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**Blaney
McMurtry**
BARRISTERS & SOLICITORS LLP

THE SUPREME COURT OF CANADA AND THE LAW OF CAUSATION REVISITED

Kerry W. Nash
Blaney McMurtry LLP
416.593.3916
knash@blaney.com

and

Stephen R. Moore
Blaney McMurtry LLP
416.593.3950
smoore@blaney.com

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INTRODUCTION

Our intention in this paper is to re-examine, with the benefit of hindsight, whether, and to what extent, the forecasts we made and concerns we expressed shortly after the release of the Supreme Court of Canada's decision in *Resurfice v. Hanke*¹ (hereafter "*Hanke*") have, in fact, come to pass. Following a brief recap of our earlier paper² we will examine several key questions necessary to assess our criticism of the Court's ruling in *Hanke*. It should be understood therefore that this paper is less of a re-evaluation of the Supreme Court's ruling in *Hanke* than it is an update to our earlier paper. For this reason, the reader would benefit greatly from familiarity with our earlier commentary prior to reading this material.

BRIEF RECAP

In October of 2007 we presented our paper critical of the Supreme Court of Canada's recently released ruling on causation in *Hanke*.³ Our thesis was that the Supreme Court's discussion of causation in *Hanke* failed to alleviate much of the confusion that had followed its earlier ruling on causation in *Athey v. Leonetti*⁴ (hereafter "*Athey*"). Specifically, it was our position that the *dicta* emanating from our highest court provided little in the way of meaningful guidance on an already complex and difficult area of law. In that paper we expressed some concerns and made some tentative predictions as to how lower courts might approach causation in light of *Hanke*.

Resurfice v. Hanke

Hanke was a products liability case. As the operator of an ice resurfacing machine Hanke was seriously injured after he negligently poured hot water into the gasoline tank of the machine. An overhead heater ignited the gas released into the air when Hanke filled the wrong tank and caused an explosion which left Hanke seriously burned. Hanke sued the manufacturer alleging negligent design. At trial, the trial judge dismissed the action having found that Hanke did not establish that the accident was caused by the negligence of the

¹ [2007] 1 S.C.R. 333 [*Hanke*].

² Stephen R. Moore & Bianca Matrundola, "The Supreme Court of Canada and the Law of Causation", 3rd Annual Update Personal Injury Law and Practice 2007, Osgoode Professional Development CLE, 2007.

³ *Ibid.*

⁴ [1996] 3 S.C.R. 458 [*Athey*].

defendant. The Court of Appeal set aside the judgment and ordered a new trial, concluding that the trial judge had erred in both his foreseeability and causation analyses.

Although the Supreme Court agreed with the trial judge's findings that no duty of care was owed to Hanke in the circumstances since it was not reasonably foreseeable that an operator of the ice resurfacing machine would mistake the gas and hot water tanks, the Supreme Court nevertheless took the opportunity to discuss the law with respect to causation. The Court of Appeal held that the "material contribution" test was the appropriate test to apply in this case on the basis that there were multiple potential causes of leading to Hanke's injuries. The Supreme Court responded that "to accept this conclusion is to do away with the "but for" test altogether, given that there is more than one potential cause in virtually all litigated cases of negligence."⁵

Accordingly, the Supreme Court articulated the following principles with respect to causation⁶:

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

It is beyond the scope of this paper to revisit in detail the full breadth of our earlier discussion of *Hanke's* apparent shortcomings and its likely impact on the law of causation in Canada. Nevertheless, we feel it is necessary to focus on two important aspects of that decision which initially gave us cause for concern. Our goal in this paper is to evaluate whether our concerns were justified.

⁵ *Supra* note 1 at para. 19.

⁶ *Ibid.* at para. 25.

Impossibility of “but for”

We suggested that *Hanke* had clearly restored the “but for” test to a position of primacy as *the* default test for causation, even in cases of multiple tortious causes. While this ‘reaffirmation’ would likely be welcomed for bringing some much needed certainty to the law of causation, we expressed concern that the Supreme Court had not gone far enough. Although it was clear in *Hanke* that the “material contribution” test was now clearly limited to situations where it was impossible for reasons beyond the plaintiff’s control to determine causation under the “but for” test, we argued the decision failed to shed meaningful light on what exactly the Court meant by the terms “impossible” and “beyond the plaintiff’s control”. The two cases alluded to by the Supreme Court in *Hanke* as ‘classic’ examples of sufficiently impossible situations where resort to the “material contribution” test would be appropriate were of limited value in this regard.⁷

In particular, our concern was that lower courts might take liberties with any ambiguity left in the wake of the *Hanke* decision and continue to find the “material contribution” test applicable in situations where the application of the “but for” test is difficult but not truly “impossible.” Initial reaction by lower courts immediately following *Hanke*’s release however suggested that, if any such ambiguity lingered, it would not necessarily result in lower courts automatically reverting to the “material contribution” test.⁸

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

Material Contribution Test

While there was little doubt that *Hanke* would help clear away some of the legal fog surrounding *when* it is appropriate to resort to the “material contribution” test, it was our position that *Hanke* fell far short of providing much needed clarity and direction to lower

⁷ *Supra* note 2 at 10 and 11 for discussion of the Supreme Court’s reference to *Walker Estate v. York Finch General Hospital*, [2001] 1 S.C.R. 647 (S.C.C.) and *Cook v. Lewis*, [1951] S.C.R. 830 (S.C.C.).

