Clarifying Causation in Tort

Erik S. Knutsen
Queen's University

Follow this and additional works at: https://digitalcommons.schulichlaw.dal.ca/dlj

Part of the Torts Commons

Recommended Citation

This Article is brought to you for free and open access by the Journals at Schulich Law Scholars. It has been accepted for inclusion in Dalhousie Law Journal by an authorized editor of Schulich Law Scholars. For more information, please contact hannah.steeves@dal.ca.
This article argues that there is nothing overly confusing about the law of causation in negligence. It attempts to define the current state of causation in Canadian negligence law with a simple goal in mind: to have a clearer, more productive conversation about the law with the fundamental concepts clearly on the table.

The author argues that while the leading decisions on causation are often couched in broad-based, universal terminology to refrain from inhibiting conceptual portability, the cases can be read as a sustained continuum of conversations about causation. A cohesive framework for the law is offered by taking a longitudinal perspective and focusing on the simple themes of Canadian tort law present in the causation jurisprudence: the doctrinal tests for causation, evidence for proving causation, thin skulls, and crumbing skulls. Avoiding a case-by-case dissection approach, this article instead attempts to synthesize the relevant jurisprudence. At the centre of the analysis is the bedrock principle that the negligence system is a fault-based system which relies on proving a connection between a defendant's wrongful behaviour and a plaintiff's injury.

L'auteur avance qu'il n'y a rien qui puisse porter à confusions dans les règles de droit applicables pour déterminer le lien de causalité dans les actions en négligence. Il tente de définir l'état actuel du lien de causalité dans le domaine de la négligence en droit canadien en ayant un objectif simple en tête : tenir une conversation franche et productive sur le droit tout en définissant clairement les concepts fondamentaux.

L'auteur allègue que si même les arrêts phares en matière de lien de causalité sont souvent rédigés en termes généraux et universels pour éviter de limiter l'applicabilité des concepts, ils peuvent être lus comme faisant partie d'une continuité ininterrompu de conversations sur le lien de causalité. Il propose un mécanisme cohérent en adoptant une perspective longitudinale et en mettant l'accent sur les thèmes simples du droit canadien de la responsabilité civile délictuelle présents dans la jurisprudence sur le lien de causalité : les critères doctrinaux concernant le lien de causalité, les preuves permettant d'établir le lien de causalité et les règles de vulnérabilité (« thin skull », « crumbing skull »). Évitant de procéder à une analyse exhaustive au cas-par-cas, l'auteur tente plutôt de résumer la jurisprudence pertinente. Son analyse tourne autour du principe qui constitue la clé de voûte des règles de droit en matière de négligence, c'est-à-dire que nous sommes face à un régime de responsabilité fondé sur la faute qui exige la preuve d'un lien entre le comportement fautif de la partie défenderesse et le préjudice subi par la partie demanderesse.

* Erik S. Knutsen, Assistant Professor, Faculty of Law, Queen’s University. The author would like to thank Vaughan Black, Russell Brown, and David Chiefetz for comments and conversations about this article. The author would also like to thank Ashley Brown, Law ’09 and Emily Joyce, Law ’10 for outstanding legal research assistance. Thanks also to the Foundation for Legal Research for funding a research grant for this project.
Introduction

There is much confusion about causation in negligence law. Indeed, causation is the cause of much angst in Canadian legal spheres. Courts continue to provide what appear, at first glance, impenetrable and cryptic reasons in answer to the question: “what caused an accident?” Commentators appear perplexed by the labyrinthine judicial reasoning and philosophical soup accompanying the question: “what caused an accident?” And lawyers who are trying to guide their clients through the tort system must surely be frustrated with all of this when explaining to their clients “what caused an accident.”
Clarifying Causation in Tort

Why does causation cause confusion? Perhaps it is the economy of language with which the Supreme Court of Canada has addressed this seemingly challenging topic. Perhaps it is that the topic itself is laden with history and philosophical underpinnings which inevitably drag it from simplicity into complexity. Perhaps the doctrinal tools of causation—the “but for” and material contribution tests plus causal inferences—are deceptively simplistic for the challenging task of adjudging negligent behaviour in a complex world. Perhaps courts and commentators are taking a reductionist, hyper-literal meaning of the leading cases on causation and imbuing the text of the decisions with biblical significance. Perhaps it is all of this combined.

This article about causation in negligence law is different from past attempts at unravelling causation. It argues that there is nothing overly confusing about the law of causation in negligence. Rather than lament the confusing state of affairs or argue for a new causation test, the article attempts to define the current state of causation in Canadian negligence law with a simple goal in mind—to have a more productive conversation about the law with the fundamental concepts clearly on the table. Such clarification should help augment and streamline discussions among courts, commentators, and lawyers about this seemingly thorny subject.

To date, writings about causation in tort have focused largely on the mess

---

1. For example, the Supreme Court of Canada’s latest case touching on causation, Fullowka v. Pinkerton’s of Canada, Inc., 2010 SCC 5, has only five short paragraphs which merely reiterate, nearly verbatim, the holding in the Supreme Court’s decision in Hanke v. Resurfice Corp., 2007 SCC 7, [2007] I S.C.R. 333. Hanke itself is a remarkably short judgment, with the causation section being a very brief 12 paragraphs long.
The entire subject and how so much is confusing and undefined. This article proceeds on the foundation that the leading Canadian cases on causation should not be read like cryptic advice from isolated fortune cookies, with each word taking on ominous significance. Although the language comprising the judgments is often written in broad-based, universal terminology to refrain from inhibiting conceptual portability, the cases can be read as a sustained continuum of conversations about causation. This article aims to offer a cohesive framework to the law by taking a longitudinal perspective and focusing on the simple themes of Canadian tort law present in the causation jurisprudence: the doctrinal tests for causation, evidence for proving causation, thin skulls, and crumbing skulls. Avoiding a case-by-case dissection approach, this article instead aims to synthesize the relevant jurisprudence in a comprehensible way.


5. Here, a frank acknowledgement is due that there indeed appears to be much confusion in lower courts about basic tort causation doctrine. Some courts appear to apply both a “but for” test and, in the alternative, a “material contribution” test. (See i.e. Nattrass v. Weber, 2010 ABCA 64, where, had the plaintiff patient been regularly tested, he would have been given alternative medication). Other courts disagree on the presence or absence of causal evidence and the ability to make causal inferences. (See i.e. Barker v. Montfort Hospital, 2007 ONCA 282, 278 D.L.R. (4th) 215; and Aristorenas v. Comcare Health Services (2006), 83 O.R. (3d) 282 (C.A.); both cases with strong dissents). Whether the culprit of the confusion is the Supreme Court of Canada’s economy of language in discussing causation, the difficulty in tracing consistency in the applicability of various complex causal concepts, or the sophistry of litigants attempting to apply causation doctrine to a given set of facts, such is not the focus of this article. Instead, the article is an attempt to weave together with some cohesion the Supreme Court’s pronouncements on causation, with an eye to clarifying the landscape.
At the centre of the analysis is the bedrock principle that the negligence system is a fault-based system which relies on proving a connection between a defendant's wrongful behaviour and a plaintiff's injury.6

I. **What is Causation?**

This article is concerned primarily with cause-in-fact—the third step in a standard negligence analysis in tort which links the defendant's breach of the applicable standard of care with the harm to the victim. A court only gets to the causation stage of the negligence analysis after the plaintiff has successfully proven that the defendant owed the plaintiff a duty of care and the defendant fell below the applicable standard of care. Causation links the defendant's breach of the requisite standard of care with the production of some harm to the plaintiff. Justice Sopinka aptly defined causation in tort as "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."7 The causation step in a negligence case is often the most contentious, most expensive step. It requires the most evidence, often in the form of expert evidence. And it is probably the most heated step in the analysis simply because, in order to arrive at the causation step, the plaintiff will have already had to prove that the defendant breached the standard of care. So the plaintiff will have already established fault. The causation step builds the connection between fault and harm.

II. **The “but for” test is the default test for causation**

Despite what past case law may have appeared to suggest, the standard doctrinal test for causation in a negligence analysis remains the "but for" test.8 And again, despite what past case law may have appeared to suggest, this test works for nearly all factual circumstances. The test requires that a fact-finder ask: "but for" the defendant's negligent behaviour, would the plaintiff have suffered some injury? The defendant's negligence only has to be "a" cause, not "the" sole cause, and there may be other tortious and non-tortious causes in the mix.9 This simple test often causes much confusion because two fundamental aspects of the test are misunderstood.

---

8. As affirmed by the Supreme Court in Hanke, supra note 1, and reaffirmed in Fullowka, supra note 1.
They are misunderstood because it is forgotten that tort law is a fault-based system that relies on establishing a connection between responsibility for harm on the part of one party (the defendant) and the suffering of that harm on the part of another party (the plaintiff). Courts, commentators, and litigants would be well-served by constantly keeping this fundamental purpose in mind.

The first misunderstood aspect of the "but for" test is the fact that the causal "trigger" (if it can be called such) is the defendant's breach of the standard of care. So, to put the test in more understandable and precise terms, it asks: "but for" the defendant's breach of the standard of care, would the plaintiff have suffered some injury? Clarifying this simple detail is fundamental to the operation of the test. The "but for" test is not about discovering what factor really caused the accident, in the real world. Nor is it about discovering what really happened factually to bring about the turn of events which resulted in injury. The only purpose the test serves is to determine the link between the at-fault conduct of the defendant and the plaintiff's alleged harm caused by that at-fault defendant.

All too often, it is easy to forget that the causation inquiry in negligence law is not a forensic inquiry into "what happened." Or, one can get distracted by chasing "but for" causes down an endless chain of events. The only relevant relationships between causes and harm are those that involve the defendant's negligent behaviour and the injured plaintiff before the court. That is why a defendant's breach of the standard of care only needs to be "a" cause of the plaintiff's injury, and not the sole, independent cause. To do otherwise is to trace causal events to absurd levels of abstraction, from the events of the accident to what the defendant had for breakfast and all the way back to the "primordial slime" out of which humans evolved. The simple threshold of causal relevance is the defendant's breach of the standard of care.

