EXPECT THE BEST

Blaney McMurtry
BARRISTERS & SOLICITORS LLP

THE SUPREME COURT OF CANADA AND THE LAW OF CAUSATION

Stephen R. Moore

Blaney McMurtry LLP
416.593.3950
smoore@blaney.com

and

Bianca Matrundola

Blaney McMurtry LLP
416.597.4877
bmatrundola@blaney.com

The Supreme Court of Canada and the Law of Causation

Table of Contents

The Supreme Court of Canada and the Law of Causation

INTRODUCTION[1]

Last year, James Tomlinson presented an excellent paper on the law of causation to this conference.[2] In many respects this paper is the sequel to that paper, however, the scope of this paper is much narrower. We have restricted our comments to the issues raised in the recent Supreme Court of Canada decision in *Resurface Corp. v. Hanke*[3] (hereafter *Hanke*) and its earlier decision in *Athey v. Leonati*[4] (hereafter "*Athey*").

This paper is divided into two main sections. The first part focuses on the Supreme Court's analysis of the "but for", "material contribution" and "material increase in risk" causation tests. The second part of the paper comments on two additional causation issues which are addressed in these two cases. First, we will briefly look at the so-called "thin skull" and "crumbling skull" question. Finally, there will be an equally brief discussion regarding the responsibility of a defendant to compensate a plaintiff where the injury has been caused by multiple tortious events.

It is our thesis that the Supreme Court of Canada has created a great deal of confusion in its several recent pronouncements on the issue of causation. In these cases it has failed to provide much guidance with regards to some very difficult concepts. The trial and provincial appellate courts are attempting to sort out this confusion but, apparently, without a great deal of success. We do not anticipate that the Supreme Court's decision in *Hanke* will actually provide them with much assistance in this endeavour. It is difficult for most practitioners to deal with complex causation questions and this has been complicated by the confusing *dicta* emanating from our

---

[1] I would like to thank my co-author Bianca Matrundola for her invaluable assistance in the preparation of this paper.

[2] James Tomlinson, *'But For' and Beyond: The Developing Law of Causation*, 2nd Annual Update: Personal Injury Law & Practice, Osgoode Professional Development CLE, 2006. We would suggest that you read his paper in conjunction with this paper.

[3] [2007] 1 S.C.R. 333

[4] [1996] 3 S.C.R. 458

highest court. Hopefully, this paper will highlight the issues that we all need to be aware of, but it, by no means, attempts to resolve the thorny issues regarding causation addressed in these cases.

In the *Hanke* decision the Chief Justice, writing for the court, stated:

> 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.[5]

In our opinion, one of the reasons that the Supreme Court chose to address causation in the *Hanke* case, when arguably that discussion was unnecessary to dispose of the appeal, was that certain of its *dicta* in *Athey* were creating problems for the lower courts. Of course, one of the lower courts that was "getting it wrong" was the Alberta Court of Appeal in the *Hanke* case itself. We believe that the profession would have been better served if the Supreme Court had chosen to spill a little more ink on this subject. One could argue that the House of Lords has already spilt a great deal of ink on this subject and created just as much confusion by doing so. However, it is our view that the major issues in this area have been canvassed by the Courts in both Canada and Great Britain and it would have been appropriate for the Supreme Court to have provided us with a little more guidance in the *Hanke* case.

THE CAUSATION TESTS

What is Meant by "Causation"

Causation is an essential and critical part of tort law. For instance, while a defendant may have acted negligently, breaching a standard of care, they will typically not be found liable for a plaintiff's loss unless it can be said that their act *caused* injury to the plaintiff. This cause and effect analysis is what is known conceptually as factual causation, as it deals with the scientific

---

[5] see note 3 at paragraph 20.

[7] Ken Cooper-Stephenson, *Personal Injury Damages in Canada*, Toronto: Carswell, 1996 at p. 747 [Cooper-Stephenson, "Personal Injury Damages"]. Note this is to be contrasted with legal causation which Cooper-Stephenson, Personal Injury Damages, at p. 749 defines to involve questions of proximity and remoteness and embraces moral and policy considerations to determine true legal wrongfulness.

or objective connection of events that must determine a link between the wrong in question and the detrimental effect suffered by the plaintiff.[7] In other words, the plaintiff's loss must be tied to the defendant's negligent conduct. If the plaintiff's loss resulted from something other than the negligent conduct of the defendant, then the defendant's conduct is not the cause of the plaintiff's loss.

A simple example may assist in understanding this concept. If the defendant runs a red light and the plaintiff is not struck by the defendant, but rather loses control of their vehicle some distance beyond the intersection, after developing a flat tire, then the negligence of the defendant cannot be said to be the cause of the plaintiff's loss. This is often referred to as "negligence in the air". Unless the negligence "caused" the loss, the defendant is not obliged to compensate the plaintiff. Of course a very simple change to the facts in the last example could establish that the plaintiff's loss was caused by the defendant. If there was no flat tire and the plaintiff testified that the reason they lost control of their vehicle resulted from an attempt to avoid hitting the defendant's vehicle in the intersection, then the causal connection between the defendant's negligence and the plaintiff's loss may be made.