⁸ *Ibid.*

courts regarding *how* the “material contribution” test ought to be applied. Arguably, one of the shortcomings of the Supreme Court’s ruling on causation in *Atbey* was that beyond recognition that a defendant’s negligent conduct must contribute more than *de minimus*, there was no further guidance on what the Court meant by *de minimus* or how to apply it.

Unfortunately, in this respect, we predicted that *Hanke* would likely achieve no better and, in fact, may have nailed shut the coffin on factual causation altogether once a plaintiff proved the “but for” test was unworkable. The second part of the “material contribution” test articulated in *Hanke* curiously focused on whether the defendant “exposed” the plaintiff to an “unreasonable risk of injury”. In our view, this *dicta* was an erroneous amalgamation of two different tests for causation that were offered up as one in the same. The result we feared was that by focusing on materially increasing the risk of injury rather than materially contributing to the actual occurrence of the injury liability will likely be imposed because a finding that the defendant materially contributed to the risk of injury is likely to be supported in most scenarios.

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

1. But For “Impossibility” – the Gate-Keeper Concern

As mentioned, initial reaction by lower courts to the Supreme Court’s ruling in *Hanke* were promising and suggested the decision in *Hanke* could be used to prevent over use of the “material contribution” test that had become commonplace following *Atbey*. There is at least some evidence that this initial trend has continued. In particular, in cases of medical malpractice, which have traditionally been the type of case where courts have had little trouble resorting to “material contribution” to determine causation in factually complex situations. On the other hand, we will also explore some cases where we believe a finding of “impossibility” may be unsupported by the facts and which suggest our initial fears may have been well founded.

Frazer v. Haukioja⁹

In *Frazer v. Haukioja* (hereafter “*Frazer*”), the plaintiff was injured in a (non-tortious) motorcycle accident, treated at the hospital and released. The defendant physician neglected to inform the plaintiff about a small talar fracture in his right ankle. After returning to work, the plaintiff soon began experiencing severe pain. It was not until the plaintiff followed up with other doctors that he learned of the severity of his injuries. The plaintiff brought an action in negligence against the defendant physician claiming damages for pain and suffering, and emotional and psychiatric illness.

Liability in this case turned primarily on the issue of factual causation. Turning to *Hanke* for guidance, the trial judge commented that the two the cases cited by the Supreme Court in *Hanke* as examples where the “but for” test was properly deemed unworkable were of no assistance.¹⁰ The trial judge noted that this was a type of case unforeseen in *Hanke* where the plaintiff’s damages were brought about by an act or omission of the defendant that was superimposed upon a loss sustained in an accident that was causally unrelated to the defendant’s negligent conduct.¹¹ The trial judge noted that prior to *Hanke*, “such a situation might well have been determined according to the material contribution test described in *Athey v. Leonati*.”¹² Post-*Hanke* however, the trial judge recognized there was now a clear need to seriously consider whether it would be impossible for the “but for” test to determine causation in the circumstances.¹³ Although faced with difficult questions of causation, the trial judge in *Frazer* applied the “but for” test and found the defendant doctor responsible for the plaintiff’s damages.

Bohun v. Segal¹⁴

In *Bohun v. Segal* the defendant physician failed to order a biopsy of the plaintiff’s breast lump which later metastasized into a cancerous tumour killing the plaintiff. At trial the judge found that when the plaintiff first attended the defendant physician she had about a 79% chance of survival and a 21% chance of death from her undiagnosed breast cancer. After

⁹ [2008] W.D.F.L. 2259, 58 C.C.L.T. (3d) 259 (Ont. S.C.J.) [*Frazer*].

¹⁰ *Supra* note 7.

¹¹ *Frazer*, *supra* note 9 at para. 214.

¹² *Ibid.*

¹³ *Ibid.* at para 215.

¹⁴ [2008] B.C.J. No. 97 (C.A.) [*Bohun*].

considering the Supreme Court’s ruling in *Hanke*, the trial judge concluded that, since the plaintiff was unable to prove whether the cancer had metastasized before or after she first saw the defendant, the “material contribution” test of causation was appropriate in the circumstances. Accordingly, the defendant was found liable.

On appeal however, the British Columbia Court of Appeal noted that the trial judge had erred in determining “impossibility” in the circumstances and had failed to appreciate unique scientific evidence available that was capable of establishing proof of causation under the “but for” test. The Court of Appeal held that it was possible in this case for a unique prognostic tool to predict, within one per cent, the outcomes for patients with breast cancer. As a result, the plaintiff was required to prove that it was more probable than not that she would likely have lived longer had the defendant not been negligent.¹⁵ Having failed to establish this, there was no causation in the circumstances.

Fullowka v. Royal Oak Ventures Inc¹⁶

Fullowka v. Royal Oak Ventures Inc (hereafter “*Fullowka*”) was not a case involving medical malpractice. It is however notable for its treatment of *Hanke* and its application of the “but for” test in a situation requiring consideration of human behaviour as a causative factor in bringing about the plaintiffs’ harm. This is especially interesting given the Supreme Court’s specific reference to *Walker Estate v. York Finch General Hospital*¹⁷ (hereafter “*Walker*”) in *Hanke* as an example where the “but for” test might not prove workable because prediction of human behaviour was required in order to establish causation.

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

¹⁵ *Ibid.* at para. 52.

¹⁶ [2008] N.W.T.J. No. 27 (C.A.)[*Fullowka*].

¹⁷ [2001] 1 S.C.R. 647 [*Walker*].