An example helps to clarify the basic concepts of "but for" causation. Imagine Lucy is in a motor vehicle collision with Ethel. Lucy and Ethel were each driving their own vehicles. Ethel did not stop at a "stop" sign because she was talking on a cell phone and accidentally drove into Lucy's vehicle. Lucy was injured. To recover from Ethel in tort, Lucy must establish that Ethel's breach of the applicable standard of care was a cause of her injuries. If Lucy was also intoxicated from alcohol at the time and had also forgotten to wear her prescription glasses she was legally required to wear to operate her vehicle, the causation question still remains

the same: “but for” Ethel’s breach of the standard of care of a reasonable driver, would Lucy have suffered some injury in the car accident? The “but for” test does not switch to some other inquiry about “what happened to make this mess?” Even though there may be other causal factors at work, each operating to create an end result injury (i.e., the intoxication and the poor eyesight), the “but for” test remains steadfastly focused on the wrongful conduct of the at-fault tortfeasor. Is it Ethel’s fault that resulted in some harm to Lucy?

The second often misunderstood element of the “but for” test is the fact that the injury in question must be the result of the defendant’s conduct. This seems simple enough but, in a complex, multi-causal situation, can become confusing. The at-fault defendant is only being held responsible in tort law for the injury caused by her behaviour.\(^2\) The defendant is not being held responsible for the fact that the accident merely happened. There is a significant difference between the “happening” of an event and the causing of an injury which is, in itself, just the result of a “happening.” Tort law is only concerned with the result of the happening—the injury. In the example above, the question must be focused on whether or not, regardless of other potential causes of harm intermingled in the happening, Ethel’s breach of the standard of care is “a” cause of “some” harm. Even if Lucy’s drunkenness and her failure to wear her glasses also contributed to the end result injuries she suffered, if Lucy can prove that Ethel’s breach of the standard of care resulted in “some” injury to Lucy, she has proven “but for” causation.\(^3\) In this example, “but for” Ethel’s at-fault behaviour, Lucy would not have been injured. This is so because the negligence system is only concerned with fault-based liability.

Time and again, the Supreme Court of Canada has re-affirmed that the “but for” test is the default test to apply when faced with determining causation.\(^4\) Arguably, and despite much commentary to the contrary,\(^5\) this test works for the vast majority of tort cases. There is typically no reason

---

13. The intoxication and failure to wear glasses are dealt with using contributory negligence principles, after Lucy has proven the tort against Ethel.
14. See i.e. Snell, supra note 7; Athey, supra note 9; Walker Estate v. York-Finch General Hospital, 2001 SCC 23, [2001] 1 S.C.R. 647; Blackwater, supra note 9; Hanke, supra note 1; and Fullowka, supra note 1.
15. See i.e. Black & Cheifetz (2007), supra note 4; Cheifetz & Black (2006), supra note 4; Cheifetz, supra note 4; David, McCague & Yaniszewski, supra note 4; Black (2002), supra note 4 at 187; Beever, supra note 3; Black (2001), supra note 4; Demeyere, supra note 4; McInnes (2000), supra note 4; McInnes (1997), supra note 4; and Weinrib, supra note 4.
to reach for any novel doctrinal causation tool. Indeed, the Supreme Court has said as much in *Hanke v. Resurface* and again in *Fullowka*. One primary reason this Court may have had to repeatedly remind the legal world that the bedrock test for causation is “but for” is simply because lower courts have often confused the utility of the test with the ease of operation of the alternative test for causation in Canada: the material contribution test. That test is reserved only for instances where the “but for” test is “unworkable.”

And therein lies the problem. “Unworkable” is in the eye of the beholder. Whenever a court had a challenging causation issue, it was simply too easy to reach for the material contribution test and find causation. Commentators have consistently lamented the fact that the Supreme Court has offered little guidance as to when the “but for” test is “unworkable” and when to use the material contribution test. However, the Supreme Court arguably did just that in *Hanke*.

III. *The material contribution test: the rare exception*

There is actually some discernible judicial guidance about how and when to use the material contribution test to prove causation in negligence. One just has to start with the premise that the “but for” test is the default test and the material contribution test is the exceedingly rare exception to “but for.” It is reserved only for those instances where proving “but for” causation results in some logical impossibility that is obviously incorrect or unjust in a fault-based tort system.

The material contribution test is the doctrinal test to use when “but for” causation is “unworkable.” The test is simple in operation, and there are two remarkably stringent pre-conditions to the application of the test.

---

16. Such as: (a) the material contribution test from *Hanke, supra* note 1; (b) reversing the burden of proof to the defendant to disprove causation (as was the case in *McGhee v. National Coal Board, [1972] 3 All E.R. 1008 (H.L.)* and its short-lived Canadian progeny such as *Nowco Well Service Ltd. v. Canadian Propane Gas and Oil Ltd.*, [1981] 7 Sask. R. 291 (C.A.) and *Letnick v. Toronto, (Municipality of Metropolitan)*, [1988] 2 F.C. 399 (Fed. CA)); or (c) holding the defendant responsible for risk increase alone (see i.e. Lynda Collins, “Material Contribution to Risk and Causation in Toxic Torts” (2001) 11 J. Envtl. L. & Prac. 105 and David Gerecke, “Risk Exposure as Injury: Alleviating the Injustice of Tort Causation Rules” (1990) 35 McGill L.J. 797.

17. *Hanke, supra* note 1.

18. See *Athey, supra* note 9; *Walker, supra* note 14; *Hanke, supra* note 1; and *Fullowka, supra* note 1.

19. See i.e. *Brown, supra* note 4; *Black & Cheifetz (2007)*, * supra* note 4; *Cheifetz & Black, supra* note 4; and Hillel, McCague & Yaniszewski, * supra* note 4.

20. As has been consistently repeated by the Supreme Court of Canada in *Athey, supra* note 9; *Walker, supra* note 14; *Hanke, supra* note 1; and *Fullowka, supra* note 1.

21. What is, or is not, “unworkable” will be discussed in more detail below.

22. From the Supreme Court’s decision in *Hanke, supra* note 1.
First, it must be impossible for the plaintiff to prove causation under the “but for” test. This impossibility must be something beyond the plaintiff’s control. The Supreme Court gives the notion of “current limits of scientific knowledge” as one reason for the impossibility. Another, implied from the Supreme Court’s discussion in Hanke of the Cook v. Lewis example, appears to be when it may be practically impossible to apply the “but for” test because of the particular facts of the happening (i.e., two hunters negligently shoot at once, but it is impossible to tell which one’s birdshot strikes an incorrect target and injures someone). The plaintiff is unable to prove “but for” causation because of the inherent nature of the peculiar happening here, not because the plaintiff could obtain sufficient evidence in the circumstances but merely did not. The impossibility is thus beyond the plaintiff’s control.

The second pre-condition for the material contribution test is that the plaintiff must be able to prove that the defendant breached the standard of care, exposed the plaintiff to an unreasonable risk of injury, and the plaintiff must have suffered that type of injury. Note that the pre-condition still requires a finding of fault on the part of the defendant—the defendant must have conducted herself below the accepted standard for that particular type of behaviour.

If both of these pre-conditions are met, a court can apply the material contribution test for causation. That test operates as follows: as long as the plaintiff can prove on a balance of probabilities that the defendant’s

---

24. It is important to note here that it appears the Supreme Court of Canada was using only the factual backdrop of the Cook v. Lewis case as a hypothetical factual basis for explaining potential problems with using “but for” causation. The Court did not discuss the merits of the specific holding in that case nor the actual result of the case.
25. There is nothing more the injured plaintiff—or anyone in that circumstance at the time—could do in Cook v. Lewis to prove “but for” causation. Evidence of causation was not merely deficient or even absent: it was unobtainable at that time in history. The Plaintiff did not offer evidence to prove causation because of the peculiar circumstances of the negligence of the parties meant he could not get it. The Plaintiff cannot sensibly provide an answer to the “but for” causation question: “but for the negligence of Hunter A, would the victim have suffered some harm?” The answer is an unsatisfactory: “I don’t know, because of the simultaneous negligence of Hunter B and the particular indivisible mechanics of the acts of Hunters A and B.” One could suppose that there is an alternative result: a finding of no liability on either hunter. But the Supreme Court in Cook v. Lewis did not hold as such. By using the same factual backdrop to describe instances where the standard “but for” test is unworkable and the pro-plaintiff material contribution test can instead be utilized, the Supreme Court in Hanke appears to approve of placing the cost of accidents on those tortfeasors, like the hunters, who have breached the standard of care and whose conduct was such that the plaintiff cannot prove causation through no fault of his or her own.
breach of the standard of care materially contributed to the plaintiff’s injury beyond the *de minimis* range, causation is proven.  

The point to emphasize is that the use of material contribution as a doctrinal test for causation is severely restricted and rare. “But for” will almost always work to answer the causation question about a particular case, and the answer depends upon the sufficiency of the evidence. The material contribution test has nothing to do with the number of potential causes, the complexity of the case, the number of parties, pre-existing conditions, crumbling or thin skulls, or anything other than the defendant’s breach of the standard of care in relation to the plaintiff’s resulting injury. But the problem with the material contribution test is that it usually works in favour of the plaintiff. One can almost always find causation against the defendant whose behaviour increased the risk of harm to the plaintiff. In essence, material contribution has the potential to create liability for breach of a standard of care plus risk creation.