In most cases, determining factual causation is relatively straight forward. However, in some situations, for example, where scientists have not yet be able to fully explain any cause and effect relationship, the courts face a dilemma in ascribing causation to the negligence of the defendant. This often occurs with industrial and environmental diseases caused by exposure to toxins. In some cases, medical science cannot even say whether the exposure "caused" the disease. In others, it can demonstrate that the toxin caused the disease but cannot actually explain the role of the toxin in doing so. It is in these situations where the law often struggles in its attempts to determine whether the defendant's negligent conduct "caused" the plaintiff's injury.

The Three Causation Tests

The classic cause in fact test is the "but for" test. Where a number of factors contributed to the plaintiff's loss, the defendant's negligent conduct will not be held to be the cause of the plaintiff's loss unless it can be demonstrated that "but for" the negligent conduct of the defendant, the plaintiff would have suffered damage. The defendant's conduct need not be the sufficient cause of the injury in and of itself but it must be a necessary cause of the injury.

The English cases have suggested that where the defendant's actions were a necessary but not sufficient cause of the loss (i.e., the "but for" test has been satisfied), then the court's enquiry on the issue of causation is complete. However, if the court cannot answer the "but for" question, it may be appropriate to consider the material contribution test. The House of Lord's decision in *Bonnington Castings Ltd. v. Wardlaw*[8] provides an excellent example of the application of the test. The plaintiff developed pneumonconiosis as the result of exposure to silica dust from two sources. The first source of silica dust was created non-negligently but the second source resulted from the defendant's negligence. The disease is caused by the cumulative effect of inhaling silica dust and is made worse by increased exposure. It could not be said, however, that "but for" the source of dust created by the defendant's negligence that the plaintiff would have developed the disease. Accordingly, the House of Lords recognized that the classic "but for" test might not be satisfied. Nevertheless, it held that if the defendant's negligent conduct made a material, as opposed to a *de minimis*, contribution to the development of the disease, then the plaintiff was entitled to recover his full loss from the defendant.

A third test has also been promulgated. In certain circumstances, where the defendant's conduct materially increases the plaintiff's risk of injury, that may be sufficient to find causation. A good example of this theory of causation is contained in the House of Lords decision in *Fairchild v. Glenhaven Funeral Services Ltd.*[9] In that case a disease, mesothelioma, was contracted by the plaintiff because of exposure to asbestos dust from two different employers. It was possible that the plaintiff developed the disease because of the inhalation of only a single asbestos fibre. Accordingly, that fibre would have come from only 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. However, there was little doubt that it was the two employers' negligent exposure of the plaintiff to asbestos fibres which caused the plaintiff's disease. The House of Lords was prepared to find liability against both employers because they had each increased the risk of the plaintiff contracting the disease. It could not be said, however, that "but for" either

---

[8] [1956] A.C 613

[9] [2003] 1 A.C. 32

employer's negligence that the plaintiff would have developed the disease or that either employer materially contributed to its development.[10]

The Supreme Court's decisions in *Athey* and *Hanke* have confused the application of these three distinct causation tests in Canada. The balance of this section of the paper is our attempt to explore the implications of the *Athey* and *Hanke* decisions.

The *Athey* Decision

The *Hanke* decision, insofar as it discusses causation, is really an attempt by the Supreme Court to limit the application of some of its *dicta* in *Athey*. Therefore, we will begin by discussing *Athey* and then we will turn to *Hanke* itself.

The facts of *Athey* are not that unusual and; as with most personal injury cases, it involves a situation where multiple factors contributed to the plaintiff's ultimate injury. The plaintiff was involved in two auto accidents that resulted in injury to his back. He also suffered from a pre-existing lower back condition. While he was recovering from the accidents, he resumed his regular course of exercise on the (non negligent) advice of his doctor. During a stretch, he herniated a disc in his back. The case turned on whether the car accident (the two accidents were treated as one for the purpose of the litigation) could be said to have caused the disc herniation.

The trial judge awarded the plaintiff twenty five percent of his assessed damages on the theory that the defendant's conduct constituted one quarter of the cause of his loss. An appeal of the trial award to the British Columbia Court of Appeal was dismissed. In the Supreme Court, Major J., writing for the Court, acknowledged the trial judge's findings that the herniation was caused by a combination of factors; injuries from the accident and the pre-existing back weakness.[11] Each factor was a necessary ingredient in bringing about the herniation. This seemed like a classic application of the "but for" test.

Unfortunately, the Court felt obliged to comment on an alternative approach to the question of causation, the so-called "material contribution" theory. We would argue that this comment was

---

[10] See the much more detailed analysis of these cases in James Tomlinson's paper at note 2 above.

[11] *Athey*, see note 4 above at para. 43

unnecessary given the medical evidence in the case. It is these comments which have given rise to confusion regarding the status of the "but for" test in Canada.