One of the central issues on appeal was whether the trial judge had applied the proper test to determine causation. Although the Court of Appeal found that the defendants did not owe a duty of care to the plaintiffs in the circumstances, the court also ruled that the trial judge, having rendered his decision prior to *Hanke* and “therefore did not have the benefit of the Supreme Court of Canada's restatement and clarification of the law on causation”¹⁸ had failed to use the proper test for determining causation. Interestingly, on this point the Court of Appeal cited *Walker* for the proposition that the “but for” test “was not rendered unworkable simply because the hypothetical inquiry involved another person’s reaction to the conduct of the defendant as an element of the chain of causation.”¹⁹ In *Hanke* the Supreme Court referenced precisely this type of situation in *Walker* as one where it might be impossible to prove what a particular person in the causal chain would have done “but for” the defendant’s negligent act or omission.²⁰

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

There are of course some situations where we feel the court has been too quick to find “impossibility” and resort to a “material contribution” test. Where, for example, a close scrutiny of the facts suggest that what at first glance might be a set of circumstances deserving of a material contribution approach to causation, is, in fact, suitable for a “but for” analysis. Ultimately, in such situations it may still be possible to achieve a similar finding of causation under the higher standard test. We’ll discuss, for example, the factual

¹⁸ *Fullonka*, *supra* note 16 at para. 197.

¹⁹ *Ibid.* at para. 196.

²⁰ *Hanke*, *supra* note 1 at para. 28.

circumstances in two cases where the “material contribution” test has been employed and present our alternative analysis under the “but for” test.

Ball v. Imperial Oil Resources²¹

In *Ball v. Imperial Oil Resources* (hereafter “*Ball*”) the plaintiff’s cattle became ill after the defendant oil and gas company conducted repair work on pipelines running underneath the plaintiff’s ranch. The plaintiff alleged that the defendant’s negligence had contaminated the soil with hydrocarbons which subsequently injured the plaintiff’s cattle. The court held that this was an exceptional case where the “material contribution” test ought to be applied because it was impossible for the “but for” test to establish that hydrocarbons had, in fact, injured her cattle. Hydrocarbons have a half-life of ten hours or less which meant that within ten hours half of the entire quantity of hydrocarbons would have dissipated from an animal’s system. Unless an exposed cow was euthanized and autopsied almost immediately following exposure, it would be impossible to verify the presence of meaningful amounts of hydrocarbons sufficient to cause injury. Ultimately, the trial judge held that the defendant’s negligence was a significant contributing factor to the harm suffered by the plaintiff.

I note further that the trial judge in this case also held that because the defendant had breached a duty of care owed to the Plaintiff it “thereby exposed the Plaintiff’s [cattle] to an unreasonable risk to injury which it in fact suffered.”²² We will return to explore the significance of this statement later in this paper’s examination of the whether courts have, in certain situations, migrated to a “material increase in risk” approach to causation under the auspices of material contribution causation.

For now, let us reconsider for a moment the trial judge’s assessment that, on the facts of this case, the “material contribution” test was necessary in order to determine causation specifically because there was conflicting expert opinion about whether there was sufficient detectable hydrocarbon contamination to cause the injuries complained of.²³ We respectfully disagree with this assessment. Moreover, we submit that, despite language to the contrary, the trial judge in this case actually found causation based on a classic “but for” analysis.

²¹ [2009] A.W.L.D. 1336 (Q.B.)[*Ball*].

²² *Ibid.* at para. 133.

²³ *Ibid.* at paras. 133 and 140.

We do not dispute the fact that evidence necessary to show that hydrocarbons, in fact, caused the injuries to the plaintiff's cattle was technically unavailable through scientific means. However, all we need do is recall the principles of causation outlined in *Snell v. Farrell*²⁴ (hereafter "*Snell*") for guidance. In *Snell*, Sopinka J. expressly stated that "Causation need not be determined by scientific precision"²⁵ and that a common sense approach to causation is to be preferred.²⁶ Arguably, there was no reason why, given the circumstances of this case, a judge considering all of the evidence could not have reached the same result by different and (arguably) more appropriate means. Consider the following evidence in this case: hydrocarbons *could* cause the injuries complained of; hydrocarbons were a known by-product of the defendant's repair work; otherwise healthy cows, which were well cared for, began to suffer symptoms of illness that *could* be related to hydrocarbon exposure; the illnesses complained of began appearing soon after the defendant's repair work; etc.

In our analysis, it does not matter that the evidence necessary to establish that hydrocarbons (*i.e.* the harm-causing agent) were actually present or detectable in the cows was scientifically unavailable. With respect, the focus on this aspect of the case as the trigger for resort to the lower standard "material contribution" test misses the mark. Rather, the mountain of scientific and circumstantial evidence presented at trial easily allowed for the 'common sense' conclusion that "but for" the presence of the hydrocarbons which likely resulted from the defendant's negligence the cows would not have become ill. In other words, the evidence in this case, even despite the absence of 'smoking gun' scientific certainty that hydrocarbons were present in the cows, established the substantial connection necessary for "but for" causation.

Finally, we submit that, despite use of the term "material contribution" test,²⁷ the trial judge in this case actually applied "but for" causation. This was not a case where it was suggested some 'other' source of hydrocarbons may have also contaminated the cows. If this were true, it may have made more sense to resort to a "material contribution" approach. However, the trial judge's reasons suggest that, in the end, he ultimately concluded that there was a substantial connection between the hydrocarbons negligently released by the

²⁴ [1990] 2 S.C.R. 311 at para. 15[*Snell*].

²⁵ *Ibid.* at para. 29.

²⁶ *Ibid.* at para. 44.