Perhaps there is nothing wrong with that. Perhaps more than any other doctrinal tool, material contribution gets closer to working justice in that small subset of cases where appropriate. Jane Stapleton has recently argued that causation in negligence is plagued with problems largely for structural reasons of the concept itself—there is no way to communicate cause other than in a dyadic, all-or-nothing fashion—either a defendant’s negligence is a cause of harm or it is not. She proposes that causation instead be examined in terms of causal “involvement” of the defendant’s negligence, with that negligence being one factor in a complex set of events. Measuring and assessing “involvement” on a causal continuum instead of a reductionist cause/no cause arbitrariness perhaps gets closer to the factual truth when one is faced with an already negligent defendant whose negligence is but one cause in a realistic panoply of possible causes, both tortious and non-tortious. The Supreme Court’s approach to material contribution, with its emphasis on fault-centred risk creation, gets closer to Stapleton’s notion of involvement as a solution to logically impossible causation cases like circular and dependency causation cases.

27. *Athey, supra note 9; Walker, supra note 14; Hanke, supra note 1; and Fullowka, supra note 1.
29. See Jane Stapleton, “Choosing What We Mean By ‘Causation’ In the Law” (2008) 73 Mo. L. Rev. 433.
IV. When is “but for” unworkable? Circular and dependency causation

1. Examples of “but for” unworkability

The Supreme Court in Hanke provides two examples of when “but for” is “unworkable” and it is therefore permissible to resort to the material contribution test. The first is the Cook v. Lewis “circular causation” situation, where it is impossible to tell which of two potential tortious sources caused the harm to the plaintiff. In Cook v. Lewis, two hunters simultaneously negligently shot at what they thought was a bird. Instead, one hunter’s birdshot struck a third person. It was impossible to tell what shot came from which gun. Even modern forensic ballistic science would be hard-pressed to identify from which firearm the shot pellets came, assuming the same shot size was used by each hunter. Hence, there is a real limit to the scientific knowledge for uncovering causation. The “but for” test leads to an absurd result in this case, knowing at the very least that both hunters are at fault. One asks “but for the negligent shooting of hunter A, would the plaintiff have been injured?” The response is unknowable because of the actions of hunter B. One would respond “perhaps, because hunter B may have been the one whose shot struck the plaintiff.” When one then returns the question about hunter B, one gets the same circular response: “but for the negligent shooting of hunter B, would the plaintiff have been injured?” One would respond “perhaps, because it may really have been hunter A whose shot struck the plaintiff.”

The causal response is circular because the plaintiff knows that one of either hunter A or B was a cause of the harm, and one of either hunter A or B was not but, because causal analysis only accommodates focusing on one hunter at a time, the result is the unsatisfactory answer: “impossible to tell without knowing the answer for the other potential tortfeasor.” Both hunters were at fault, and it is obvious one hunter’s shot connected with the plaintiff and resulted in some harm. If not for both hunters acting negligently and shooting at once, the plaintiff would not be in such an impossible circular proof position. In a “one hunter” scenario, the answer is simple: liability for that hunter. But in the “two hunter” scenario where only one hunter’s birdshot connects yet each is just as negligent as the other, it makes little sense for the causation answer of “impossible to tell” to lead to a finding of no liability when the victim was certainly shot by one of the two negligent hunters. The key to identifying a circular causation situation is that there is nothing the plaintiff can do to adduce evidence pointing more to one causal source than the other. The evidentiary frustration is one about identity of the causal source. It is not that there was merely not enough evidence adduced to prove identity. There must be no evidence
available to prove identity because of the unique circumstances of the case. This evidentiary stalemate is not the fault of the plaintiff—proof is merely unobtainable due to how the accident happened.

The Supreme Court’s words in Hanke are likely trying to express that, in instances where there is complete circular logic which makes the “but for” test unanswerable, like in cases where it is impossible to prove which one of two or more tortious sources caused the plaintiff’s injury, one can reach for the material contribution test to find causation. It is a question not of “how much” but of “which one.” The Supreme Court is not saying, however, that the material contribution test applies to any case where there is more than one tortfeasor. That was the mistake previous courts kept committing. Rare is the case where a fact scenario with multiple tortfeasors requires the material contribution test. McLachlin C.J.C.’s example of Cook v. Lewis is likely trying to communicate that, in instances of “circular causation,” where the “but for” test produces an endless circular answer that is unsatisfactory because one potential causal source is certainly a cause of harm, one can use the material contribution test as long as both pre-conditions are met.

The second example in Hanke where the material contribution test is suitable to use involves a chain of multi-party actions, each depending on the other, in a situation of “dependency causation.” The “but for” test may be impossible to prove when one must determine what a party would have done had the defendant not been negligent, and thus how that party’s decision affects the plaintiff’s resulting injury. The example the Court gives is Walker v. York Finch Hospital,30 a case where it may have been impossible to prove “but for” causation.31 In that case, it may have been impossible to prove that, but for the negligent screening of blood donors by the defendant blood collection service, a person with HIV-infected blood may not have donated the infected blood which eventually injured the plaintiff. The causal link between the at-fault defendant and the injured plaintiff is thus mediated by the action of a third party. This “dependency causation” necessarily relies on evidence of causation beyond the relationship between the at-fault defendant and the injured plaintiff, and is potentially very difficult to obtain.

31. In fact, the Court was able to find “but for” causation in this case because there was evidence from the donor to prove, on a balance of probabilities, that the blood donor would not have donated blood had the defendant properly implemented screening procedures.
An example of a third case not mentioned in Hanke\textsuperscript{32} which does pass the two pre-conditions to the material contribution test is the House of Lords case of Fairchild \textit{v. Glenhaven Funeral Home}.\textsuperscript{33} This is a case of circular causation, where the plaintiff ran up against an impossibility with the “but for” test because of multiple potential tortious causes and an inability to prove which of the tortious causes (all negligent defendants) was a cause of his injuries. The plaintiff worked at multiple asbestos operations over a period of time. He contracted mesothelioma. This disease can be caused by the inhaling of one single fibre of asbestos. The employers all breached the applicable standard of care in keeping unsafe work environments. The plaintiff could not prove “but for” one employer, he would not have suffered some injury. There were multiple negligent employers and it was impossible, based on current scientific limits, to prove at which employer he inhaled the asbestos fibre. Proof was beyond the plaintiff’s control, but the plaintiff knew he inhaled the asbestos at one of the potential tortious employers. Again, because the causal analysis is structured to focus on one tortfeasor at a time, this scenario also leads to circular causation responses. The plaintiff, however, could prove breach of the standard of care, exposure to risk, and the fact that he contracted the very disease foreseeable by exposure to the ambit of such risk. Thus, in Canada, this type of case fits with the application of the material contribution test. In Britain, the House of Lords adopted a modified version of the test, holding that exposure to risk was sufficient proof of causation in this special case of mesothelioma.\textsuperscript{34}

Another example from the Supreme Court of Canada is a hypothetical from the facts of Athey \textit{v. Leonati}.\textsuperscript{35} In that case, the plaintiff suffered two separate car accidents and then later experienced a disc herniation while doing mild exercise. He also had pre-existing degenerative disc disease. Major J. indicated that if either of the accidents alone, or the pre-existing back condition alone, were sufficient to cause the ultimate disc herniation, and there was no evidence indicating one potential cause was more likely the cause than the other, then the application of the material


\textsuperscript{33} \textit{Fairchild v. Glenhaven Funeral Services Ltd.}, [2002] 1 UKHL 22.

\textsuperscript{34} The concept has since been expanded to apply in England to a case where the plaintiff’s injury from asbestos dust could have from one of three potential causes—either of two negligent employers (both tortious causes) or the plaintiff’s own contributory negligence when he exposed himself to asbestos dust at work (a non-tortious cause). \textit{See Barker v. Corus}, [2006] UKHL 20.

\textsuperscript{35} \textit{Athey}, \textit{supra} note 9.
contribution test would have been appropriate. This would be a case of circular causation, where it is impossible to tell which of the equally plausible but mutually exclusive potential causes are a cause of the loss. It is no different than the *Cook v. Lewis* scenario described in *Hanke*. Two potential tortious causes—two accidents—plus a non-tortious cause—the pre-existing condition—would all be equal candidates for being a cause of the plaintiff’s ultimate injury. The key here is that the hypothetical presumes that each cause alone may have been sufficient to cause the harm. It is a question not of “how much” but of “which one.” The problem is that, without definitive evidence on a balance of probabilities of one of the three causes being a more likely cause, the “but for” test becomes circular. It is equally either this cause or that cause or the other cause, but not all three.

The “but for” test thus appears to be unworkable in instances of circular causation and dependency causation. Both of these types of causation situations are beyond the plaintiff’s control—they just happen. They therefore fit the first pre-condition. Neither scientific information nor anything within the plaintiff’s control can assist in either solving which hunter shot the plaintiff or what a third party blood donor may or may not have done had a blood agency properly informed its donors.

The second pre-condition in *Hanke* cements the fault-based causal connection that is central to tort law. It avoids the unfortunate result of finding parties liable when there is no wrongdoing on the part of the party. There must at least be fault—breach of a standard of care. The second pre-condition requires a showing of a breach of the applicable standard of care, and exposure to some risk, with the foreseeable injury resulting. Each example above matches this pre-condition. The hunters in *Cook v. Lewis* both breached the standard of care of a reasonable hunter in firing in the vicinity of an unsafe target. These breaches increased the risk of being shot, and the plaintiff was shot. In the *Walker* example, the blood agency breached the applicable standard of care of a reasonable blood agency by not properly screening and informing its donors. “But for” appears to fail in instances of circular and dependency causation, two admittedly rare factual circumstances. But is that the limit of material contribution? If so, it is a very restricted test. The answer lies in an examination of when the “but for” test does work.

---

36. In the case itself, the evidence adduced proved that it was necessary to have both the accidents and the pre-existing condition for the ultimate disc herniation to occur. The herniation would not have occurred “but for” the accidents happening as well. See Athey, supra note 9 at para. 41.
2. When “but for” works
To discern when “but for” is unworkable, it is strangely revelatory to learn that the Supreme Court jurisprudence about the material contribution test never actually applies the test. It is also strangely revelatory to learn just how often “but for” works. This can only mean that the material contribution test is quite rare and truly reserved for practical proof impossibilities like circular causation and dependency causation. By proceeding with that concept in mind, the jurisprudence about causation becomes that much more clear.

a. Sufficient evidence
“But for” works when there is enough evidence to prove, on a balance of probabilities, that the defendant’s breach of the standard of care was a cause of the plaintiff’s injury. The reverse is also true. “But for” works when there is insufficient evidence to prove, on a balance of probabilities, that the defendant’s breach of the standard of care was not a cause of the plaintiff’s injury. The logical answer, whether in favour of the plaintiff or defendant, is usually the result. The material contribution test is not a solution for evidentiary insufficiency. Plaintiffs must still prove causation on a balance of probabilities. The only instances “but for” does not work are in instances where there is insufficient evidence to prove “but for” causation and there is either circular or dependency causation.

