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Update on the Law on Causation

Prepared by Gary Zabos, Heather Laing & Karyn Kowalski, McDougall Gauley LLP

Presented by Gary Zabos & Heather Laing, McDougall Gauley LLP



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**Gary Zabos, Q.C.
Heather Laing, Q.C.
Karyn Kowalski (Student-at-Law)**

The requirement that the plaintiff in a negligence claim must prove that the negligent actions of the defendant caused the damage complained of is as old as the law of negligence itself. The analysis of what “causation” means has evolved over time, and continued to present unanswered questions. Despite efforts by various Courts to bring clarity to the law in this area and establish “once and for all” the proper analysis to be taken in assessing the issue of causation in tort cases, some of the old concepts seemed to keep coming back to life. One of the most troublesome of these was the so-called “material contribution” test.

This paper will review the development of this area of the law in recent years. It is the view of the authors that recent case law suggests that while there still may be some questions waiting to be answered, the idea that the material contribution test can be resorted to as some sort of tool for relaxing the requirements that a plaintiff must establish for causation, has finally been put to rest.

1. What is Causation and why is it Important?

Classic liability analysis in a negligence case requires that a plaintiff must establish three elements on a balance of probabilities in order to succeed:

- (a) the defendant owed a duty of care to the plaintiff;
- (b) the defendant breached that duty of care; and
- (c) that breach of duty caused damage (or injury) to the plaintiff.

While the requirements may appear to be simple, the application of the tests for each element to a particular fact situation has often proved challenging. The causation element is no exception and in fact, is a particularly fertile area for raising uncertainty as to how that required element was to be proved.

Before understanding when to apply a certain test for causation, it is important to become familiar with what causation is actually referring to. In order to prove causation, it must be established that certain negligent behaviour caused injury to someone else. But what degree of proof is required? What if there are multiple negligent acts that could have caused the injury? What about the difficult cases where proof that one thing caused or led to another is not so clear? Should the plaintiff recover nothing? What about where there are multiple possible causative factors at play, and it is unclear what the “real” cause was? Should the defendant be freed from liability? These are some of the many questions that led to such uncertainty in this area.

2. The Causation Tests

Before considering the developments in this area of law, the following definitions will be helpful.

a. The “But For” Test

The general test for proving causation is the “but for” test. In applying this test, the Court asks the question “but for” (in other words, without) the negligent act of the defendant, would the plaintiff have suffered the injury or loss? If it is found that the plaintiff would not have suffered the injury without the defendant’s act or omission, causation is established and the defendant would be liable to compensate for the damage caused to the plaintiff.

For example, if a driver becomes distracted, crosses the centre line on a highway and collides with the oncoming vehicle, causing injury to the driver plaintiff, the “but for” test could establish causation. It would be found that the plaintiff would not have been injured but for the defendant crossing the line into oncoming traffic. This test is easy to state, and

is well understood. It works well in many situations, and certainly in simple ones like in the example given. But what about where things are not so clear?

b. The Material Contribution Test

It was as a result of perceived difficulties in applying the “but for” test that some Courts began, in the early 1970’s, to adopt (and adapt) a principle that had previously been part of our law but limited in its application to very particular situations, to create a modified causation test. This test, which became known as the material contribution test, was applied in situations where the Court considered that the “but for” test could not be satisfied due to a deficiency in evidence or difficulty in proof. As some Courts applied this test, the required element of causation could be established when the negligent conduct of the defendant “materially contributed” to the injury, or in some cases, to the risk of injury.

This test, when applied, raised difficulties for defendants in challenging the causation part of a negligence claim. As long as the plaintiff could satisfy the Court that the negligence of the defendant more probably than not played a contributing role in their loss or injury, the causation test was met. It was not necessary to prove that it was the primary cause or only cause of the loss or injury (or that “but for” the defendant’s actions, the loss or injury would not have occurred). Additionally, the material contribution test was suggested to apply in situations where the defendant merely contributed to the risk of injury, and not the injury itself. An example of the application of this is *Rizzi v Mavros*¹, where the court outlined the two circumstances that allowed for the material contribution test this way:

First, it must be impossible for the plaintiff to prove that the defendant's negligence caused the plaintiff's injury using the "but for" test and, second, it must be clear that the defendant breached a duty of care owed to the plaintiff thereby exposing the plaintiff to an unreasonable risk of injury and the plaintiff must have suffered that form of injury.