²⁷ *Ball, supra* note 21 at para. 133.

defendant and the illness that later developed in the cattle. The trial judge's language regarding causation has all the hallmarks of a common sense "but for" analysis and supports our position above. For instance, regarding causation the trial judge notes:

The onus is on the Plaintiff to establish causation based on a balance of probabilities and not conclusively...In light of the evidence adduced on behalf of the Plaintiff...the only reasonable conclusions to be drawn is that the [cattle's] exposure to the BTEX hydrocarbons was a significant factor in its subsequent compromised health...The Plaintiff does not have to prove conclusively that exposure to the hydrocarbons or ingestion of them led to the problems subsequently suffered by a portion of her herd - the test is the balance of probabilities. There must be more than conjecture for an inference to be drawn in the absence of exact proof. Such inference must be reasonable. However, the inability of the experts to give a firm diagnosis or to agree on a diagnosis is not fatal such [sic] an inference.²⁸

Clements (Litigation Guardian of) v. Clements²⁹

In *Clements (Litigation Guardian of) v. Clements* the plaintiff was a passenger who suffered a severe brain injury when she crashed on a motorcycle driven by the defendant husband. In this case, at least four 'potential' causes were identified that may have contributed to the creation of an 'instability weave' leading to the crash, specifically two non-tortious causes (a rapid rear tire deflation because of a nail puncture and inclement weather) and two tortious causes (speeding and excessive weight on the motorcycle). The trial judge accepted expert opinion that it was, in fact, the rapid deflation of the rear tire that had actually caused the weave³⁰ which the defendant driver could then not control, despite his best efforts. However, the judge was also concerned with what part the defendant's breaches (*i.e.* speeding and overloaded weight) played in his inability to recover from the weave.³¹

Ultimately, the trial judge held that a "material contribution" test was necessary determine causation in this case because "after the fact, it is not possible through accident reconstruction modeling to determine at what combination of lower speed and lesser weight recovery from the weave instability would have been practicable."³² Inevitably, liability of the defendant followed.

²⁸ *Ibid.* at para. 138-141.

²⁹ [2009] B.C.W.L.D. 5641, [2009] B.C.J. No. 166 (S.C.) [*Clements*].

³⁰ *Ibid.* at paras. 37 & 58.

³¹ *Ibid.* at para.59.

³² *Ibid.* at para. 66.

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

In the end, this case may arguably represent one of those scenarios that initially gave us cause for concern following *Hanke’s* unclear *dicta* on “impossibility”. A judge, sympathetic to the plight of the plaintiff, found the ‘wiggle room’ necessary in the ambiguity left in the wake of the *Hanke* decision to find “impossibility” in order to resort to a lower threshold test for causation. If the non-tortious rear tire deflation was the identified *cause* of the crash, what would it matter, causally speaking, that the defendant could not properly recover from it? Consider also that there was at least some expert evidence indicating that once the weave began the crash was inevitable, regardless of the defendant’s excess speed or overloaded bike.³³

In reading the decision in *Clements* one gets the sense that the trial judge may have felt obligated to resort to a “material contribution” test simply because other possible (and seemingly plausible) causes of the crash had been canvassed by the experts. However, as the Supreme Court noted in *Hanke*, generally speaking, there is more than one potential cause in virtually all litigated cases of negligence and this should not be the basis for abandoning the “but for” test in favour of material contribution causation.³⁴

In the end, a “but for” test for causation in this case would have likely resulted in a finding that “but for” the defendant’s speeding and overloaded bike the accident would still have occurred and the innocent plaintiff would be left with no means to recover for her injuries. Our concern however is that the vague notion of “impossibility” offered up in *Hanke* may have left judges sympathetic to the plaintiff a means of accessing “material contribution” causation in order to fill in important evidentiary gaps in the plaintiff’s case otherwise necessary in order to establish the defendant’s negligence was cause-in-fact related to the plaintiff’s harm.

³³ *Ibid.* at paras. 44, 53 & 60 (**Note:** the judge nevertheless chose to ignore this part of the expert evidence stating that, in regard to these two factors, expert opinion was based on assumption and conjecture).

³⁴ *Hanke*, *supra* note 1 at para. 19.

There is some good news however. In an article released in June 2008, Karey Brooks and Robert Easton reported that of approximately 75 cases that had considered *Hanke* up to that time only nine went on to apply the “material contribution” test.³⁵ This suggests that the tide has turned decidedly in favour of “but for” as the default test for causation and that courts are not necessarily shying away from the use of this test in difficult situations. In truth however, it is impossible to say with precision to what extent this has been the case in the absence of a detailed statistical study of the case law.

Nevertheless, any effort by the judiciary to tackle difficult questions of causation under the “but for” test post-*Hanke* should be welcome news for defendants. It is generally understood that demonstrating that a cause materially contributed to a plaintiff’s loss is a lower standard than the substantial connection required under the ‘but for’ analysis.³⁶ That said, any good news this may represent for defendants must be tempered with the realization that if impossibility of the “but for” test is established by the plaintiff, the defendant’s chances of avoiding a finding that his negligence caused the plaintiff’s loss all but disappears. It is to a discussion of these issues that this paper now turns.

2. Material Contribution v. Material Increase in Risk

The “material contribution” test requires a plaintiff to demonstrate that a defendant’s negligent conduct was ‘material’ to the loss complained of. In other words, on analysis of the facts, the defendant’s negligent act or omission must fall outside of the *de minimus* range and amount to something more than a mere trivial contribution to the harm suffered by the plaintiff.³⁷ On the other hand, the “material increase in risk” test assesses whether the defendant’s conduct materially increased the plaintiff’s risk of injury. While a material increase in risk approach to causation has been accepted as applicable in very exceptional

³⁵ Karey Brooks and Robert Easton, “Test misnomer in Resurface creates confusion”, *The Lawyers Weekly* 28:8 (20 June 2008).