In the *Athey* case, the Supreme Court appeared to conclude that the "but for" test had been satisfied, which suggests that any discussion of the material contribution test was unnecessary. However, Major J. then went on to hold that the trial judge's finding that the accidents contributed twenty-five percent to the injury established a "material contribution", as it was outside the *de minimis* range.[12] Confusion appears to have been created because of the reference to both of these causation tests. Demeyere,[13] in her article, states that:

> Major J.'s application of these two supposedly distinct tests is confused. At one point, he concludes that the defendant's actions were a "necessary ingredient in bringing about the herniation." This finding of necessity satisfies the "but for" causation standard. However, Major J. then goes on to characterize the trial judge's finding that the defendant's actions contributed 25% to the disc herniation as one of a "material contribution." It seems therefore, that Major J. based his finding of cause-in-fact on both standards indiscriminately.[14]

This indiscriminate use of the "material contribution" terminology, along with the acknowledgment in the decision that the "but for" test may be unworkable in certain circumstances (without clearly defining those circumstances), may have (un)intentionally introduced an understanding into the law that the material contribution test could, in fact, be used in situations of multiple necessary causes. This is apparently even what the Supreme Court of Canada later pronounced itself in *Walker Estate v. York Finch General Hospital*,[15] where it stated: "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** [emphasis added]." [16]

---

[12] *Athey*, see note 4 above at para. 44.

[13]Gillian Demeyere, "The 'Material Contribution' Test: An Immaterial Contribution to Tort Law: A Comment on *Briglio v. Faulkner*" (2000) 34 U.B.C. L. Rev. 317-334 [Demeyere, "Immaterial Contribution"]

[14] Demeyere, Immaterial Contribution, see note 13 above at para. 17.

[15] [2001] 1 S.C.R. 647 (S.C.C.) [*Walker*]

[16] *Walker*, see note 15 above at para 87.

From these mixed beginnings, *Athey* also became the case generally cited in both the case law and literature as a source for understanding the "material contribution" test's proper application.[17] The problem with the formulation in *Athey*, however, is that other than noting the contribution must be more than *de minimis*, there is no other instruction for its proper application.

This has created real confusion for both the courts and the profession. Brown argues it has permitted courts to (a) simply impose the causative link on the basis that the defendant contributed to the plaintiff's injury on some intuitive level and (b) "fudge" causation in situations where a finding of no causation would seem overly harsh on an innocent plaintiff and too lenient on a blameworthy defendant.[18] As such, it has left defendants with the short end of the stick, so to speak, as causation can be inferred in almost every situation. It also practically did away with the more objective "but for" test as it was applied to multiple cause scenarios, which arise the majority of the time.

The *Hanke* Decision

Hanke is the most recent decision of the Supreme Court of Canada that has tried to resolve some of the confusion surrounding the issues of when the "material contribution" is to be applied instead of the "but for" test. It also comments on the threshold conditions that must be satified before one resorts to the latter test. The case itself involved an issue of product liability. Hanke was the operator of an ice surfacing machine. He was seriously injured after he negligently poured hot water into the gasoline tank of the machine. Some of the hot water overflowed the gas tank, vapourizing the gasoline which was released into the air. An overhead heater then ignited the gas and caused an explosion which left Hanke seriously burned. Hanke sued the manufacturer alleging negligent design.

The case was really resolved on the grounds of breach of duty of care. In order to establish Resurfice was negligent, Hanke first had to prove a breach of a duty of care, and then that the

---

[17] See for instance *Walker* at note 15 above and Albert Roos, "Advanced Topics in Causation & Assessment of Damages."

[18] Russell Brown, "Cause-in-Fact at the Supreme Court of Canada: It's Still Bad News for Insurers" (September 2007) at p. 8 pgs. 8 & 14 [Brown, "Bad News"]

breach caused his injury. The Supreme Court of Canada agreed with the trial judge's findings that it was not reasonably foreseeable that an operator of the ice resurfacing machine, in these circumstances, would mistake the gas and hot water tanks and therefore a breach of the duty of care could not be established.[19] In other words, there was nothing negligent in the design of the ice resurfacing machine.

Even though the case was resolved on the issue of forseeability in the context of duty of care, the Supreme Court of Canada took the opportunity to discuss the law with respect to causation. Presumably, one of the reasons it decided to do so was the Court's awareness of the problems that the "over interpretation" of *Athey* was creating. On the (erroneous) basis that the plaintiff and the defendant both had some tortious responsibility for the injury, the Court of Appeal had suggested that the "material contribution" test was the appropriate causation test to apply. It, in fact, relied on the Supreme Court's pronouncement in *Walker* seen above.[20] The Supreme Court, however, rejected this saying 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."[21]

Instead, they articulated the following principles[22]:

- 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.

---

[19] *Hanke*, see note 3 above at para. 12.

[20] *Walker*, see note 15 above.

[21] *Hanke*, see note 3 above at para. 19.

[22] *Hanke*, see note 3 above at para. 25.

- Two examples were laid out by the SCC to demonstrate the appropriate application:[23]

    1. When two shots are carelessly fired in the direction of the a victim by two different shooters but it is impossible to say which shot injured the victim (*Cook v. Lewis*);

    2. 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 (*Walker Estate v. York Finch General Hospital*).

The *Hanke* decision has attempted to reinvigorate the "but for" test as the primary touchstone for determining causation. However, in our submission, the above quoted requirements for the application of the "material contribution" test have actually conflated the "material contribution" and the "material increase in risk" tests.