The Walker v. York Finch Hospital example fits this pattern. Recall that this was the factual example that the Supreme Court in Hanke cited as a possible situation where the material contribution test would be suitable to apply. But, in this specific case, there was actual evidence from the blood donor which established, on a balance of probabilities, that the blood donor in this case would not have donated blood had he been sufficiently warned by the negligent blood agency. There was no need, in this specific case, to reach for the material contribution test. “But for” was satisfied as follows: “but for” the negligent blood agency’s failure to warn the donor, the donor would not have donated infected blood and the plaintiff would not have been injured. The case would be markedly different if there was no evidence from the donor at all. Assume the donor was unavailable as a witness. This would create a situation of dependency causation, because it would not be the plaintiff’s fault that the donor—a non-party to the lawsuit—was unavailable to testify what he would have done had he been properly warned. “But for” breaks down. “But for” the blood agency’s

37. The “but for” test was applied by the Supreme Court of Canada in Snell, supra note 7; Athey, supra note 9; Walker, supra note 14; Blackwater, supra note 9; and Hanke, supra note 1.
negligence, it is unknowable as to what the donor would have done. Material contribution is an appropriate test here to fill in the causative gap. Otherwise, the “but for” test is suitable for all instances where there is enough evidence to prove causation on a balance of probabilities. While that seems obvious, the concept often explains why courts find the causation issue in favour of defendants: the defendant successfully rebutted the plaintiff’s causation evidence on a balance of probabilities.

b. Multiple negligent parties
“But for” also works when there are multiple negligent parties. Merely adding more negligent characters to the torts story does not attract use of the material contribution test, whether or not each may have separately, or in conjunction, harmed the plaintiff. The only time “but for” fails is in the circular causation scenario where there are multiple exclusive potential tortious causes of an injury and the plaintiff, through no fault of her own, cannot prove which one of the causes was “a” cause. If multiple defendants all potentially harm the plaintiff, a court can perform a “but for” test on each negligent actor.

c. Multiple potential causes
Cases involving multiple potential causes, whether tortious or non-tortious, nearly always satisfy the “but for” test unless there is a contest of mutually exclusive potential causes which results in circular causation, as in the Cook v. Lewis example in Hanke, or unless there is dependency causation, as in Walker. There are nearly always multiple potential causes for any plaintiff’s injury. Sometimes the causes are the results of negligent behaviour, as described in the section above. Sometimes the causes are unrelated to the negligence of the defendants but occurring in nature or internally within the plaintiff. Sometimes there is a combination of these two classes of causes. Regardless, the “but for” test is adequate unless one of the two exceptions in Hanke appears in the causal matrix. The answer to the “but for” question most often rests not on causation but on evidentiary sufficiency and the plaintiff’s ability to prove causation on a balance of probabilities.

Take Snell v. Farrell as an example of a case involving two potential causes of a plaintiff’s injury. Dr. Farrell negligently performed an operation on Mrs. Snell’s eye by continuing the operation despite noticing some bleeding. Mrs. Snell was a diabetic and prone to vascular problems. At some point between while Dr. Farrell was negligently operating on Mrs. Snell’s eye and a subsequent follow-up appointment months later, Mrs. Snell suffered a stroke at the back of her eye and went blind. It was impossible for Mrs. Snell to prove on a balance of probabilities that Dr.
Farrell's breach of the standard of care was a cause of her injury. There was the other competing cause—the stroke. That, too, could have been a cause of her injury. The “but for” test here still works but the problem is an evidentiary one, not something wrong with the doctrinal test for causation. It is important to note that the focus of the inquiry is not on whether or not, but for the diabetic stroke, would Mrs. Snell have been blinded. The inquiry is only focused on the negligent behaviour as a cause of Mrs. Snell's injuries. The stroke was not on trial. Dr. Farrell was.

The Supreme Court's solution, as discussed in greater detail below, was to allow an inference of causation as long as Mrs. Snell could adduce some evidence implicating Dr. Farrell's negligence as a possible cause of her harm. This inference is nothing more than an evidentiary short-cut to proving standard “but for” causation. As “but for” causation requires proof on a balance of probabilities, the inference gets the plaintiff from “some evidence” to “sufficient evidence.” Of course, a defendant is free to rebut the inference with competing evidence.

The point here is that, even in cases of multiple potential causes, whether tortious or non-tortious, the “but for” test can answer the causal question. Issues of evidentiary sufficiency are just that—they are not indicative of problems with the “but for” test itself.

d. Successive and cumulative injuries
Successive and cumulative injury cases, including those involving pre-existing conditions, can also satisfactorily meet the “but for” test. The test becomes more a question of sufficiency of proof and damages than one of causation. For example, in the Athey case, there was evidence that both successive accidents plus the pre-existing degenerative disc disease were necessary conditions for the ultimate disc herniation to occur. However, if it were the case that accident #1 caused some damage to the plaintiff, accident #2 some additional damage, and the pre-existing condition itself would have eventually led to the disc herniation, the tort concepts of restoration and responsibility act as gatekeepers on liability, not the law of causation. Tort law is designed to put the plaintiff back in the position he was in before the tort. Furthermore, negligent defendants are only responsible for the harm their negligence caused, no more and no less.

“But for” operates just fine when one recalls that the defendant's negligence need only be “a” cause, not “the” cause. “But for” the defendant's negligence in accident #1, the plaintiff would not have experienced “some” injury. Causation is proven for defendant #1. “But for” the defendant's negligence in accident #2, the plaintiff would not have experienced “some” additional injury. Causation is proven for defendant #2. The fact that each
defendant would be responsible to pay for only what damages he caused is a damages question. It is not a causation question. Each defendant caused some injury to the plaintiff. The particular damages each caused are sorted out as contributions in the damages phase of the inquiry. Causation itself is never divisible because defendants’ negligence need only be “a” cause of “some” harm. Only damages doctrine allows rateable proportions of responsibility to pay for harm.

As for the pre-existing condition, the same principle applies. If the plaintiff would have been in the same injured state as a result of his pre-existing condition at some point in the future, that consideration is left for the damages phase. This is the crumbling skull doctrine, discussed more fully below. It is not an appropriate inquiry at the causation phase for one simple reason: the pre-existing condition is not on trial. The negligent defendants are. Tort is concerned with linking fault-based behaviour with harm. The pre-existing condition cannot be a negligence-based cause. It has no fault but is internal to the plaintiff. Its impact is taken into consideration at the damages phase, as a contingency, where the defendants’ proportional responsibility to pay for the plaintiff’s ultimate harm is reduced because the plaintiff would have suffered the harm at some point, without the involvement of the defendants’ negligent behaviour.

“But for” causation is therefore not complicated in successive or cumulative injury contexts when one focuses solely on each actor and each actor’s role in the causal story. The confusion results when one forgets two things: first, that it is a defendant’s breach of the standard of care that is the locus of the causal inquiry, and second, that a defendant’s negligence need only be proven to be “a” cause of “some” injury to the plaintiff. The damages phase of the negligence inquiry does the work of sorting out responsibility among potential causes, whether separated by time and space or by actor or by internal causes. It does so by adhering to the tort principles of restoration and responsibility. Causation is not affected.

e. **No breach of the standard of care**

This is somewhat of an obvious ringer category, but deserving of mention. One cannot have a “but for” causal inquiry if the defendant did not first breach the applicable standard of care. This was the case in *Hanke*. Causation is reliant first on proof of fault on the part of the defendant. Absent that wrongdoing, one never gets to the causal analysis.

In *Hanke*, the manufacturer of the ice-resurfacing machine was found to have adhered to the applicable standard of care in designing the spigots with which one refuelled and re-watered the machine. When the operator tried to put fuel into the water spout and the machine exploded,
the ultimate resulting injury was not the consequence of any negligent behaviour on the part of the machine manufacturer. There was no breach of the standard of care to complete the “but for” inquiry. It could be said that, for real-world but not for tort purposes, the accident was “caused” by something other than the negligence of the defendant. In this case, the sole cause of the accident was the negligence of the plaintiff (i.e., the plaintiff was 100% contributorily negligent). To prove the initial tort, the “but for” test does not inquire about any other factor as causative other than the defendant’s breach of the standard of care. Hence, no breach means no causation. So the “but for” test is entirely workable in situations where the defendant did not breach the applicable standard of care or, alternatively, where the plaintiff is 100% contributorily negligent because the causation step cannot be proven without breach of the standard of care from the defendant. This proves that the defendant’s negligence could never have been “a” cause.

3. A note on “current limits of scientific knowledge”
The Supreme Court’s noting in Hanke of “current limits of scientific knowledge” as one possible reason for “but for” causation being beyond the reach of the plaintiff to prove requires some clarification. The statement must be read in the context of what the Supreme Court was trying to say: in order to depart from the standard “but for” test, the test must be unworkable for circular or dependency causation reasons, neither of which is the fault of the plaintiff.

“Current limits of scientific knowledge” should not be read out of context to mean that the material contribution test is appropriate in any case where the science involved is difficult, complex, or “just not there yet.” Frankly, that is just about any case where personal injury is involved. The science of medicine as it relates to the interaction of disease, medication, and trauma on the body is more of an art than a science. It is constantly evolving. Indeed, one might argue it will always have current limits that soon get eclipsed by future, unknowable limits. But the Supreme Court’s statement is nothing more than an example of one reason why there may be a logical impossibility in proving causation with the “but for” test. It is an explanatory reason, so to speak, for the existence of circular causation. It is not a reason to turn to the material contribution test. It is certainly not a gatekeeper for the material contribution test. The gatekeeping function is met by the two pre-conditions which must be satisfied in instances of circular or dependency causation.