³⁶ *Anderson v. British Columbia*, [2008] B.C.J. No. 42 at para.38 (S.C.); Also see *Bobun*, *supra* note 14 at para. 53.

³⁷ Philip H. Osborne, *The Law of Torts*, 3rd ed. (Toronto: Irwin Law Inc., 2007) at 57.

and fact specific cases in the U.K.,³⁸ there remains considerable debate about whether such an approach is valid as a standalone test for causation in Canada.³⁹

As Lewis Klar notes, the main distinction between a “material increase in risk” test and a “material contribution” test is that the material increase in risk approach represents a “radical departure from the way the law normally connects the defendant’s negligence to the plaintiff’s injury, since it focuses on the defendant’s negligence contributing to a risk of injury rather than the injury itself.”⁴⁰ Just a few years prior to the Supreme Court’s ruling in *Hanke*, the British Columbia Court of Appeal cautioned that to allow a material increase in risk approach to determine causation would be “to dispense as a matter of law with proof of causation”⁴¹ and that this represented “a radical step”⁴² that should only be employed in the rarest of cases.⁴³

It is curious therefore that such a radical step forward in the law of causation would come in the form of *Hanke*, a relatively short decision where it was arguably unnecessary for the Court to comment on causation in order to dispose of the appeal. The Supreme Court’s discussion of causation in *Hanke* was likely brief because in that case the Court held that it was “neither necessary nor helpful to catalogue the various debates” regarding causation. Rather it was enough “to simply assert the general principles that emerge from the cases.”⁴⁴ By choosing to gloss over “the various debates” however, some important considerations and distinctions regarding the different tests for causation may have been overlooked. In particular, while the decision in *Hanke* has restored the primacy of the “but for” test in Canadian causation law, it appears to have also adopted, without serious consideration or discussion, the “material increase in risk” test for causation.

So the question remains, are lower courts finding causation based on whether a defendant’s negligent conduct materially increased the risk of injury to the plaintiff? Generally speaking,

³⁸ *B.M. v. British Columbia (Attorney General)*, [2004] B.C.J. No. 1506 (C.A.) [*Mooney*], leave to appeal to S.C.C. refused, [2004] S.C.C.A. No. 428; see also *McGhee v. National Coal Board*, [1973] 1 W.L.R. 1 (H.L.); *Fairchild v. Glenhaven Funeral Services*, [2003] 1 A.C. 32 (H.L.) [*Fairchild*]; *Barker v. Corus (U.K.) plc*, [2006] UKHL 20 (H.L.) [*Barker*].

³⁹ Lewis Klar, *Tort Law* 4th ed. (Toronto: Thomson Canada Limited, 2008) at pg. 441.

⁴⁰ *Ibid.*

⁴¹ *Mooney*, *supra* note 38 at para. 156.

⁴² *Ibid.* at para. 157.

⁴³ *Ibid.* at para. 158.

⁴⁴ *Hanke*, *supra* note 1 at para. 20.

the courts have by no means openly embraced this approach to causation. There is however some scant evidence in the case law suggesting that a material increase in risk approach to causation may be beginning to take hold post-*Hanke*.

Bowes v. Edmonton (City)⁴⁵

In *Bowes v. Edmonton (City)*, the defendant city had failed to provide the three plaintiff property owners with a geological report detailing the risks of landslides on their property. The court found the city negligent for not providing the plaintiffs with this report. The three plaintiffs then built their homes that were later destroyed when land on their property gave way. In terms of determining causation in this case, since the court was forced to speculate on whether the plaintiffs would still have built their homes if they had been given the report, the “but for” test was deemed incapable of making this determination. Under the “material contribution” approach, the court held that since the report would likely have made the plaintiffs aware of the risk of landslide and, since this was the type of risk or injury that actually occurred, the defendant could be said to have contributed to that risk and therefore responsible for the plaintiffs’ losses.⁴⁶ However, because of a limitations issue in this case, the plaintiffs action was ultimately out of time.

Zazelenchuk v. Kumleben⁴⁷

In *Zazelenchuk v. Kumleben* (hereafter “*Zazelenchuk*”), the plaintiff attended the hospital with symptoms suggesting to the defendant physician the plaintiff was suffering from acute coronary syndrome (“ACS”). The plaintiff however said he was not experiencing any chest pain, and an ECG did not show any significant abnormality. The defendant diagnosed the plaintiff’s condition as acute anxiety and hyperventilation, admitted him to the hospital overnight and prescribed anti-anxiety medications. The next day it was discovered that the plaintiff had suffered a massive heart attack and was left with permanent damage to his heart.

At trial, it was recognized that there were some difficulties with proof of causation under the “but for” test in this case. Various treatments called for at different stages to treat heart

⁴⁵ [2007] A.J. No. 1500 (C.A.).

⁴⁶ *Ibid.* at paras. 231 to 245.

⁴⁷ [2007] A.J. No. 1204. (Q.B.)[*Zazelenchuk*].

attack sufferers were generally successful for most but not all patients. It could not be established even if the plaintiff had received any or all of the available medical remedies that he would have gone on to develop the heart attack that caused permanent damage to his heart. It was also difficult to know whether and when these treatments would have been applied to the plaintiff. Ultimately, the trial judge relied on the decision in *Hanke* as authority for applying a lower standard test of causation because the plaintiff could not prove, for factors beyond his control, that he would have been one of the majority of patients who would have been successfully treated. Causation was established in this cases on the basis that the defendant's negligence exposed the plaintiff "to a risk that developing ACS would not be discovered and treated and would lead to permanent heart damage."⁴⁸ In other words, absent proof establishing factual causation the defendant's negligent conduct increased the plaintiff's risk of illness to such an extent that liability could be imposed.