The real problem appears to lie with the second test. Frankly, that test is simply a restatement of the test that the court applies to find that the defendant was negligent. As Fleming states: "Negligence is conduct falling below the standard demanded for the protection of others against unreasonable risk of harm".[24] If the second test is not simply a restatement of the definition of negligence, then by focussing on "unreasonable risk of injury", it does not appear to be a causation test but rather a test which is focussed on liability. Additionally, the English cases do not focus on "risk" when applying the "material contribution" test. Rather, the issue of risk is only discussed when attempting to apply the "material increase in risk" test.

The two tests promulgated in *Hanke* appear to be intended to answer the question of when to apply the material contribution test. They do not address the question of how it is to be applied. Apparently, the test should still only be applied when the contribution to either the injury or, arguably, the severity of the injury is not *de minimis*.

We are concerned that the two tests will be used to answer both the questions of when and how to apply the material contribution test. If this occurs, then the courts may focus solely on the issue of risk without requiring an actual contribution to the loss by the defendant's conduct. What we could end up with is a test that is triggered whenever the defendant's conduct increases

---

[23] *Hanke*, see note 3 above at paras. 27-28.

[24] Fleming, *The Law of Torts, 9th Edition*, LBC Information Services, 1998

the risk of injury to the plaintiff. This suggests that when the court concludes that it cannot apply the "but for" test, the defendant will be held liable if its conduct increased the risk of injury to the plaintiff without any proof of actual causation. We could end up jumping from the "but for" test to the "material increase in risk" test without even stopping to consider the "material contribution" test.

The English cases, to date, have imposed more rigorous conditions on the application of the "material increase in risk" test than the two step test proposed in *Hanke*. We are concerned that the *Hanke* test will create the same kind of confusion as the Court's comments in *Athey* did. Due to the fact that the "but for" test has been restored to its position of primacy, this new confusion should not affect as many situations as the confusion created by *Athey* did.

Incidentally, the examples provided in *Hanke* reinforce these concerns. We will now turn to the two examples cited by the Court in *Hanke*.

Cook v. Lewis[25]

In *Cook*, the plaintiff was shot in the face while hunting. However, it was indeterminable (or "impossible" as needed by requirement #1 on the *Hanke* application) which of two other hunters in the area had actually fired the shot that hit him. As such, there was one defendant who was completely "innocent" in the sense that his shot did not cause the injury to the plaintiff (and this was therefore <u>not</u> a scenario where there were two sufficient causes of the injury). According to McLachlin C.J., this scenario represents a situation in which the defendants could be seen as creating an unreasonable risk of injury, of which the plaintiff actually suffered (requirement #2). On this basis the substantive content of the material contribution test takes form as follows: Irrespective of the inability to prove causation, the plaintiff will succeed if he can prove material contribution to the risk of injury (as opposed to the occurrence of the injury)."[26]

---

[25] [1951] S.C.R. 830 (S.C.C.) [*Cook*]

[26] Brown, Bad News, see note 18 above at p. 21-22.

Walker Estate v. York Finch General Hospital

The *Walker* case involved negligent donor screening in the context of blood gifts. The plaintiff was injured upon receiving tainted blood. The blood was traced to a specific donor, who at the time of making his blood donation, was unaware he was infected with HIV. While not explicitly necessary to apply the material contribution test on the facts of that case, it was suggested that this was a type of case where one may need to apply it if it was impossible to prove what the donor would have done if he had been properly screened.[27] On this basis it would appear that McLachlin C.J. adopted this case as the kind of scenario that may require the material contribution test. If it cannot be proven (because it is impossible to prove) that the proper screening would have deterred the donor, then the plaintiff must only show that the plaintiff's negligence increased the risk to the plaintiff of obtaining the injury.

Another example of where it may be impossible to prove what a particular person in the causal chain would have done had the defendant not committed a negligent act is the situation in *Mooney v. British Columbia (Attorney General).*[28] In that case, the plaintiff made complaints to the police that her spouse was threatening her. Later, the spouse broke into her house, shooting a friend and a daughter. He then set the house on fire and killed himself. The police were found to be negligent in their investigation of the complaint. On the facts of the case however, causation was not established because the judge was satisfied that given the spouse's violent history he would not have been deterred, even if the complaint had been properly investigated. Had the court determined that it was impossible to tell what the spouse would have done given the proper intervention of the police, this would become a scenario in which *Hanke's* newly formulated material contribution test would apply. The court would then be left with the task of determining whether the negligent investigation increased the risk of injury to the plaintiff.

Other Scenarios

Since the examples given in *Hanke*, were just that, examples, there will undoubtedly arise future scenarios that seem to meet the material contribution criteria but were not explicitly referred to in *Hanke*. There are clearly imaginable situations (as courts have had to previously deal with such

---

[27] *Walker*, see note 15 above at para. 88.

[28] (2004), 31 B.C.L.R. (4th) 61 (C.A.)

cases) that would also appear to satisfy the requirements to use the "material contribution" test. The hope is that courts will not interpret *Hanke* too broadly so as to return to the aftermath of *Athey* where material contribution was applied to everything and not so strictly that situations akin to the examples provided are excluded.