The Cook v. Lewis and Fairchild examples solidify this interpretation about the limits of science. In 1951, the current limits of scientific
knowledge were (and arguably today are still) such that no one could tell definitively which pellets came from which shotgun. Hence, there was circular causation as to which of the two defendants was a cause of the plaintiff's harm. The material contribution test was therefore the appropriate test. The limits on science are not the excuse for the test but merely an explanatory reason for the circular causation problem—it is not within the accident victim's control that no ballistics science can deduce from which shotgun came which pellet. If however, each hunter in the case were instead using rifles and firing bullets as ammunition instead of using shotguns and firing pellets as ammunition, modern ballistic tests can identify the firearm from which one single projectile bullet was shot. In that instance, causation would not be beyond current limits of scientific knowledge and the “but for” test works.

In Fairchild, the current limits of scientific knowledge prevented one from knowing from which employer the single asbestos fibre came. Again, the limits of science are not causative of the logical impossibility, but merely the explanatory reason for its current existence.

To apply the material contribution test, one must first have either a situation of circular or dependency causation. These situations may change over time, as the world gets increasingly complex or, inversely, increasingly explainable by science. Causal information is not static from case to case as science can simultaneously allow more or less reliable information into evidence. The point of including “current limits of scientific knowledge” as a possible reason for resulting circular or dependency causation was merely to signify to litigants that proof potential changes as knowledge in the world changes. But the doctrinal tests for causation remain the same.

The material contribution test is thus the judicial loophole designed for those particularly strange and difficult cases where everyone knows that to deny the plaintiff the ability to prove the tort based on causation, in the wake of solid evidence of negligent behaviour on the part of the defendant, is just plain wrong. The Supreme Court in Hanke has set up some important pre-conditions to the test. There must be first a logical impossibility in proving “but for” causation. The examples given by the Supreme Court include both circular causation and dependency causation. Perhaps there may be more. But these are the present examples. Second, the plaintiff must prove breach of the standard of care (which is nothing new), plus the fact that the breach exposed the plaintiff to an unreasonable risk of injury and the plaintiff suffered such an injury.
V. Causation and evidentiary sufficiency

As has already been mentioned, one great source of confusion about the law of causation in Canada likely comes from the fact that much of the Supreme Court’s pronouncements on causation have really not been about altering traditional legal doctrine but instead about explaining evidentiary sufficiency—what it takes to prove causation. This was implicit in Hanke, Athey, and Walker, as each of those cases proceeded with the “but for” test, each re-affirmed the “but for” test as the default causation test, and each had sufficient evidence to determine “but for” causation on a balance of probabilities. Canada’s most influential case about causation, Snell v. Farrell, is really an evidentiary roadmap for causal proof in situations where rigidity does no more than complicate things. It does not alter the standard “but for” test nor does it require anything less than proof of causation on a balance of probabilities. What the case does is target evidentiary sufficiency in real-world litigation.

1. “Robust and pragmatic” causal inferences: the causal draw

The Supreme Court in Snell v. Farrell set rules for dealing with causal proof problems. These rules still operate under the principle that there must be a fault-based causal inquiry and such inquiry requires proof on a balance of probabilities. The proof level was not altered, nor was the requirement for a finding of fault. In Snell, physician Dr. Farrell negligently performed an operation on Mrs. Snell’s eye. At some point during or after the operation, Mrs. Snell suffered a stroke which may have resulted from her prior diabetic condition. Mrs. Snell became blind. Mrs. Snell could not muster enough evidence to determine that, of the two potential causes—the negligence of Dr. Farrell (the tortious cause) or the pre-existing condition (the non-tortious cause)—it was more likely than not Dr. Farrell’s negligence that resulted in her blindness. Cause here was ambiguous. What Mrs. Snell did have was some evidence that Dr. Farrell’s negligence could have been a cause of her injury. This point is key.

Justice Sopinka wrote that, as long as a litigant can muster “very little affirmative evidence” implicating the defendant’s breach of the applicable standard of care as a cause of the plaintiff’s injury, a court was entitled to draw a causal inference as against that defendant. That

38. In Athey, supra note 9 and Walker, supra note 14 causation was proven; in Hanke, supra note 1 it was not.
39. The author has elsewhere defined an “ambiguous cause” as one in which two or more alternative causes are present, and there is insufficient evidence to definitively prove which of two causes was a cause of the plaintiff’s injury. See Knutsen, supra note 28.
40. Snell, supra note 7 at para. 31.
inference can certainly be rebutted by evidence from the defendant, at any point.\textsuperscript{41} What the inference does is bump up the plaintiff’s level of proof from something less than sufficient (less than a balance of probabilities) to something sufficient (the level of a balance of probabilities). The process involves viewing the evidence with real-world common sense and taking a “robust and pragmatic approach to the facts.”\textsuperscript{42} In \textit{Snell}, in the presence of possible evidence of both potential causes but in the absence of evidence definitively pointing to one or the other, the Court inferred that Dr. Farrell’s breach of the standard of care was a cause of Mrs. Snell’s blindness. Justice Sopinka noted that, in cases such as medical malpractice, causation need not be proven “with scientific precision”\textsuperscript{43} to get to a sufficiency level adequate to prove causation. The causal inference does the work, in the absence of other competing evidence about causation which might rise to the balance of probabilities sufficiency.\textsuperscript{44}

What this case does, then, is assist plaintiffs with evidentiary issues in proving causation. The “robust and pragmatic approach” is not in and of itself a doctrinal causation test. Nor is the causal inference made about the evidence a doctrinal causation test. All these two techniques do is assist with augmenting an evidentiary foundation that has already been laid to some degree. In the absence of causal evidence pointing to one cause or another, courts are entitled to pin causation on the negligent cause, but only if there is no defence evidence on a balance of probabilities proving otherwise. Courts have, in the past, used causal inferences and the robust and pragmatic approach to the facts to fudge all kinds of conclusions about causation. In fact, the approach has become a bit of a causal wildcard. That was not its purpose. It does not magically produce causation where no evidence exists. It also does not assist the plaintiff in overcoming proof burdens in the face of evidence countering a favourable causation finding. Nor does it simplify a difficult causation case by circumventing the “but for” test and replacing it with an inference of causation. All it does is augment some evidence about causation to the level of a balance of probabilities, as long as there is not other competing evidence that is of a greater level of proof sufficiency, and as long as such augmentation accords with common sense.

\textsuperscript{41} And, of course, any defendant is utterly incentivized to do so.
\textsuperscript{42} \textit{Snell, supra} note 7 at para. 34.
\textsuperscript{43} \textit{Ibid.} at para. 40.
\textsuperscript{44} For an insightful analysis about the inference approach in \textit{Snell} and how that approach plays out against issues of evidentiary sufficiency, see Russell Brown, “The Possibility of ‘Inference Causation’: Inferring Cause-in-Fact and the Nature of Legal Fact-Finding” (2010) 55 McGill L.J. I (emphasizing that an informed approach to “inference causation” can be gained not just from causation theory but from evidence theory).
The spirit of *Snell v. Farrell* was to be a plaintiff-friendly assist in proving difficult causation cases in the face of inconclusive evidence. That is why the nods to common sense and the distancing from scientific precision are there. A causal inference is no more than an educated guess taking all the circumstances of the case together. The Supreme Court’s references to common sense and science are to remind other courts that this guess need not be hampered by overly rigid applications of logic or proof principles if doing so leads to absurd or troubling results. It is also a message to plaintiffs that the law of negligence does not require of them evidentiary proof to such a degree that plaintiffs must disprove causation. The causal inference assists with the plaintiff’s proof of negligence as a cause of the injury. The defendant is left to his or her own devices to rebut the plaintiff’s evidence with proof of other, non-tortious causes that are more likely than not a cause of the injury.

In *Snell*, for example, Mrs. Snell did not have to scientifically prove that her diabetic condition was not the cause of her stroke. Indeed, she could not likely prove as such. The focus of the inquiry is the at-fault conduct of Dr. Farrell. Mrs. Snell also did not have to scientifically prove that Dr. Farrell’s negligence was the only cause of her injury. All she required was “very little affirmative evidence” that Dr. Farrell’s negligence was a cause of her blindness. This, she had. What won the case for her was that Dr. Farrell could not muster more evidence than Mrs. Snell to prove that either he was not a cause or that some other cause was more likely than not the cause of her blindness. The case was an evidentiary draw, with each party having some evidence of causation but not enough to prove or disprove causation on a more likely than not sufficiency. The causal inference thus works by calling the draw in favour of Mrs. Snell, using a robust and pragmatic approach to what happened. And what is that robust and pragmatic approach? The court had, on the one hand, a woman who underwent an eye operation to help her and instead became blind. On the other hand, the court had a physician whose conduct Mrs. Snell had proven had fallen below the applicable standard of care for a physician. In calling the causal draw in a fault-based tort system, the causal ties go to Mrs. Snell. The causal inference and robust and pragmatic approach, then, are merely evidentiary tools to assist in causal draws in litigation. Nothing more.

2. *Common sense and the spirit of Snell v. Farrell*

And what of “common sense” and the “robust and pragmatic approach?” How does that fit into the causal picture? The spirit of *Snell* was to bring causal proof into reality, and away from overly rigid, scientific thresholds
of evidence. The point is this: why spend precious litigation resources in forcing parties to prove things that, in the real world, may be painfully obvious? The adversarial system can often turn the simplest dispute into a battle of the experts. Not everything requires proof to a scientific degree. In fact, much should not be proven to such a degree. Not only is it wasteful but it overly complicates what is often a simple issue. “Robust and pragmatic” is nothing more than calling for an all-encompassing, contextual and practical approach to proving causation—step away from causal rigidity if the situation demands. An elevator falls because gravity pulls it down. There may be many reasons why an elevator malfunctions, but it is difficult to imagine any of them where negligence is not front and centre as a cause. A plaintiff is often not in a position to prove much more than the fact that the elevator should not have fallen. The *Snell* spirit recalls the concept of circumstantial evidence which absorbed the prior doctrine of *res ipsa loquitur*. There are some things that, in certain circumstances and with no evidence to the contrary, are obvious and, with simple common sense, should not require complex proof. All Sopinka was saying in *Snell* was that courts should be mindful of these instances when weighing evidence in difficult causation questions.