Other Cases

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

Returning to the decision in *Frazer*, where the plaintiff was injured in a motorcycle accident and not notified by the defendant physician regarding a fractured ankle, as discussed, causation was determined in this case by reference to the "but for" test. However, the trial judge opined that, in the alternative, he was of the opinion that this case was one that amounted to an exceptional situation suitable for a "material contribution" approach to causation in the event the application of the "but for" test was not appropriate. In so saying, the trial judge remarked that of the two potential causes of the plaintiff's injuries, the (non-tortious) motorcycle accident and the defendant's negligence, the defendant's negligence "certainly increased the risk that [the plaintiff] would suffer the illness, limitations and disability that he now certainly does."⁴⁹ In fairness, the judge also referred to the defendant's breaches as likely "contributing" to the plaintiff's injuries suggesting that references to both

⁴⁸ *Ibid.* at para. 149.

⁴⁹ *Frazer*, *supra* note 9 at para. 214.

the increase in risk of injury and contribution to the actual injury may be nothing more than semantics.⁵⁰

In *Cartner v. Burlington (City)*⁵¹ (hereafter “*Cartner*”) the plaintiff was injured when she slipped and fell on the city sidewalk, fracturing her right femur and causing extensive injuries. The plaintiff had slipped on muddy concrete slurry that had pooled on the sidewalk. The plaintiff’s action against the defendant city succeeded and causation was determined on the basis that “but for” the defendant’s failure to maintain the sidewalk the plaintiff would not have suffered injury. In the alternative, the trial judge commented that this was “arguably the very kind of case that calls for the application of the “material contribution” test.”⁵² The trial judge went on to comment that since the defendant city owed a duty of care to prevent unreasonable risk of injury to pedestrians using its sidewalks, a failure on the part of the defendant to maintain its sidewalks in a good state of repair would result in liability if a pedestrian like the plaintiff suffered from the form of slip and fall injury the defendant had a duty to guard against.⁵³

This decision in the alternative is notable because it illustrates the concern we expressed in our last paper that *Hanke*, by unnecessarily focusing on whether the defendant has exposed the plaintiff to an unreasonable risk of injury, may have injected a duty and/or standard of care analysis into causation where such analysis has no rightful place because they are ill suited to making cause-in-fact determinations. Taken literally, the *obiter* in *Cartner* adopts somewhat circular logic to the effect that, if the defendant’s conduct exposes a plaintiff to a risk that it is duty bound not to expose the plaintiff to, then any injury sustained by the plaintiff which falls within the ambit of that breach is compensable. The question of whether the breach of duty actually caused the plaintiff’s injury is never even addressed.

Consequences of Adopting a Material Increase in Risk Approach to Causation

In our last paper we cautioned that, based on the Supreme Court’s articulation of the “material contribution” test in *Hanke*, we could end up with the “material increase in risk” test being utilized by the courts without any meaningful discussion as to whether we want to

⁵⁰ *Ibid.* at paras. 214 to 216.

⁵¹ [2008] O.J. No. 2986 (S.C.J.) [*Cartner*].

⁵² *Ibid.* at para. 24.

⁵³ *Ibid.* at para. 25.

even adopt that test. We pointed out that adoption of a “material increase in risk” test for causation was vigorously debated in the English courts and its acceptance came only after a considerable period of time and after extensive judicial consideration from the U.K.’s highest court.

It would appear that, post-*Hanke*, Canadian courts, particularly the trial courts, have shown some willingness to adopt the “material increase in risk” approach to causation post-*Hanke*. To date, it appears that the appellate courts are much less likely to accept that the “but for” test should be rejected in favour of the “material contribution” or “material increase in risk” tests.⁵⁴

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

In our previous paper we briefly examined the House of Lords decision in *Fairchild v. Glenhaven Funeral Services Ltd.*⁵⁵ (hereafter “*Fairchild*”). In that case, the plaintiff contracted mesothelioma because of exposure to asbestos dust from two different employers. It was possible that the plaintiff developed the disease because of inhalation of only a single asbestos fibre. Accordingly, that fibre would only have come from one of the sources, in which case the defendant who created the second exposure did not contribute to the development of the disease in the plaintiff. In this case it could not be said that “but for” either employer’s negligence the plaintiff would have developed the disease or that either employer materially contributed to its development.

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

⁵⁴ See for example: *Seattle (Guardian ad litem of) v. Purvis*, [2007] B.C.J. No. 1401 (C.A.); *Barker v. Monfort Hospital*, [2007] O.J. No. 1417 (C.A.); *Jackson v. Kelowna General Hospital*, [2007] B.C.J. No. 372 (C.A.); and *MacDonald (Litigation Guardian of) v. Goertz*, [2009] B.C.J. No. 1631 (C.A.).

⁵⁵ [2003] 1 A.C. 32 (H.L.) [*Fairchild*].

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

Barker v. Corus (U.K.) plc⁵⁶

The decision in *Barker v. Corus (U.K.) plc* (hereafter “*Barker*”) is ostensibly the counter-weight to the *Fairchild* Exception because it imposes necessary restrictions on the application of the material increase in risk approach to causation, restrictions that, in the absence of similar judicial discussion in this country, have largely gone unnoticed.