That brings us to the question of the multiple sufficient cause scenario. Cooper-Stephenson argues that "it is logically inappropriate to use "but for" reasoning in such cases because that reasoning cancels out causal responsibility altogether."[29] Consider for instance the scenario where two fires, started independently by two separate tortfeasors, burn down the plaintiff's house. The evidence is such that either fire, on its own, was sufficient to cause the same destruction. On the "but for" test, neither party would be seen as liable because absent the fire they started, the other would still have burnt it down.[30] In such a case it would be impossible to prove causation using the "but for" test. However, the plaintiff would likely be able to show that the defendants independently increased the risk of injury. As such, this would seem to imply that the "material contribution" test could properly be used in these circumstances.

Of course the two fire example is the prototypical example used to describe the multiple sufficient cause scenario. Although rare in their occurrence, there are other cases which have dealt with the issue. Klimchuk and Black[31] provide the example of a plaintiff who was injured after the horse he was riding became frightened from the passing by of two motorcycles on either side of the horse. The evidence was that in the absence of one of the motorcycles the horse would still have become frightened and therefore each was a sufficient cause of the injury. The "but for" test would certainly meet its limitations in these circumstances, as it would be impossible to find causation. In fact, on the "but for" test, neither defendant would be liable because each would cancel the other out as suggested by Cooper-Stephenson. However, both defendants could be said under the *Hanke* test to have created an unreasonable risk of injury.

---

[29] Ken Cooper-Stephenson, "Justice in Saskatchewan Robes: The Bayda Tort Legacy" (2007) 70 Sask. L. Rev. 269 at para. 32

[30] Brown, Bad News, see note 18 above at p. 5.

[31] Dennis Klimchuk and Vaughan Black, "Athey v. Leonati: Causation, Damages and Thin Skulls" in (1997) 31 U.B.C. L. Rev. 163-178 at para. 17 [Klimchuk and Black, "Causation, Damages"]. The case they refer to is called *Corey v. Havener* and is an early U.S.A. decision.

Criticisms of the "New" Material Contribution Test

"Fairness and Justice" as the New Standard?

What binds all of the "material contribution" examples together is the fact that at a gut or instinctual level the feeling is that someone should be liable to the plaintiff for their injuries but it cannot be proven who is responsible. Some wrong has been imposed in their life, that they were the innocent victim of. To ensure plaintiffs recover compensation for their loss, it is rationalized that there must be some test that prevents defendants from totally escaping liability. To do otherwise, would be to "offend basic notions of fairness and justice."[32] As such, the new "causation" is defined as material contribution to risk of injury instead of material contribution to the actual occurrence of the injury. Brown argues this has, in effect, erased factual causation as an element of liability.

> Having jettisoned that necessary historical connection between wrong and harm by conceiving of harm as the introduction of risk, the Court has, for all practical purposes dispensed as a matter of law with proof of causation. Because unreasonable conduct is inherently risky, proof of the defendnat's breach of the standard of care is now, in and of itself, proof of causation. In equating risk with harm, *Hanke* has transformed causation from an instance of corrective justice to a distributive and arguably superfluous device.[33]

Of course there is the limiting factor that in order to use the "material contribution" test, a plaintiff must first satisfy the requirement that it be impossible, for reasons outside of their control, to find causation on the "but for" test. This initial threshold for the test's use, however, has been criticized by Brown who opines that "impossibility affords fact-finders the wiggle room to fudge causation by resorting to material contribution when they want the plaintiff to win and to refuse to apply material contribution when they do not."[34] This seems to suggest that since what is deemed "impossible" will be a judgment left to the trier of fact, courts may continue to find the "material contribution" test applicable in situations where the application of the "but for" test is difficult and complex but not truly "impossible."

---

[32] *Hanke*, see note 3 above at para. 25.

[33] Brown, Bad News, see note 18 above at p. 25.

[34] Brown, Bad News, see note 18 above at p. 20.

What appears to govern then, is fairness to the plaintiff in the situation. Regardless of the scenario, there will always be some way of finding the defendant liable. At least one author has opined that this represents a blurring in Canadian causation law between the policy considerations pertinent to duty and determinations of factual causation as the focus has become one of fairness versus one of causation.[35] This may be happy news for plaintiffs, but not for defendants. As a result, the costs associated with such injuries will continue to be placed upon defendants, and insurance companies. Insurance companies will truly be insuring "risk" in a way they likely never envisioned.

Applications of the Test

In all fairness to the courts, it does not appear that at this point in time, courts have taken such wide liberties with respect to the *Hanke* application of "material contribution" than anticipated by some. A pair of decisions, applying *Hanke* in the Court of Appeal of Ontario and British Columbia are illustrative.

Barker v. Montford Hospital[36]

Barker was a case of alleged medical negligence. The plaintiff presented in the emergency room with abdominal pain. She was diagnosed with an obstructed bowel and admitted for observation. Her condition began to decline during the night and the physician was called but did not attend for an examination until morning when it was determined surgery would be necessary. During surgery, a five foot piece of small intestine was removed because it had died. The trial judge found that the physician's negligence in not examining her or operating on her earlier caused the loss of the section of small intestine.