Evidence for evidence’s sake should be avoided where a causal draw can be decided without further impossible evidentiary burdens to meet.

How is common sense applied in *Snell*? The answer lies in how a court faced with a causal draw situation takes a step back and asks the tough question: “just what really happened here?” Forcing Mrs. Snell to provide proof on a balance of probabilities when it is logically or scientifically impossible to do so is manifestly unfair. Similarly, it would be manifestly unfair to ask Dr. Farrell to disprove his own negligence as a potential cause when it is logically or scientifically impossible to do so. The common sense, robust, pragmatic thing to do is to acknowledge that Mrs. Snell, in her position as patient, could not possibly prove causation beyond what she was able. Similarly, if Dr. Farrell also did not have evidence to convince a

45. *Res ipsa loquitur*, the “thing speaks for itself,” is an evidentiary doctrine that had often been used to assist in proving causation in negligence cases where a court can infer factual circumstances simply because surrounding factual circumstances happened and it is knowable that such actions generally could not occur without the presence of negligence. See i.e. the classic case of *Byrne v. Boadle*, [1863] 159 Eng. Rep. 299 (Exch.) (plaintiff hit by sack of flour from overhead window and, even though the plaintiff could not prove what happened, the accident was held to be the fault of the bakery located above because such accidents do not normally happen except in the presence of negligence). This doctrine was replaced by the less rigid concept of circumstantial evidence, in *Fontaine v British Columbia (Official Administrator)*, [1998] 1 S.C.R. 424.

46. Lara Khoury notes that *Snell*’s “generous pro-plaintiff attitude” has been reserved for cases of “true’ uncertainty” about causation. See Lara Khoury, *Uncertain Causation in Medical Liability* (Oxford: Hart, 2003) at 171.
court on a balance of probabilities as to causation, the court ought to decide the case somehow. If there is an evidentiary draw in proving causation, ties go to Mrs. Snell in this peculiar circumstance.

The problem with the common sense, robust and pragmatic approach is that it has somehow lost its sheen in the courtroom. Courts still appear to require proof of causation on a balance of probabilities even in draw cases, and are reluctant to split the difference in draw cases. There are several reasons why this is so. The first is perhaps a simple over-use of the Snell stance on evidence. If a party adduces some evidence of causation and then asks for a common sense causal inference, the inference will not be made if the opposing party has more persuasive evidence of causation. The Snell concept has worn thin because many courts and litigants have forgotten that the purpose of causation in negligence is to link the defendant’s breach of the standard of care to its causal role in the plaintiff’s injury. All too often, courts focus not on the fault connection but instead on causation as an explanatory process for discussing “what happened.” Plaintiffs are not suing to discover what happened. The causation step is much more limited than that. The Snell concept is not an excuse for lack of causal evidence. It assists in evidentiary draws about causation in questions about fault. The second reason why the spirit of Snell is often ignored is the use of the Snell concept any time evidence about causation appears mildly complex or reliant on scientific opinion. But that is not the spirit of Snell. It is not about getting around complexity, scientific or not. Science hardly ever relies on layperson common sense. That is why it is science. Science most often will have two competing answers to a causal question. The weighing of one answer over the other only requires an appeal to common sense when there is, in fact, a draw.

The final reason the common sense, robust and pragmatic approach to the facts has fallen out of fashion may be that the overly complicated way cases are litigated has removed the facts themselves from common sense application. There is a tendency to require a scientific evidentiary explanation for everything. A court does not have to make a tough decision if an expert provides the answer, wrapped in a neat package with complicated terminology and referenced by peer-reviewed scholarship. It is far easier to believe one expert’s opinion than be required to come to one’s own common sense opinion and test it in the public sphere and appellate courts.

3. **How much evidence? Delay in treatment cases**

Nowhere is the lack of effect of Snell’s common sense, robust and pragmatic approach more evident than in delay in treatment cases which
fail for reasons of evidentiary insufficiency about causation. Recall that, in 
*Snell*, in order for an evidentiary causal inference to be made, the plaintiff
must at least adduce “very little affirmative evidence” upon which to build
the inference. There must be some evidence of the defendant’s breach of
the standard of care as being a “but for” cause of the plaintiff’s harm.
In addition, the defendant must not have adduced evidence rebutting that
presumption to a greater degree. There must be an evidentiary draw. The
important point is that the plaintiff must have some evidence—*Snell* does
not make up evidence where none exists.

A trio of Ontario Court of Appeal cases make this point. In *Cottrelle v. Gerrard*,\(^47\) a plaintiff with pre-existing diabetes suffered a leg wound and
eventually lost her leg to gangrene. Her physician delayed treatment twice.
The Court of Appeal reversed the trial judge’s finding of causation because
it held that there was no evidence from the plaintiff which proved, on a
balance of probabilities, that the delay in treatment caused the loss of this
plaintiff’s leg. In fact, the Court found that the defence expert’s testimony
proved, on a balance of probabilities, that the leg was not capable of being
saved even with treatment (and even though the treatment fell below the
applicable standard of care). The plaintiff’s problem on causation was that
she did not have evidence to satisfy, on a balance of probabilities, that
the delayed treatment caused her some injury. The Court gave credence
to the defendant’s expert, who did have a theory as to the loss. The *Snell*
principle of causal inference did not assist when there was no causal
evidence from the plaintiff and where there was definite causal evidence
from the defence.

Similar results occurred in two other cases, *Aristorenas*\(^48\) and *Barker*.\(^49\)
In *Aristorenas*, the plaintiff patient went into the hospital to have a baby. She
left the hospital and developed flesh-eating disease at the C-section wound
site shortly thereafter. As in *Cottrelle*, the majority of the Court of Appeal
for Ontario reversed the trial judge’s finding of causation because Ms.
Aristorenas adduced no evidence linking the negligent delay in treatment
she received with such delay being a potential cause of her harm (again,
even though the treatment fell below the applicable standard of care). In
*Barker*, the defendant physician also negligently delayed treatment for a
patient who was suffering from a bowel obstruction. The majority of the
Court of Appeal reversed the trial judge’s finding on causation and held
that the plaintiff did not adduce any evidence that the delay in treatment


was the cause of her bowel obstruction. The *Snell* principle was again not helpful because there was no evidentiary draw—evidence was just absent. So, the minor point to make from these cases is this: *Snell* can be helpful to a plaintiff who has at least some evidence linking negligent behaviour to causation. However, *Snell* is not helpful in the absence of any evidence on causation.

The major, and more important, point to make about these cases is this: sometimes, the *Snell* requirement of “very little affirmative evidence” runs aground of the common sense, robust and pragmatic approach to the facts. These delay in treatment cases are completely opposite to the larger spirit of *Snell* about tempering proof of causation in negligence with simple common sense. The majority of the Court of Appeal in each of the cases demanded proof of something obvious. This is precisely what courts are not supposed to do. This is the robust and pragmatic approach in reverse. The Court demanded some evidence of what appears to be a fundamentally common sense point of life: a delay in treatment can cause injury. Who could deny this? Does one require an expert to hop up on the stand and testify to something that any layperson could intuit? That is not the approach in the spirit of *Snell*. The dissenting opinions in *Aristorenas* and *Barker* spoke to precisely this issue. MacPherson J.A. in *Aristorenas* and Weiler J.A. in *Barker* both used *Snell*’s causal inference approach to find that the plaintiff had led enough evidence to conclude, on a balance of probabilities, that the plaintiff had properly proven causation. They took a common sense view of causation unhindered by the strict trappings of science. The difference in reasoning between the majority and minority in these cases, as well as between the majority and the trial judges, is the weighing of evidence.

Take each of the three cases. In *Cottrelle*, the Court demanded evidence that a particular delay in treatment did not harm the plaintiff. Recall that an at-fault defendant only has to be “a” cause of an injury, not “the” cause. Here, can a plaintiff really be put to the cost of adducing expert evidence to testify that a particular physician’s unreasonable delay in managing a diabetic patient with a gangrenous wound may have some causal role in the resulting amputation? If a physician leaves a patient unattended for an unreasonable time, what good can come of it? Does it hurt the patient? It certainly does not help the situation. Is this common sense, to demand

---

The dissenting opinions in *Aristorenas* and *Barker* spoke to precisely this issue. MacPherson J.A. in *Aristorenas* and Weiler J.A. in *Barker* both used *Snell*’s causal inference approach to find that the plaintiff had led enough evidence to conclude, on a balance of probabilities, that the plaintiff had properly proven causation. They took a common sense view of causation unhindered by the strict trappings of science. The difference in reasoning between the majority and minority in these cases, as well as between the majority and the trial judges, is the weighing of evidence.

Take each of the three cases. In *Cottrelle*, the Court demanded evidence that a particular delay in treatment did not harm the plaintiff. Recall that an at-fault defendant only has to be “a” cause of an injury, not “the” cause. Here, can a plaintiff really be put to the cost of adducing expert evidence to testify that a particular physician’s unreasonable delay in managing a diabetic patient with a gangrenous wound may have some causal role in the resulting amputation? If a physician leaves a patient unattended for an unreasonable time, what good can come of it? Does it hurt the patient? It certainly does not help the situation. Is this common sense, to demand

---

expert evidence of something that really does seem obvious in a general sort of way? If the issue in the case was whether or not the plaintiff would be in the same position in any event, that is a crumbling skull issue rightly left for the damages phase. But here, the Court chastized the plaintiff for failing to lead evidence of causation. The Court in Cottrelle demanded precisely what Justice Sopinka said was not required—scientific evidence of causation, devoid of common sense. It seems the majority of the Court of Appeal is using evidentiary process to trump common sense. Better to place an expert on the stand to at least say “something” about causation, even if it is painfully obvious to all in the courtroom (although, curiously, the plaintiff in this case did just this—and still did not have enough evidence to reach the level of a balance of probabilities, on re-weighing by the Court of Appeal).