¹ 2007 ONCA 350 at para 12.

Effectively, so long as the plaintiff suffered from the injury, a defendant could be found liable if he or she merely exposed the plaintiff to the unreasonable risk of injury

3. The Evolution of the Causation Analysis in Canadian Law

The cases below outline the landmark decisions that have paved the way to where we currently stand on the causation analysis.

Cook v Lewis²

This case from 1951 is often considered to have formed the foundation for the eventual development of the material contribution test. Three men were out hunting and two of them fired shots, virtually simultaneously. One of the shots struck a fourth hunter, Mr. Lewis, and he sued both defendants in negligence. On the evidence, it could not be established which defendant's gun had fired the shot that injured Mr. Lewis. Clearly, one of the men had caused Mr. Lewis' injury, but the evidence did not provide any indication as to whom.

The defendants defended the case on the "but for" test, and argued that the plaintiff's claim should be dismissed, because the plaintiff could not establish that "but for" the shot they took, he would not have been injured. The argument they made was succinctly stated in the following passage from the case:

... when it is certain that one of two individuals committed the offence charged, but it is uncertain whether the one or the other was the guilty agent, neither of them can be convicted.³

Here, the plaintiff established that the defendants breached the duty of care owed, as they shot in the direction of the plaintiff.⁴ But a strict application of the "but-for" test would

² 1951 CanLII 26 (SCC), [1951] SCR 830 [*Cook*].

³ *Cook* at p 840.

result in an unjust result – the defendants would escape responsibility for the injury their negligent acts caused. The solution the Court accepted as appropriate in such a situation was to place the burden of proof back onto the shoulders of the negligent parties. If the plaintiff could prove that the two defendants were negligent and that one actually caused the loss, but it is impossible to determine which one, the burden of proof shifted to the defendants. If they could not prove which one fired the injuring shot, they were both jointly liable.

Athey v Leonati⁵

This case, decided by the Supreme Court of Canada in 1996, is often seen as the case which developed the material contribution test as an alternative to the “but for” test. In this case, the plaintiff had a pre-existing back condition prior to being in a car accident that the defendant was responsible for. The plaintiff’s physician advised him to exercise and when doing so, the plaintiff sustained a herniated disc, which resulted in permanent disability. When this case came before the Supreme Court of Canada, the only issue was whether the disc herniation was caused by the injuries sustained in the accidents or whether it was attributable to the appellant’s pre-existing back problems. The trial judge held that although the accidents were “not the sole cause” of the disc herniation, they played “some causative role” and awarded 25 percent of the global amount of damages assessed. An appeal to the Court of Appeal was dismissed.

The Supreme Court in *Athey* outlined the law this way, at paragraphs 14 and 15:

14. 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: *Horsley v. MacLaren*, 1971 CanLII 24 (SCC), [1972] S.C.R. 441.

⁴ *Cook* at p 842.

⁵ 1996 CanLII 183 (SCC), [1996] 3 SCR 458 [*Athey*].

15. The “but for” test is unworkable in some circumstances, so the courts have recognized that causation is established where the defendant’s negligence “materially contributed” to the occurrence of the injury: *Myers v. Peel County Board of Education*; 1981 CanLII 27 (SCC), [1981] 2 S.C.R. 21, *Bonnington Castings, Ltd. v. Wardlaw*, [1956] 1 All E.R. 615 (H.L.); *McGhee v. National Coal Board*, *supra*. A contributing factor is material if it falls outside the *de minimis* range: *Bonnington Castings, Ltd. v. Wardlaw*, *supra*; see also *R. v. Pinsky* 1988 CanLII 3118 (BC CA), (1988), 30 B.C.L.R. (2d) 114 (B.C.C.A.), *aff’d* 1989 CanLII 47 (SCC), [1989] 2 S.C.R. 979.

The principle in *Athey* related to how the Court should deal with a situation where there may be more than one cause of an injury, one “tortious” (the negligence) and one “non-tortious” (the pre-existing disc problem) as the Court noted that there will often be other factors contributing to an injury, or preconditions that contributed to the outcome. The Court held that as long as part of the injury was caused by the defendant, the defendant will be found liable.⁶ What did “caused” mean? It means that the tortious action contributed in a material way to the outcome. This reasoning was explained as:

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.⁷

The other significant principle from *Athey* related to the degree to which the defendant was to be held liable where there are tortious and non-tortious causes acting together to cause the injury.