On appeal, the court found that the trial judge erred in finding the negligence caused the loss of the small intestine (in fact they found that the trial judge had simply inferred causation, which as noted, was a typical approach under the *Athey* formulated test of material contribution).[37] Since

---

[35] Vaughan Black, "The Transformation of Causation in the Supreme Court: Dilution and "Policyization"" in Todd Archibald and Michael Cochrane, eds., *Annual Review of Civil Litigation 2002* (Toronto: Carwswell, 2003) at 208. Black refers to this phenomenon as "Policyization."

[36] [2007] O.J. No. 1417 (C.A.) [*Barker*]

[37] *Barker*, see note 36 above at para. 41.

the plaintiffs had not presented any evidence that the death of the intestine had occurred during the delay and not before (and it was not "impossible" to do so), it could not be said that "but for" the negligence, the intestine could have been saved.[38] In the result, the appeal was dismissed.

Seatle (Guardian ad litem of) v. Purvis[39]

Seatle was another case of alleged medical negligence. Seatle is a child with cerebral palsy. The action was brought against Purvis, the doctor who performed the plaintiff's delivery at birth. During the delivery a complication arose, called shoulder dystocia which lead to asphyxiation of the infant which in turn caused the plaintiff's condition. Purvis had used a vacuum device to assist with the birth. The plaintiff alleged that Purvis, in using the vacuum, applied an excessive amount of traction, thereby causing the shoulder dystocia and eventually the cerebral palsy. The case was dismissed by the trial judge on the basis that there was an insufficient evidentiary basis to find causation.

On appeal, the plaintiff urged the court to apply the "material contribution" test as formulated in *Hanke*, claiming they met all of the prerequisite conditions to its application.[40] However, the court determined that the impossibility factor was not met because it was within their power to tender the appropriate evidence. The plaintiff asked the court "to fill in the evidentiary gap because, in the words of *Hanke*, it would offend the basic notions of fairness and justice to deny liability." [41] The court declined and the appeal failed.

It is clear therefore that at least with respect to the initial requirement of "impossibility," the courts have not used it to "fudge causation" as suggested by Brown to find liability in sympathetic circumstances. Instead, and even in light of a plea for "fairness and justice" in *Seatle*, the Courts declined to make the causal connection that might have been inferred under the *Athey* approach in order to find compensation for an "innocent" plaintiff. Instead, they held firm to the use of "but for" as the predominant test to find causation. The circumstances, they found, did not warrant the use of the newly formulated "material contribution" test that would

---

[38] *Barker*, see note 36 above at para. 54.

[39] [2007] B.C.J. No. 1401 (C.A.) [*Seatle*].

[40] *Seatle*, see note 39 above at para. 65.

[41] *Seatle*, see note 39 above at para. 69.

allow a finding that an increase in the risk of injury would establish liability where pure causation could not be ascertained.

Causation Conclusion: Where Are We Now?

In the aftermath of *Athey*, the law of causation was left with two distinct problems that created hardship and confusion in subsequent applications of the tests for causation. First, courts were led to believe that the "material contribution" test was appropriately applied in cases where multiple factors led to the loss suffered by the plaintiff. The second is that the "material contribution" test lacked real substance, such that courts were simply applying it in situations where it seemed an inference of causation was justified.

Hanke has certainly paired back the application of the "material contribution" test by confirming that "but for" is still pre-eminent; it is to be applied in the majority of cases. "Material contribution" is now appropriately applied only in extraordinary situations. However, in those situations, causation of harm may have been replaced with causation of risk so as to apply what some see as a more fair and just response to plaintiffs' suffering of loss (this may ultimately prove not so different from the inference of causation that appeared after *Athey*) and what others see as an inappropriate infusion of policy into the issue of causation. Essentially, however, the result is the risk of the removal of true causation from the analysis of liability.

The gatekeeper to the "material contribution" test, seems to be the criteria that it must be "impossible" to apply the "but for" test for reasons that are beyond the control of the plaintiff. As discussed, this criteria has the potential to be misused by courts, allowing them to "fudge" the issue of causation. If impossibility is found, liability will inevitably be applied because a finding that one materially contributed to the risk of injury is likely to be supported in almost every scenario. While the effects of *Hanke* have only begun to play out in the jurisprudence, there is evidence that courts will not take such a liberal view of the impossibility criteria. Even in the cases of *Barker* and *Seatle*, where sympathetic plaintiffs suffered serious loss, courts were not persuaded to find it was impossible for the plaintiffs to prove causation on the "but for" test in order to permit recovery in the interests of fairness and justice.

Additionally, when cases arise where the distinction between the "material contribution" and "material increase in risk" tests are critical, the court could simply apply the two step *Hanke* test without due consideration to the differences between these two tests. 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 even adopt that test. This issue was vigorously debated in the English courts but may not be in ours.