In *Barker* the plaintiff’s husband died of mesothelioma after having been exposed to asbestos during three periods in his working life, first while working for a company which had since become insolvent, secondly while working for the defendant and thirdly while self-employed. Similar to the situation in *Fairchild*, the deceased could have developed the disease by inhalation of only a single asbestos fibre but it was scientifically impossible to determine at what point in time this actually occurred. Unlike *Fairchild* however, the deceased’s first two exposures to asbestos resulted from breaches of duty by employers while the last exposure involved a failure on the part of the deceased to take reasonable care for his own safety.⁵⁷

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

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

⁵⁶ [2006] UKHL 20 (H.L.)[*Barker*].

⁵⁷ *Ibid.* at para. 3.

In its ruling in *Barker*, the House of Lords revisited the *Fairchild* Exception and imposed two important limitations on the material increase in risk approach test. First, Their Lordships found that tortious exposures which increased the risk of an injury occurring must emanate from the same agent or from agents which operated in the same way.⁵⁸ It should be noted that it was precisely this limitation that Justice Smith of the British Columbia Court of Appeal referenced in *Mooney*, a pre-*Hanke* decision, to dismiss the material increase in risk test as the appropriate test to determine causation in the circumstances of that case.⁵⁹ .

Secondly, the House of Lords also recognized that in applying the material increase in risk approach to causation, the extent of the defendant's liability should only be linked to the degree of risk created by that particular defendant since it was only the chance of injury which formed the actionable damages. In other words, where the "material increase in risk" test is used to determine causation, the defendant's liability to the plaintiff is several. In cases where liability was based on "material contribution" joint and several liability remained applicable since the justification underlining the joint and several liability rule is that "if you caused harm, there is no reason why your liability should be reduced because someone else also caused the same harm."⁶⁰ This, in essence, represents the fundamental demarcation in U.K. causation law between factual causation based on the "material contribution" test and 'legal' causation based on the "material increase in risk" test.

Liability of the defendant in *Barker* was established by the lower courts on the basis that the injury to the deceased was **a)** an indivisible injury resulting from **b)** two concurrent joint tortfeasors (*i.e.* the actions of either the insolvent employer or the defendant employer were sufficient in and of themselves to produce the plaintiff's damages).⁶¹ As a result, according to orthodox negligence principles, the lower courts found the defendant employer was joint and severally liable for all of the plaintiff's damages.

The House of Lords recognized however that, while the injury suffered by the plaintiff was indivisible, this was *not* a case of concurrent joint tortfeasors. It was impossible in this case to prove that the actions of either would be sufficient in and of themselves to produce the

⁵⁸ *Ibid.* at para. 17.

⁵⁹ See *Mooney*, *supra* note 38 at paras. 153 & 169.

⁶⁰ *Barker*, *supra* note 56 at para. 43.

⁶¹ *Ibid.* at para 27.

harm suffered by the plaintiff.⁶² Rather, resort to the “material increase in risk” test was appropriate in this case precisely because such proof was impossible. As a result, while the lower courts were correct in resorting to the “material increase in risk” test based on the *Fairchild* Exception, the courts below had erred in assessing joint and several liability of the defendant in the same way as if the “material contribution” test had been used. Lord Hoffman noted it would be wrong “to proceed on the fiction that a defendant who had created a material increase in risk of mesothelioma was deemed to have caused or materially contributed to the contraction of the disease.”⁶³

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

The House of Lords held that allowing several liability in cases where a defendant had materially contributed to the risk of the plaintiff’s harm (vs. materially contributing to the cause of the harm) “would smooth the roughness of the justice which a rule of joint and several liability creates.”⁶⁴ Lord Hoffman explained;

...The defendant was a wrongdoer, it is true, and should not be allowed to escape liability altogether, but he should not be liable for more than the damage which he caused and, since this is a case in which science can deal only in probabilities, the law should accept that position and attribute liability according to probabilities. The justification for the joint and several liability rule is that if you caused harm, there is no reason why your liability should be reduced because someone else also caused the same harm. But when liability is exceptionally imposed because you may have caused harm, the same considerations do not apply and fairness suggests that if more than one person may have been responsible, liability should be divided according to the probability that one or other caused the harm.⁶⁵

⁶² *Ibid.* at para. 29.

⁶³ *Ibid.* at para. 31.

⁶⁴ *Ibid.* at para. 43.

⁶⁵ *Ibid.*

Lord Hoffman's reference to the principle of fairness to the defendant in *Barker* is reminiscent of the Supreme Court's recognition in *Hanke* that fairness to the plaintiff requires a principled approach to causation in order to allow a lower standard test "where the "but for" test is not satisfied, because it would offend basic notions of fairness and justice to deny liability by applying a "but for" approach."⁶⁶ The decision in *Barker* and its appeal to fairness appears to recognize however that, if left unchecked, a material increase in risk approach to causation could result in injustice to the defendant who it can only be said at best *may* have injured the plaintiff by increasing the risk of injury. If a "material increase in risk" test has, in fact, found its way into Canadian causation law through the Supreme Court's *dicta* in *Hanke*, then defendants in this country would be well served if courts here gave similar consideration to balancing the fairness already afforded to plaintiffs where the "but for" test is unworkable. At present such considerations have yet to surface.