The trial judge had found the defendant only partially liable, since there were non-tortious causes, despite the defendant’s material contribution to the injury. The Supreme Court rejected this, holding that instead, the defendant was liable for the entire loss. That it was not definite that the injury would not have occurred “but for” the accident was found to be irrelevant, and the material contribution test prevailed.

Walker Estate v York Finch General Hospital⁸

⁶ *Athey* at para 17.

⁷ *Athey* at para 19.

⁸ 2001 SCC 23 [*Walker Estate*].

Walker contracted HIV from blood supplied by the Canadian Red Cross Society (CRCS) and claimed that CRCS was negligent in screening the blood donors. In Walker's case, the donor whose blood infected him was only given a basic questionnaire to fill out, as part of CRCS's screening procedure. The donation was made in 1983 and the first brochure and questionnaire that asked questions regarding HIV was not introduced by CRCS until 1986.

The trial judge dismissed Walker's case for failing to show causation. He found that even if the standard of care would have been met, the donor would still have given blood, as he was in good health, believed his blood would be tested, and continued to donate after the 1984 brochure was released. It was not proven that the negligence of the CRCS caused Walker's loss.

The Court of Appeal⁹ set aside the trial judge's decision and relied on principles from *Hollis v Dow Corning Corp.*¹⁰ In *Hollis*, it was found that a manufacturer should not be able to escape liability for failing to warn physicians of risks associated with their products by simply stating that if they did warn, the physician would not have forwarded this information to the patient anyways. The Court of Appeal here applied this test in relation to the CRCS's failure to warn the donor about HIV risks and failure to properly screen the donor, and not making the patient aware of these risks. From this analysis, the Court found that CRCS was liable for failing to warn.

At the Supreme Court of Canada, it was stated that the *Hollis* analysis should not have been applied, as the facts were distinguishable. The Court of Appeal failed to consider whether the donor's conduct would have made CRCS's failure to warn irrelevant. Typically the "but for" test would be used, but it was determined to be unworkable in this case, as there were "multiple independent causes that may bring about a single harm".¹¹ The material contribution test was applied based on *Athey* and found to be satisfied on the

⁹ *Walker v York Finch General Hospital*, 1999 CanLII 2158 (ONCA).

¹⁰ 1995 CanLII 55 (SCC), [1995] 4 SCR 634 [*Hollis*].

¹¹ *Walker Estate* at para 87.

basis that CRCS's negligence materially contributed to the injury. *Athey* was cited in that "a contributing factor is material if it falls outside the *de minimus* range".¹² Here, failure to warn was found to be outside of this range.

The court held that the "but for" test would also have been satisfied, but that the material contribution test could be used here since it was impossible to establish that the donor would not have given blood had CRCS properly warned him against doing so. Ultimately, CRCS was found to have materially contributed to Walker's loss.

This rule was later summarized in *Resurfice Corp. v Hanke* as follows:

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 material contribution test may be applied].¹³

Resurfice Corp. v Hanke¹⁴

This case set the stage for the next rise of the "but for" test. Here, Hanke was a zamboni operator and was badly burned from a zamboni explosion. The gas and water tanks' filler caps were similar in appearance and close together, which caused confusion to Hanke. He filled the gas tank with hot water, and an explosion occurred. Hanke argued that the zamboni manufacturer was negligent based on this design defect and had failed to warn users of the danger.

At trial,¹⁵ Hanke did not establish that the zamboni manufacturer was liable. Causation was only briefly considered based on the "but for" test, and the primary discussion surrounded the manufacturer's liability based on reasonable foreseeability.

¹² *Athey* at para 15; *Walker Estate* at para 88.

¹³ 2007 SCC 7 at para 28 [*Resurfice*].

¹⁴ *Resurfice*.

¹⁵ *Hanke v Resurfice Corp.*, 2003 ABQB 616.

On appeal, the Court of Appeal held that the material contribution test, rather than the “but for” test, was appropriate to determine causation since there was more than one potential cause. Since Hanke’s act of inserting and leaving the water hose in the gasoline tank may have been a factor to cause the explosion in addition to the manufacturer’s design flaw, the “but for” test would not be suitable. The trial judgment was set aside and a new trial ordered.