MULTIPLE CAUSES & THE CRUMBLING SKULL ISSUE

Tortious and Non-Tortious Causes

Athey was also a significant case for its discussion of the "thin skull" and "crumbling skull" principles and the assessment of damages. Although the plaintiff had a predisposed back weakness, the defendant was held fully liable for the disc herniation. This was based on the "thin skull" principle which requires that "even if a person of normal fortitude would withstand a certain blow to the head without serious injury, the defendant is fully liable for the unexpectedly serious consequences of her actions if her victim happens to experience catastrophic loss because he has an unusual thin skull."[42] Essentially, the defendants were required to take their victim as they found him; subject to the pre-existing lower back problems as it was a latent weakness that was only made manifest through the tortious conduct of the defendants.[43] Presumably this was because "but for" the accident, he would not have suffered from the disc herniation; he would likely have continued on living, subject to his constraints but would not have suffered in such an aggravated state. Apportionment in these circumstances, between tortious and non-tortious causes, is considered contrary to the principles of tort law because the defendant would escape full liability even though he caused or contributed to the whole injury.[44]

As an aside, it is interesting to note that Demeyere believes that the *Athey* decision, in laying out the "thin skull" principle in a decision riddled with talk about "material contribution" led lower courts to conclude that it is only on application of the "material contribution" test that full

---

[42] Mitchell McInnes, "Causation in Tort Law: Back to Basics at the Supreme Court of Canada" in (1997) 35 Alta. L. Rev. 1013 [McInnes, "Back to Basics"]

[43] Klar and Linden et al., *Remedies in Tort*, Toronto: Carswell, 2006 at §45.1 [Klar, "Remedies"]

[44] Klar, Remedies, see note 43 above at §45.3

recovery to a defendant where multiple causes have led to their injury would be allowed.[45] Perhaps, this is a reason why a proliferation or reliance on the "material contribution" test instead of the "but for" test was seen in the aftermath of *Athey*.

On moving forward to consider the issue of damages in *Athey*, Major J. stated that "had the trial judge concluded (which she did not) that there was some realistic chance that the disc herniation would have occurred at some point in the future without the accident, then a reduction of the overall damage award may have been considered."[46] This is clearly a contemplation, at the stage of damage assessment, as to whether the plaintiff was in fact beyond just a thin skull but had in fact a "crumbling skull." In the case of a "crumbling skull" the award of damages can be adjusted to account for the "crumbling skull"; where there is a measurable risk that the plaintiff would suffer the same injury in the future regardless of the defendant's conduct.[47] Since the "crumbling skull" is determined to be inherent in the plaintiff's original position, and the defendant must only compensate for the difference between the plaintiff's injured position and their original position, damages are reduced.[48] The ultimate conclusion in *Athey* was that since he could not be said to be a "crumbling skull", he was entitled to full compensation under the thin skull principle.

The problem with framing the "thin skull"/ "crumbling skull" distinction, as it was in *Athey*, is twofold. Firstly, it is practically impossible to meet the "crumbling skull" test. Secondly, it deviates from the compensation principle which requires that the plaintiff be put in the same position as if the injury had not occurred.[49]

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

---

[45] Demeyere, Immaterial Contribution, see note 13 above at para. 35

[46] *Athey*, see note 4 above at para. 48.

[47] Klar, Remedies, see note 43 above at §45.3

[48] *Athey*, see note 4 above at para. 35. See also Richard M. Bogoroch and Tripta S. Chandler, "How Canadian Courts Have Turned "Thin Skull" Damages into "Crumbling Skull" Damages: What are the Implications" (September 2002) (at 10) and McInnes, Back to Basics, above at note 42 for further discussion .

[49] Klimchuk and Black, Causation, Damages see note 31 above at para. 28.

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

As mentioned, once the "crumbling skull" defence was rejected by Major J. as speculative, the full quantum of damages assessed by the trial judge was imposed upon the defendants. As Klimchuk and Black point out, this was akin to giving an award to the plaintiff as if they did not suffer any pre-existing back injuries.[50] Although there was no evidence that the plaintiff would suffer the exact same injury in the future (as required to meet the "crumbling skull" test), it was not unreasonable to expect that the pre-existing back injury may have, at some time in the future, caused pain or back problems that would require him to alter his normal activities.[51] Quoting the court in *Graham v. Rourke*,[52] Klimchuk and Black highlight that such an award of damages created "the anomalous situation whereby [the plaintiff] was treated as particularly vulnerable "thin-skulled" victim for the purposes of assessing the effects of the accident on h[im], but as a normally healthy person for the purposes of assessing h[is] future pecuniary loss."[53] As such, a contingency deduction should have been permitted to account for the less speculative future costs associated with the plaintiff's pre-existing condition.[54] This would more appropriately accord with the compensation principle as it would only require defendants to be responsible for

---

[50] Klimchuk and Black, Causation, Damages see note 31 above at para. 24.

[51] Klimchuk and Black, Causation, Damages see note 31above at para. 27.

[52] (1990), 75 O.R. (2d) 622 (C.A.).

[53] Klimchuk and Black, Causation, Damages see note 31 above at para. 28.