Comparative Analysis: U.K. and Canadian Causation Law & Increase in Risk

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

We return briefly to the Alberta Court of Queen's Bench decision in *Zazelenchuk* discussed above whereby the plaintiff attended the hospital with chest pain and was diagnosed by the defendant with acute anxiety and hyperventilation rather than the ACS he actually suffered from. Ultimately, causation was established on the basis that the defendant's negligence exposed the plaintiff "to a risk that developing ACS would not be discovered and treated and would lead to permanent heart damage."⁶⁷ Recall that there was evidence in this case that some, but not all patients, if afforded certain treatments in time, would have likely avoided the injury sustained by the plaintiff. Resort to material increase in risk causation in this case was determined on the basis that the plaintiff could not prove, for factors beyond his control, that he would have been one of the majority of patients who would have been successfully treated.

⁶⁶ *Hanke*, *supra* note 1 at para. 25.

⁶⁷ *Zazelenchuk*, *supra* note 47 at para. 149.

Applying the “material increase in risk” test as it has developed in the U.K. to the facts in this case it can be argued that a material increase in risk approach to causation would likely not have even been considered based on the facts. In both *Fairchild* and *Barker* there was no question that the harm-causing agent was inhalation of asbestos fibre leading to mesothelioma. What was unknown in both of those cases, and the reason for resorting to a material increase in risk approach to causation, was which defendants’ negligent conduct (two tortious exposures in *Fairchild* and two tortious and one non-tortious exposures in *Barker*) actually exposed the deceased to the single fibre of asbestos necessary to cause his illness. Understandably, this was an impossible determination to make based on the facts. Therefore, each defendant was held liable for having increased the risk of the plaintiff suffering the illness.

In *Zazelenchuk* the harm-causing agent resulting in the plaintiff’s heart attack was unknown. For example, it could have been the failure to administer an ACLS algorithm, including Aspirin, Heparin, or anti-thrombolytic therapy or none of these things. Moreover, it was unknown whether and to what extent a combination of these treatments administered at different times may have prevented the plaintiff’s injury, if at all. Whatever the case may be, *Zazelenchuk* was not a case akin to either *Fairchild* or *Barker* where the harm-causing agent was a known entity and all that remained to be determined was which defendants may have exposed the plaintiff to a risk of suffering his injury. This was not a case where the court was tasked with determining whether a harm-causing agent ‘emanated from the same agent or from agents which operated in the same way.’ By appealing to a material increase in risk approach to causation in *Zazelenchuk* when it was arguably unnecessary to do so, liability in this case may have been imposed in the absence of facts necessary to support that finding.

CONCLUSION

Ultimately, it would so far appear that at least some of the concerns we raised initially following the release of the Supreme Court of Canada’s decision *Hanke* were well founded. While there is some evidence to suggest lower courts may be taking some liberties with what they consider “impossible” situations unsuitable for “but for” causation, appellate level courts appear more resolved to work through difficult factual situations and follow the direction provided in *Hanke* that the “but for” test remains the default test for causation,

even in difficult factual situations. We caution however that it may be the case that still too little time has passed since the Supreme Court's decision in order to fully appreciate its consequences.

It is nevertheless worthwhile to consider how courts in the U.K. have approached material increasing the risk of the plaintiff's injury as a basis for causation given that the Supreme Court in *Hanke* has arguably opened the door to allow the "material increase in risk" test entry into Canadian causation law.

What has evolved in the UK is a three tiered approach to causation. As in Canada, the "but for" test is the predominate test for determining causation.. In certain exceptional circumstances, where the "but for" test is incapable of determining causation the "material contribution" test is available. It should be understood however that both of these tests are considered cause-in-fact approaches to causation where joint and several liability between the defendants remains the normal practice.

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

Unlike the situation in the U.K., the climate in Canadian causation law is arguably less favourable to defendants given its two-tiered approach to causation, and may become even more so if a material increase in risk approach to causation gains sway in the absence of necessary debate about its consequences for defendants. In this regard, debate in the U.K., and in particular *Barker*, is noteworthy.

As discussed, while defendants in Canada likely benefit from a resurgence of the “but for” test which has so far proven to be a stalwart gate-keeper to prevent overuse of the lower standard “material contribution” test, lower courts have nevertheless shown either their confusion regarding its proper application in difficult (but not impossible) circumstances or a willingness to avoid its use as a means of allowing innocent plaintiffs to recover when the facts fail to support a cause-in-fact relationship. Once a plaintiff has demonstrated the “but for” test is unworkable, defendants will usually be found to have contributed to the plaintiff’s loss under the lower standard test for causation.

Arguably, if the “material increase in risk” approach to causation has arrived here, then it can be argued that *Hanke* has preserved a legal fiction that courts in the U.K., since *Barker*, have effectively eliminated; that is a defendant who is found to have materially increased the risk of the type of damage the plaintiff actually suffers should also be deemed to have caused-in-fact the plaintiff’s injuries. In the U.K. elimination of this fiction represents the demarcation line between the two ‘material’ tests for causation. In Canada, absent some future judicial debate, the consequences flowing from *Hanke* may have eliminated this distinction altogether.

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

To illustrate, in Ontario joint and several liability of negligent defendants can be found in section 1 of the *Negligence Act*⁶⁸ provides:

1. Where damages have been **caused or contributed to** by the fault or neglect of two or more persons, the court shall determine the degree in which each of such persons is at fault or negligent, and, where two or more persons are found at fault or negligent, they are jointly and severally liable to the person suffering loss or damage for such fault or negligence, but as between themselves, in the absence of any contract express or implied, each is liable to make contribution and indemnify each other in the degree in which they are respectively found to be at fault or negligent (emphasis added).⁶⁹

⁶⁸ R.S.O. 1990, c. N.1.

⁶⁹ R.S.O. 1990, c. N.1 at s. 1.

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

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