2007-04-20 – British Columbia – Supreme Court – injuries — second accident — pain — depression — motor vehicle accident

63. Barker v. Montfort Hospital, 2007 ONCA 282 — 2007-04-18 – Ontario — Court of Appeal for Ontario – bowel — volvulus — peritonitis — patient's condition — surgery

64. Martin v. Capital Health Authority, 2007 ABQB 260 — 2007-04-18 – Alberta — Court of Queen's Bench – risk — patient — surgery — stroke — bleeding

65. Radke v. M.S. , 2007 BCCA 216 — 2007-04-17 – British Columbia — Court of Appeal – pursuit — police officer — vehicle — standard of care — officer's conduct

66. Burbank v. R.T.B., 2007 BCCA 215 — 2007-04-17 – British Columbia — Court of Appeal – pursuit — standard of care — vehicle — high-speed chase — driver

67. Tonizzo v. Moysa, 2007 ABQB 245 — 2007-04-13 – Alberta — Court of Queen's Bench – infection — pain — evidence — burn — care

68. Durand v. Bolt, 2007 BCSC 480 — 2007-04-05 – British Columbia — Supreme Court of British Columbia – accident — pain — thoracic outlet syndrome — shoulder — suffered

69. Adams v. Borrel, 2007 NBQB 102 — 2007-03-20 – New Brunswick — Court of Queen's Bench of New Brunswick – seed potatoes — virus — eradication — testing — infected

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[1792] The leave panel was McLachlin C.J., Fish and Rothstein JJ. For whatever this might be worth, the Supreme Court's case summary was, in part: "Whether Court of Appeal erred in failing to find but for causation upon proof that the specific event that harmed the plaintiffs would not have happened in the absence of the defendant's negligence, and in requiring that the plaintiffs disprove hypothetical alternative causes - Whether material contribution test was inappropriate notwithstanding impossibility of predicting the actions of a fraudulent third party and the negligence of the defendant solicitors." See the SCC case summary online at http://cases-dossiers.scc-csc.gc.ca/information/cms/case_summary_e.asp?32148.

70. Block v. Canadian Pacific Hotels Corp., 2007 ABQB 166 —2007-03-13 – Alberta — Court of Queen's Bench – cart — golf — brake — path — tee

71. Simpson v. Baechler., 2007 BCSC 347 — 2007-03-13 – British Columbia — Supreme Court of British Columbia – pedestrian – utility pole – relocate – vehicle – crosswalk

72. Hutchings v. Dow, 2007 BCCA 148 — 2007-03-12 – British Columbia — Court of Appeal – tortfeasors — depression — damages — injury — assault

73. Greenall v. MacDougall and HMTQ, 2007 BCSC 339 — 2007-03-09 – British Columbia. Supreme Court – sexual assaults — alcohol dependent — psychological — injury — drinking

74. Marszalek et al v. Bishop, 2007 BCSC 324 — 2007-03-08 – British Columbia, Supreme Court – nurses — dizziness — alcohol withdrawal — neurological — neck pain

75. Jackson v. Kelowna General Hospital, 2007 BCCA 129 — 2007-02-28 – British Columbia – Court of Appeal, leave to appeal refused 2007 CanLII 37198 (S.C.C.) – respiratory distress, causation – vital signs – monitoring – morphine

76. Nason v. Nunes, 2007 BCSC 266 — 2007-02-28; British Columbia — Supreme Court of British Columbia – bridge — road — standard of care — negligent — ice

77. Resurfice Corp. v. Hanke, 2007 SCC 7 — 2007-02-08 – Canada — Supreme Court of Canada – causation, material contribution, but-for, ice-resurfacing machine, gasoline tank

XXIV. Law Report Database Search Parameters

"Scraping" deals with all of the reported Canadian common law cases *relevant* to causation since the release of the Supreme Court reasons in *Resurfice Corp. v. Hanke*, that are reported on CanLII or eCarswell, or are not reported, yet, but have been provided to me, and that mention *Resurfice* or *Athey*, or both, and causation. A large number of cases cite *Athey* but not on causation. They are not listed or discussed. A few cases mention *Resurfice* but not on causation. They're not supposed to be listed although I think one or two likely are. I have used CanLII cross-checked against Carswell. I still have not checked QL. I might eventually do that. I have assumed, for all decisions since *Resurfice*, that anything the courts send to either of QL or Carswell also goes to CanLII.

There also also, now, cases that cite (with or without quoting from) *Resurfice* without more withou. Those cases will not be included in the case-list unless there is something else about the case that makes it relevant; however, the cases may be mentioned in the footnotes.

I have run searches based on *Athey*, alone. Remarkably, as of May 2008, I still find causation cases in which one or both of *Snell* or *Athey* are cited as defining the relevant principles and *Resurfice* is not mentioned.

I have run searches using just "causation" and versions of "material contribution," but excluding *Athey* and *Resurfice*.

So far, all cases produced by a search for "but-for" and "causation" in the same paragraph, that involve factual causation, also have *Athey* or *Resurfice* cited in the reasons.

The **only** way, at present, to obtain all of the CanLII references to *Resurfice*, is to search in the "full text" box using the Boolean search "resurf */s hanke" (without the quotation marks). This is not CanLII's failing. It is because the CanLII search algorithm uses the neutral citation. However, some reasons either do not use that citation, or the format is wrong. That means you should not rely on the "note-up", "reflex" or "most-cited" tools routines provided by CanLII.

I may well have missed a case that is relevant because the result necessarily means something about what the judge(s) thought the law is but the reasons do not contain any case law citations or either of "but-for" or "material contribution" or anything else that amounts to a discussion of the law with a key term. I am reasonably satisfied I have not missed any reported case that contains a relevant discussion of the law.

XXV. *Resurfice*'s Material-Contribution Test Process

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