[54] Klimchuk and Black, Causation, Damages see note 31 above at para. 27.

the "value of the difference between the back the plaintiff had at trial and the one he would have had but for the accidents."[55]

Multiple Tortious Causes

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

In *Alderson v. Callaghan*[56] the plaintiff suffered brain damage in a motor vehicle accident. The defendant claimed that the injury was actually the result of a series of domestic assaults inflicted upon her prior to and subsequent to the accident. On the basis of *Athey*, the court found that so long as the accident could be said to have materially contributed to her overall condition (which they concluded it did in these circumstances), the subsequent tortious acts would not relieve the defendant from full responsibility for damages. However, the *Negligence Act* would allow multiple tortfeasors to seek contribution and indemnity from one another. The question that was never addressed in *Alderson* was whether the different torts actually caused the same damage, a pre-requisite for contribution under the *Negligence Act*.

This was a case where multiple tortious events caused or contributed to the plaintiff's injury. This approach is contrary to what is known as the global assessment rule applied in pre-*Athey* cases like *Long v. Thiessen*.[57] In global assessments, the plaintiff's total or global damages, resulting from both tortious acts, are first valued. The first defendant would then be responsible for paying only the portion of the plaintiff's damages up until right before the second incident, taking into consideration that they were not fully recovered yet. The second defendant would be

---

[55] Klimchuk and Black, Causation, Damages see note 31 above at para. 21.

[56] (1998), 40 O.R. (3d) 136 (C.A.) [*Alderson*]; Please also see Terry Collier's paper entitled "Causation, Sensation: An Updated Guide to Athey" presented to the Advocates' Society Practical Strategies for Advocates X in February of 2001.

[57] [1968] B.C.J. No. 1 (C.A.).

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

The Supreme Court of Canada's decision in *Blackwater v. Plint*[58] seems to have renewed a similar approach. In that case, the plaintiff suffered psychological difficulties from sexual assaults committed against him in a residential school. He had also been beaten and suffered other trauma while in the residential school, but any action arising from such a tort was determined to be statute barred. The court found that the "plaintiff is entitled only to be compensated for loss caused by the actionable wrong."[59] As such, they approved the separation of the different sources of damages, confining the defendant's responsibility to only those damages associated with the actionable tort.[60] The plaintiff was therefore only permitted recovery for damages associated with the sexual abuse.

At this juncture, with the Supreme Court of Canada's ruling in *Blackwater*, it appeared that perhaps *Alderson*, with its reliance on *Athey*, had gotten it wrong; that a defendant should only be responsible for the portion of damages which were caused by the actionable wrong of the defendant. However, one needs to be careful in reading the *Blackwater* decision so widely. This was recently confirmed in the decision of *Hutchings v. Dow*.[61]

In *Hutchings*, the British Columbia Court of Appeal distinguished the *Blackwater* facts on the basis that in *Blackwater* there was evidence to suggest, that absent the sexual assaults, the plaintiff still would have suffered from serious psychological difficulties based on the other abuse he had experienced.[62] While not entirely explicit, *Blackwater* had therefore applied a type of "crumbling skull" deduction to the award; allowing the defendant to avoid compensating for effects that would have occurred anyways.

---

[58] [2005] 3 S.C.R. 3 (S.C.C.) [*Blackwater*]

[59] *Blackwater*, see note 58 above at para. 74.

[60] *Blackwater*, see note 58 above at para. 82.

[61] [2007] B.C.J. No 481 (C.A.) [*Hutchings*]

[62] *Hutchings*, see note 61 above at para. 14.

The court in *Hutchings* also provided another clue to the assessment of damages in multiple tort scenarios. They found that in the circumstances before them, the depression suffered by the plaintiff was a non-divisible injury, caused by the melding of both a motor vehicle accident and subsequent assault.[63] In this type of situation, on the basis of *Athey*, a defendant is liable for the whole of the injury, even if they were not the sole cause of the injury (and even where other tortious causes exist).[64] Thus, they said, "it was not possible (or logical) on the evidence to determine [the plaintiff's] original position with respect to the depression in the absence of the car accident."[65]

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

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

---

[63] *Hutchings*, see note 61 above at para. 11.

[64] *Hutchings*, see note 61 above at para. 11.

[65] *Hutchings*, see note 61 above at para. 15.

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

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

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

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

GENERAL CONCLUSION

The true aftermath of *Athey* was that courts struggled to get causation right because *dicta* in *Athey* had confused the proper approach to questions of causation. As a result, a confusing and often times conflicting body of law developed. While the law has recently been infused with

more substantive meaning on the issue, it remains to be seen whether any true change will result or whether courts will continue to make inferences about causation under the new guise of "fairness and justice." The *Hanke* decision may also cause confusion because of its failure to clearly distinguish between the tests for "material contribution" and "material increase in risk".

With respect to multiple tortuous causes it would appear that the global assessment approach may only be applied to divisible injuries. Where it is a multiple cause scenario (tortious or non-tortious) and the injury is said to be indivisible, deductions will only be permitted for "crumbling skulls." This has the potential effect of over-compensating plaintiffs who present with a "thin skull" as they may be treated as perfectly healthy for future purposes. In the end, defendants are left with the uncomfortable feeling that they are compensating plaintiffs to a better position than they would have been in "but for" the accident.