At the Supreme Court of Canada, we see what is submitted to be a move back from where lower Courts appeared to be taking the principles on material contribution discussed by the Supreme Court in *Athey* and *Walker Estate*, illustrated by the Alberta Court of Appeal’s ruling. It was held that the Alberta Court of Appeal erred in finding that the material contribution test is to be applied when there is more than one potential cause of an injury. This broad application would prevent the “but for” test from applying in most situations, as there is frequently more than one potential cause. Rather, the Court held, the “but for” test applies to multi-cause injuries, and the plaintiff has the onus to prove that “but for” the negligent act of each defendant, the injury would not have existed.¹⁶ And further, “the ‘but for’ test recognizes that compensation for negligent conduct should only be made where a substantial connection between the injury and the defendant’s conduct is present”.¹⁷ This standard prevents liability being awarded when the defendant is not at fault.

The Supreme Court held that the material contribution can still be used in special circumstances, but this was not one of them. To use the material contribution test, it was explained that:

First, it must be impossible for the plaintiff to prove that the defendant’s negligence caused the plaintiff’s injury using the “but for” test. The impossibility must be due to factors that are outside of the plaintiff’s control; for example, current limits of scientific knowledge. Second, it must be clear that the defendant breached a duty of care owed to the plaintiff, thereby exposing the plaintiff to an unreasonable risk of injury, and the plaintiff must have suffered that form of injury. In other words, the plaintiff’s injury must fall within the ambit of the risk created by

¹⁶ *Resurfice* at para 21.

¹⁷ *Resurfice* at para 23.

the defendant's breach. In those exceptional cases where these two requirements are satisfied, liability may be imposed, even though the "but for" test is not satisfied, because it would offend basic notions of fairness and justice to deny liability by applying a "but for" approach. (underlining added)

Ultimately, the zamboni manufacturer was not held liable, as the appeal was allowed and the trial judgment restored.

Clements v Clements¹⁸

Despite the relatively clear ruling of the Supreme Court in *Resurfice*, the material contribution test continued to be applied in Canada, and once again the issue found its way back to the Supreme Court of Canada in 2012 with the *Clements* case. In this case, Mr. Clements was riding his motorcycle, with Mrs. Clements as his passenger, when they crashed while passing another vehicle. Mrs. Clements suffered a severe traumatic brain injury. The cause of the accident was disputed, as Mrs. Clements argued her injury resulted from Mr. Clements' negligence in operating the bike, while Mr. Clements argued that the accident would have happened regardless due to the rear tire deflating from a nail puncture.

The Trial Judge found that Mr. Clements' negligence did contribute to Mrs. Clements' injury, but the "but for" test could not be satisfied due to limitations of the scientific reconstruction evidence available. The material contribution test was then applied and Mr. Clements was found liable.

On appeal to the British Columbia Court of Appeal, the court overturned the trial decision, found that Mrs. Clements did not prove causation on a "but for" standard, and that the material contribution test did not apply to the circumstances.

¹⁸2012 SCC 32, at para 28 [*Clements*].

The matter then came before the Supreme Court of Canada where it was ultimately decided that the material contribution test did not apply and that the trial judge erred in requiring a scientific standard of proof (accident reconstruction) and by using the incorrect test for causation. The decision provided guidance on causation, in that it clarified and affirmed relevant principles. For example, the “but for” test was explained as follows:

The plaintiff must show on a balance of probabilities that “but for” the defendant’s negligent act, the injury would not have occurred. Inherent in the phrase “but for” is the requirement that the defendant’s negligence was necessary to bring about the injury — in other words that the injury would not have occurred without the defendant’s negligence.¹⁹

The burden of proof of causation lies with the plaintiff. In addition:

Evidence connecting the breach of duty to the injury suffered may permit the judge, depending on the circumstances, to infer that the defendant’s negligence probably caused the loss.²⁰

When inference is used to establish causation, the defendant has the opportunity to rebut the finding and prove that the accident would have happened regardless of his or her negligence.²¹

In regards to the material contribution test, the Court noted that it is not really a cause test at all, but rather a substitution for it. It is only applicable when it would be impossible to apply the “but for” test based on the facts of the case. What are those fact situations?