The example is even more striking with Aristorenas and Barker. In those cases, the majority of the Court indicated that the plaintiffs had “no evidence” of causation at all. Again, could the reason there was, on the written trial record, no evidence of causation actually be because it is just common sense that, in Aristorenas, negligently leaving a woman’s wound untreated could certainly lead to some injury (flesh-eating disease or not). Or instead, in Barker, that negligently leaving a woman with a bowel obstruction unattended in the hospital could lead to loss of her bowel? How could one adduce evidence that these particular delays were not a potential cause of the resulting injuries? None of the cases fail “but for” causation, when one focuses on the fundamental requirement that a defendant’s negligence only has to be “a” cause of the plaintiff’s resulting injuries. Yet the cases fail because of an overly rigid and literal adherence to one aspect of Snell v. Farrell: the requirement of “very little affirmative evidence” on causation. The minority decisions by MacPherson and Weiler JJ.A., by contrast, do find evidence of causation with which to make an inference. In Aristorenas, for example, it is a mystery as to what the etiology of flesh-eating disease really is. But the causation question does not ask the plaintiff to prove what causes flesh-eating disease. The causation question attempts to assess whether the defendant’s breach of the applicable standard of care caused some injury to the plaintiff. How could a delay in treatment not cause “some” harm? The lesson here from the Court of Appeal in these cases must sadly be, then, that every plaintiff must be put to the cost of putting someone— anyone— on the witness stand to conjecture explicitly about causation. Because once the “very little affirmative evidence” is adduced, a plaintiff can then utilize the common sense, robust and pragmatic approach in Snell and ask for a causal inference. Of course, that
inference can, and often will, be rebutted by defence evidence. But then the issue goes to weight and not mere presence or absence of evidence at all. At the appellate level, Snell's spirit has been reversed.

VI. Thin skulls and crumbling skulls are not causation issues

Issues of the thin-skulled plaintiff and the crumbling skull plaintiff are not causation issues, though they are often confused as such, particularly because each features in the Supreme Court's Athey v. Leonati decision. The thin-skulled inquiry comes into play only after "but for" causation has been proven, at the remoteness or proximate cause stage. The crumbling skull issue is a damages question. The causation step in the negligence analysis deals with the defendant's responsibility for the plaintiff's injury occurring. Remoteness and damages steps deal with the defendant's responsibility for the extent of the harm.

The Supreme Court of Canada in Blackwater v. Plint, a case about latent psychological harms for residential school abuse, dubs the crumbling skull issue one of damages. In Blackwater, the Supreme Court held that, so long as the defendant's negligence is "a" cause of the plaintiff's injuries, causation is proven, even though there may exist other potential tortious and non-tortious causes of the injury. The defendant is fully liable for the plaintiff's injuries. At the damages inquiry, the original position of the plaintiff is considered (i.e., pre-existing conditions).

---

51. This is an answer to the problem Vaughan Black and David Cheifetz see with Hanke's restriction of the material contribution test. They argue that, because an injured patient can often only prove that the delayed treatment augmented the possibility of injury, but cannot muster proof on a balance of probabilities of such, a plaintiff in a circular or dependency causation case would lose because causation must be proven on a balance of probabilities. While that is true, their analysis may not be accounting for the causal inference in cases of evidentiary draws, thanks to Snell v. Farrell, which allows a court to augment the plaintiff's causal proof to the level of a balance of probabilities. See Black & Cheifetz (2007), supra note 4 at 252.

52. The practical effect, at least at the appellate level, is in keeping with what Vaughan Black notes as a "defendant-favouring turn in civil liability." See Black & Cheifetz (2007), supra note 4. Interestingly, in 2002, Black noted a "plaintiff-favouring drift" in the law of causation in Canada. See Black (2002), supra note 4.


54. Lewis Klar notes that the causation question in negligence is really about two distinct issues: 1. did the defendant's negligence cause the plaintiff injury? (a "yes" or "no" answer); and, 2. to what extent is the defendant's negligence responsible for the losses? (a more complex answer). Klar may not be tracking the Supreme Court here in characterizing the extent issue as one of causation. See Lewis Klar, Tort Law, 3d. ed. (Toronto: Carswell, 2007) at 408. Justice Linden dubs extent of harm issues as a remoteness/foreseeability issue (i.e. was the extent of injuries foreseeable or from another source?). Allen M. Linden & Bruce Feldthuser, Canadian Tort Law, 8th ed. (Markham: Lexis Nexis Butterworths, 2006) at 384. This, too, does not track the Supreme Court law on the issue, as noted in Blackwater, supra note 9. Regardless of what the issue is, extent is certainly different than cause.

55. Blackwater, supra note 9.
According to the Court in *Blackwater*, the defendant is only liable for the losses that flow from his negligent conduct. There is no compensation for damages the plaintiff would have suffered in any event, regardless of the defendant’s negligence. A plaintiff is only entitled to be put back in the same position he was in before the accident—no better and no worse. That is the guiding principle from *Athey*,\(^6\) reaffirmed in *Blackwater*.

The Court in *Athey* puts it as follows: the plaintiff’s position must be determined both before and after the tort. The Court must assess what the “original” position would have been, without the tort. The difference between the “original” position and the “injured” position is the plaintiff’s loss for which the defendant must compensate. This approach was confirmed by the Court of Appeal for Ontario in *Mizzi v. Hopkins*\(^7\) as regards a jury instruction, and is discussed in the section below. These, though, are questions for the damages phase of the negligence analysis.

1. **Thin skull and crumbling skull are “extent” questions**

The Supreme Court in *Blackwater* highlighted the crumbling skull principle and the thin skull principle. The thin skull rule holds that the defendant takes his victim as he finds him. If the victim is overly susceptible to harm, and suffers greater than foreseeable harm as a result of the defendant’s negligence, the defendant is liable for the entire harm, not just for harm that one might think foreseeable for a “normal,” healthy person.\(^8\) If it were the case that a plaintiff suffered greater pain, discomfort, and resulting complications than would a normal plaintiff, because of some prior predisposition or other latent health condition, the defendant is liable for that heightened reaction. This would likely translate into a higher general damages award for the injuries for which the defendant is responsible. In short, she suffered hurt more because of her innate qualities, so she can be compensated for more (if such is true—i.e., if a healthy person would have had less pain, less complications, and bounced back earlier). Again, remember that this is only directed at the harm for which the defendant is responsible, not that harm which would have occurred anyway. In *Blackwater*, for example, the fact that the sexual assault victim had prior

\(^6\) *Athey*, supra note 9.

\(^7\) (2003), 64 O.R. (3d) 365 (C.A.).

\(^8\) This concept has recently been called into question with the Supreme Court’s decision in *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27, [2008] 2 S.C.R. 114. In that case, psychiatric injury was subjected to a foreseeability threshold in order to be compensable. The entire case may be viewed as setting a minimal threshold for what is compensable injury in Canada. As long as the reasonable defendant could foresee “some” injury, the injury is compensable. If no injury at all is foreseeable, as was the case when the plaintiff in *Mustapha* suffered serious and debilitating illness after seeing a fly in drinking water, then the injury does not rise to the level of a compensable injury.
trauma before going to the school meant that the defendant’s sexual assault at school might have had a greater impact on him and the victim would be compensated more, as he was pre-disposed because of the pre-existing trauma. This was a damages question, not causation. In short, if a large reason an injured plaintiff ends up with a greater injury is because of her prior health issues, prior injuries, or prior experience “primed” her for susceptibility for this very reaction, or “set the stage” for it, the defendant is liable for the full extent of the loss. “But for” causation is proven and the question moves to remoteness to assess the “extent” of the negligent defendant’s responsibility to pay for the resulting harm.

The crumbling skull idea involves a degenerative condition which the plaintiff has pre-accident which ultimately would have resulted in the same type of injury as caused by the defendant. The accident accelerates the process of degeneration. The defendant is only liable for the effect of the accident on the degenerative process, as was held in Athey. In the typical case, a negligent defendant is responsible for the entire harm unless it can be proven the plaintiff would have suffered some of the harm in any event. The job is to carve out what harm was accident-related, and what was inevitably the result of nature. Perhaps the injuries are divisible. Perhaps not. Athey presupposes that separation of harm for which the defendant is responsible is certainly possible where some of the injuries have tortious causes and some have non-tortious causes. In Blackwater, the Court held that the effect of the sexual assault on the victim’s already damaged condition must be determined. The defendant was only liable for the damages caused by the assault. Again, this is a damages question, according to the Court.

It is therefore often simple for a plaintiff to combat a defence argument that, although the defendant breached the standard of care and that breach caused some harm to the plaintiff, the defendant should nevertheless be liable for nothing, because the plaintiff would be in the same position she is in even if the defendant’s negligence never happened. The fact remains that, in the vast majority of cases, the defendant’s breach of the standard of care caused some injuries, it perhaps caused greater injuries as a result of a plaintiff’s thin skull, and it often results in the earlier loss of the plaintiff’s productive, self-sufficient life. So the defendant’s negligence caused some damage. The question becomes one of extent. Certainly at the very least, most negligent conduct makes a plaintiff’s degeneration toward her current symptoms much more painful (thin skull) and accelerated the harm. So the extent is greater than if nature took its course (if it could ever even be proven that nature would take such an eventual course). It thus defies logic to argue that the negligent defendant would be liable for nothing. He or
she is generally liable for something, if “but for” causation is proven; the question is to what extent.\textsuperscript{59}

2. \textit{Extent of harm at the damages phase}

Courts consider factors that indicate the plaintiff's loss might have occurred regardless of the defendant's negligence. The Supreme Court in \textit{Athey} confirmed that hypothetical events such as how the plaintiff's life would have proceeded without the tortious injury need not be proven on a balance of probabilities. Courts use realistic possible contingencies at the damages phase and such contingencies are given weight according to their likelihood. It is important to note that the factors affecting the damages do not need to be established on a balance of probabilities as things that \textit{will} happen. They can be established as possibilities and if the court is satisfied that they are “real” possibilities, the court can discount the damage award to reflect them. It is irrelevant whether or not these factors are natural or tortious. If there is a measurable risk that a pre-existing condition would have detrimentally affected the plaintiff in the future, regardless of the defendant’s negligence, the principles in \textit{Athey} hold that this is accounted for in reducing the overall award at the damages phase. The plaintiff must be returned to her original position, with all the risks and shortcomings of that, and not put in a better position.

