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The Supreme Court of Canada and the Law of Causation Revisited

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OVERVIEW[i]

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

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

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

A starting point for a causation analysis can be found in the Supreme Court of Canada decision in *Snell**[ii]**:*

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

proof for an injury that may very well be due to factors unconnected to the defendant and not the fault of anyone.

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

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

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

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

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

Some of these questions are:

1. Where the plaintiff can only show that one of two or more possible causes resulted in the loss, has the plaintiff failed to meet the onus to prove causation on a balance of probabilities?

2. Where more than one cause contributed to a loss, is a defendant responsible for the entire loss, part of the loss or none of the loss?

3. Is the result different if in the absence of the material cause a lesser loss would have occurred?

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

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

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

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

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

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

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

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

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

BRIEF RECAP

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

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

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

RESURFICE V. HANKE

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

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

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

ATHEY

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

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

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

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

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

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

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

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

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

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

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

In this context, the Supreme Court in *Hanke* articulated the following principles with respect to causation[ix]:

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

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

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

IMPOSSIBILITY OF "BUT FOR"

The authors suggested that *Hanke* had clearly confirmed the “but for” test as *the* default test for causation, even in cases of multiple tortious causes. While this would likely be welcomed for bringing some much needed certainty to the law of causation, the authors expressed concern that the Supreme Court had not gone far enough. Although it was clear in *Hanke* that the “material contribution” test was now clearly limited to situations where it was impossible for

reasons beyond the plaintiff's control to determine causation under the "but for" test, the authors argued the decision failed to shed sufficient light on what exactly the Court meant by the terms "impossible" and "beyond the plaintiff's control". The second case alluded to by the Supreme Court in *Hanke* as examples of sufficiently impossible situations where resort to the "material contribution" test would be appropriate was of limited value in this regard.[xi]

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

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

MATERIAL CONTRIBUTION TEST

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

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

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

While it appeared that *Hanke* would help clarify *when* it is appropriate to resort to the "material contribution" test, it was the authors position that *Hanke* fell short of providing much needed clarity and direction to lower courts regarding *how* the "material contribution" test ought to be applied.

The authors predicted that *Hanke* may have abandoned factual causation once a plaintiff proved the "but for" test was unworkable. The second part of the "material contribution" test

articulated in *Hanke* curiously focused on whether the defendant "exposed" the plaintiff to an "unreasonable risk of injury". In the authors' view, this *dicta* failed to distinguish two different tests for causation. The result feared was that by focusing on whether the defendant materially increased the risk of injury, rather than on whether the defendant materially contributed to the actual injury, liability would likely be imposed in a substantial number of cases where a defendant had not in fact caused the injury.

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

BUT FOR "IMPOSSIBILITY" - THE GATE-KEEPER CONCERN

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

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

FRAZER V. HAUKIOJA[XIII]

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.[xiv] 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.[xv] 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*."[xvi] 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.[xvii] Although faced with difficult questions of causation, the trial judge in

Frazer applied the "but for" test and found the defendant doctor responsible for the plaintiff's damages.

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

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

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

BOHUN V. SEGAL[XXI]

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

On appeal however, the British Colombia 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.[xxii] Having failed to establish this, there was no causation in the circumstances.

FULLOWKA V. ROYAL OAK VENTURES INC[XXIII]

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* ***[xxiv]*** (hereafter *"Walker"*) in *Hanke* as an example where the &l