The Court said at paragraph 39:

What then are the cases referring to when they say that it must be “impossible” to prove “but for” causation as a precondition to a material contribution to risk approach? The answer emerges from the facts of the cases that have adopted such an approach. Typically, there are a number of tortfeasors. All are at fault, and one or more has in fact caused the plaintiff’s injury. The plaintiff would not have been injured “but for” their negligence, viewed globally. However, because each can point the finger at the other, it is impossible for the plaintiff to show on a balance of probabilities that any one of them in fact caused her injury. This is the impossibility of which [Lewis v]Cook and the multiple-employer mesothelioma cases speak.

¹⁹ *Clements* at para 8.

²⁰ *Clements* at para 10.

²¹ *Clements* at para 11.

Ediger v Johnston²²

This case is of some significance, not so much because of its reconsideration of the principles of material causation, but because it provides an early illustration of the post-Clements application of the principles from that case. This was a medical malpractice case in which Johnston, a physician, was being sued as a result of Ediger, the infant plaintiff, suffering a hypoxic brain injury during birth due to umbilical cord compression during an attempt at forceps delivery. Johnston did not inform the mother of the potential risks of this procedure and did not inquire into the availability of an anaesthetist or operating room staff to assist with an emergency caesarian section as a backup. As a result of the lack of oxygen during the birth, the infant suffered from severe and permanent brain damage and has spastic quadriplegia and cerebral palsy. It was clear to the Court that a duty of care was owed to Ediger by Johnston and that it was breached. What was not as clear was whether Johnston's negligence caused the damages or if they would have occurred regardless.

At the British Columbia Supreme Court²³, the trial judge focused on the principle that a mere possibility that the defendant's negligence caused the injury is not enough to establish causation. Instead, it must be determined that the injury would not have occurred "but for" the negligence. The plaintiff was able to prove that, on a balance of probabilities, the hypoxia would not have occurred "but for" the forceps attempt or the lack of back up. The trial judge found it unnecessary to consider the material contribution test, since the "but for" test was met.

On appeal,²⁴ the causation test applied was not at issue. Rather, the defendant contended that the trial judge erred in finding that his actions caused the injury and satisfied the test.

²² 2013 SCC 18 [*Ediger*].

²³ *Ediger v Johnston*, 2009 BCSC 386.

²⁴ *Ediger v Johnston*, 2011 BCCA 253.

The Court of Appeal held that the causation analysis is to be broken down into two parts . The first aspect was that “the plaintiff must identify the specific acts of negligence by the defendant that caused the specific harm to the plaintiff”, which is referred to as factual causation. The second aspect “requires the plaintiff to establish the proximate cause between the defendant’s negligent conduct and the plaintiff’s loss or harm”, which is referred to as legal causation. There must be factual causation and the material contribution test was not a substitute for the “but for” test in establishing that. At paragraph 78, consistent with the principles in *Clements*, the Court of Appeal held that the material contribution test is restricted to certain situations:

... where it is impossible to determine which of the negligent acts of two or more defendants created an unreasonable risk of the type of injury that the plaintiff experiences or where the “but for” chain of causation is broken by the inability of the plaintiff to prove what a person in the causal chain would have done had the defendant not committed the negligent act or omission.

Applying the “but for” test, the Court found that Johnston’s negligence did not factually cause the injury. The reasoning was that having a backup team ready would not have altered the outcome, as the harm would have occurred anyway.

At the Supreme Court of Canada, the Court reconsidered whether Johnston’s negligence caused Ediger’s injury. It was found that “the trial judge did not err by finding that Dr. Johnston’s failure to have surgical back-up immediately available before attempting the mid-level forceps procedure caused [Ediger’s] injury”.²⁵

4. Recent Causation Cases

A review of case law since *Clements* and *Ediger* suggests that the material contribution test may finally have been wrestled back to its original place in Canadian law.

²⁵ *Ediger* at para 60.

Kozhikhov v Insurance Corporation of British Columbia²⁶ is one of the recent cases which affirms this proposition. In this case, the plaintiff was injured in a motor vehicle accident and ICBC refused to reimburse him for certain medical expenses. Reminiscent of the arguments in *Athey*, ICBC claimed that the plaintiff's injuries were caused directly or indirectly by a pre-existing condition of neck and back pain, which disentitled him to the benefits he had claimed.

The trial judge applied the "but for" test and held that ICBC was liable to pay the plaintiff compensation and it was upheld on appeal. ICBC "failed to prove that, but for the pre-existing condition, Mr. Kozhikhov would not have needed the treatments then claimed".²⁷ In relation to the material contribution test, it was reiterated that it is "only applied in special circumstances, where the 'but for' test is not workable".²⁸

One of those "special circumstances" very recently arose in the decision of the B.C. Supreme Court in ***McKenzie v. Lloyd***²⁹. This case is interesting, as it illustrates the court's application of both the "but for" test and the material contribution test in considering causation of four motor vehicle accidents, each of which the plaintiff claimed had caused injury to him.

The plaintiff was involved in the first motor vehicle accident on April 27, 2012 (MVA#1), and on May 15th, 18 days later, he struck his head on the doorframe of a playhouse he was disassembling. The following day, his condition deteriorated and he was ultimately diagnosed as having suffered a stroke. The cause of the stroke was the primary issue in the case, however, after that time he was also involved in three additional motor vehicle accidents:

- MVA #2 – February 19, 2013, which was "very minor" and liability was not proven by the plaintiff;

²⁶ 2015 BCCA 515 [*Kozhikhov*].

²⁷ *Kozhikhov* at para 67.

²⁸ *Kozhikhov* at para 55.

²⁹ 2016 BCSC 1745

- MVA #3 – July 29, 2013; and
- MVA #4 – May 11, 2015.

In considering causation of the injuries, the court referred to *Clements* and, on the evidence, found the plaintiff had established that it was “more probable than not” that MVA#1 had caused the stroke and that “but for” this MVA, he would not have suffered a stroke³⁰.

With respect to the third and fourth accidents, the court held as follows³¹:

To establish causation for MVA#3 and MVA#4, I consider the “material contribution test” as affirmed and explained in *Resurfice Corp. v. Hanke*, 2007 SCC 7, where the Court reaffirmed the finding in *Athey* that at times the “but for” test is unworkable: para. 18. I find in the case of these subsequent accidents (MVA#3 and MVA#4) that I cannot hold that “but for” the negligence act of each defendant the injury would not have occurred. In fact, the injuries had already occurred, and would have continued to persist, though it is impossible to say in what degree, absent the subsequent accidents. However, it is clear on the facts that in the cases of MVA#3 and MVA#4, the defendants “breached a duty of care owed to the plaintiff, thereby exposing the plaintiff to an unreasonable risk of injury”, both of which are required elements of the “material contribution test”: *Resurfice Corp.* at para. 25. The test also requires that the plaintiff suffered a form of injury which was in the ambit of the risk created by the breach.

I find this to be the case. Although the accidents did not cause the injuries outright, they both aggravated and exacerbated the plaintiff’s pre-existing injuries and ultimately contributed to his current overall mental and physical state. I find this to be within the ambit of risk created by the negligence of each defendant that led to the respective MVAs. Therefore, causation is proved for MVA#3 and MVA #4.

In summary, the court found MVA#1 had caused the plaintiff’s stroke (by application of the “but for” test) and that MVA#3 and MVA#4 had exacerbated and reactivated his symptoms, thereby materially contributing to his pain, fatigue, cognitive limitations, loss of memory, stress and depression. In apportioning liability for the plaintiff’s injuries at 90%, the court found MVA#1 caused a very discrete and identifiable injury: a dissection followed by a stroke. From this injury, the plaintiff developed chronic pain, fatigue, major

³⁰ *McKenzie* at para 113.

³¹ *McKenzie* at para 154 and 155.

depression, cognitive impairments, anxiety and other functional limitations. The defendants in MVA#3 and MVA#4 were found to be jointly liable for the remaining 10%, as the accidents and associated injuries were found to be “indivisible”.

5. Going Forward

Without another landmark decision, or a new creative approach being developed on causation, it appears that the material contribution test as a tool for easing the evidentiary burden to prove causation, has finally been put to rest, save for exceptional circumstances. The application of it is so limited, that there will not likely be an abundance of cases that will actually succeed in using it. Fortunately, there is now clarity that the “but for” test is to be primarily applied.

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