For example, if a court finds there is a 30\% chance or risk of a future event occurring which might increase damages, then 30\% of the total damages calculated for that issue may be awarded. The same principles apply for a damages reduction for future events, as held by the Ontario Court of Appeal in \textit{Graham v. Rourke}\textsuperscript{60} and \textit{Koukounakis v. Stainrod}.\textsuperscript{61}

In those cases, the Court held that the fact-finder must compare “the individual plaintiff’s anticipated lot in life after the accident with that which the plaintiff would have enjoyed but for the accident,”\textsuperscript{62} considering “real and substantial future possibilities, both positive and negative.”\textsuperscript{63}

Damages are only adjusted as per \textit{Athey} if there is a “measurable risk that the pre-existing condition would have detrimentally affected the plaintiff in the future, regardless of the defendant’s negligence.”\textsuperscript{64} The key is in establishing the “original” position as if the tort had not occurred,
and comparing it to the post-accident position. However, recall that positive contingencies can be adduced as well, even within the context of a seemingly overall negative contingency. Because these are future speculations, a plaintiff can adduce evidence that her accident, in effect, may have compromised her ability to fight the pre-existing condition. That is a compelling argument, and one which should not be ignored. That should likely reduce the contingent reduction for the inevitability factor while also increasing the level of damages as she would be categorized as a thin-skulled plaintiff. In other words, the negligent conduct of the defendant interfered with the plaintiff's ability to stave off whatever condition she was inevitably going to have in any event.

Indeed, one of the disadvantages of a defendant arguing for the application of the "crumbling skull" doctrine is that it cuts so close to appearing to be a thin-skulled plaintiff situation. It is difficult to avoid the dichotomy in a difficult case, such as where a defendant may end up acknowledging the plaintiff's thin-skulled position to get to the "crumbling skull" damages reductions. The "crumbling skull" doctrine acts to potentially decrease the damages award on a negative contingency basis. However, the thin-skulled plaintiff is entitled to greater damages for greater harm suffered because of her greater susceptibility to harm. The thin-skulled rule is not subject to any potential uncertain guesswork on its application—the plaintiff is entitled to the full extent of her damages. So, in attempting to prove the "crumbling skull" notion, a defendant may often end up adducing evidence of the plaintiff's thin skull, thus defeating the tactic in the first place.

By the same token, a crumbling skull can also have strong thin-skull attributes which can benefit a plaintiff. Assume a defendant can prove that the plaintiff would have suffered a similar condition in the future even without the defendant's negligence. Still, the plaintiff is in a position to prove that the accident has caused greater damage because it has rendered her unable to prolong the inevitable. That is the thin skull principle, in a

---

65. See i.e., *Agar v. Morgan* 2005 BCCA 579, 47 B.C.L.R. (4th) 36 (motor vehicle accident accelerated plaintiff's need for a double lung transplant which would have been required at a later time, apart from the accident); *Haney v. Malischewski* (1997), 41 B.C.L.R. (3d) 230 (B.C.S.C.), leave to appeal to B.C.C.A. refused (1999) B.C.C.A. 500 (motor vehicle accident triggered symptoms of multiple sclerosis in 26 year old plaintiff); *York v. Johnston* (1997), 37 B.C.L.R. (3d) 235 (C.A.) (motor vehicle accident triggered multiple sclerosis in 51 year old plaintiff who had symptoms of the disease but had been symptom-free for 10 years prior); and *Edgar v. Freedman* (1997), 40 B.C.L.R. (3d) 87 (C.A.) (post-accident re-growth of second brain tumor affected plaintiff's original position). Contrast these cases with *McAllister v. Sotelo*, [1999] B.C.J. No. 2132 (S.C.), where the trial court held that the plaintiff had not proven that the motor vehicle accident accelerated his multiple sclerosis. Instead, the court held the disease progressed on its own, regardless of the accident.
way. She was going downhill, but now faster, and at a more unpleasant rate. So although the time frame is shorter, the damages should be concomitantly higher. The tortfeasor, in essence, caused greater harm by the fact that the plaintiff had this condition already. It is more markedly acute in terms of discomfort, psychological upset from the acceleration, potential for reduced life expectancy, reduced working life, and reduced range of activity. That is why the cases tend to raise the level of damages award for a "healthy" individual, though they do then reduce it for a contingency based on the inevitable decline. Perhaps those courts operate under the principle of "much better to reduce an award that starts higher."

VII. What Canadian causation is not

Some commentators argue that the Canadian causation landscape should change to incorporate a causal test for risk creation alone, without a factual component implicating negligent behaviour as a cause of the plaintiff’s injury. If a defendant creates a risk and the plaintiff is exposed to the risk, risk exposure alone should be sufficient to prove causation. This perhaps goes too far past what Stapleton casts as "causal involvement." It leads instead to a sort of causal indeterminacy where proof in a fault-based tort system is on statistical risk alone. Canadian tort law is not there yet, though it is getting closer, as Russell Brown and Lara Khoury separately note. Nor is Canadian causation law yet determining causation for extra-tortious reasons. In some instances, such as in Snell v. Farrell or Cook v. Lewis, the defendant’s negligence destroys the plaintiff’s very ability to prove causation. The Canadian causation calculus, to date, does not consider a defendant’s liability to be based in any way on the defendant’s role in destruction of causal evidence.

**Conclusion: causation clarified**

In conclusion, the law of causation in Canada has often been decried as confusing. Despite the Supreme Court of Canada’s economy of language in causation cases, the law can be seen as actually quite consistent and simple, as long as one keeps at the forefront the notion that the causation test is designed to assess liability for harm caused by fault-based behaviour.

---

66. As the British Columbia cases, ibid., appear to suggest in the damages numbers.
67. See i.e., Brown, supra note 4; Collins, supra note 4; and Gerecke, supra note 4.
68. See Brown, supra note 4.
69. See Khoury, supra note 44 at 213-219. Khoury proposes a solution at 219: if a court is to compensate for increased risk, a plaintiff should have to demonstrate the link between the negligent behaviour which increased the risk and the actual realization of that risk. This proposal duly tracks the requirements of the material contribution test in Hanke.
70. See i.e. Ariel Porat & Alex Stein, *Tort Liability Under Uncertainty* (New York: Oxford University Press, 2001), and Brown, supra note 4 at 453-454.
Most of the challenges in understanding the jurisprudence about causation come from confusing the message in the cases as directing a shift in the standard “but for” causation test. In fact, most cases are instead about evidentiary sufficiency in causation. The only instances where litigants are predictably able to step outside the standard “but for” test are in situations involving circular causation and dependency causation. The spirit of Snell v. Farrell, as an evidentiary sufficiency guideline, may be missing its mark in the courts, particularly in delay in treatment cases.

A brief concluding summary of the fundamental concepts of Canadian causation law may prove helpful:

a) Negligence law is a fault-based inquiry requiring a link between breach of an applicable standard of care with some harm to an injured accident victim in order to trigger compensation for the victim;
b) The default doctrinal test for causation in negligence is the “but for” test;
c) The focus of the causal inquiry is on the defendant’s breach of the standard of care as a potential cause for some injury to the plaintiff;
d) Causation must be proven on a balance of probabilities;
e) A plaintiff need only prove that a defendant’s breach of the standard of care is “a” cause of her injuries;
f) The material contribution test for causation is a rare and exceptional test, reserved only when the “but for” test fails;
g) The “but for” test rarely fails, and currently only in situations involving circular causation and dependency causation:
   1) Circular causation involves factual situations where it is impossible for the plaintiff to prove which one of two or more possible tortious causes are the cause of the plaintiff’s harm;
   2) Dependency causation involves factual situations where it is impossible for the plaintiff to prove if a third party would have taken some action in the face of a defendant’s negligence and such third party’s action would have facilitated harm to the plaintiff;
h) If the “but for” test fails, the plaintiff must meet two pre-conditions to utilize the material contribution test for causation:
   1) It must be impossible for the plaintiff to prove causation (either due to circular or dependency causation); and,
   2) The plaintiff must be able to prove that the defendant breached the standard of care, exposed the plaintiff to an unreasonable
risk of injury, and the plaintiff must have suffered that type of injury.

i) The "robust and pragmatic" common sense approach to causation from *Snell v. Farrell* is an evidentiary sufficiency device that helps to solve evidentiary draws, providing the plaintiff has at least proffered "very little affirmative evidence" about causation;

j) If the victim is overly susceptible to harm, and suffers greater than foreseeable harm as a result of the defendant's negligence, the defendant is liable for the entire harm, not for just harm that one might think foreseeable for a "normal," healthy person (thin-skull rule)—such a concept is triggered at the remoteness phase of the negligence analysis and not at the causation phase;

k) A defendant is only liable for the extent of the plaintiff's injuries caused by the defendant's negligence (crumbling skull rule)—such a concept is triggered at the damages phase of the negligence analysis and not at the causation phase.

It is hoped that this small contribution to the overwhelming constellation of writings about causation at least serves as a facilitator in conversations about this challenging subject in tort law. In fact, the author suspects the article may, in fact, cause a little debate about causation. If so, all the better, in a continuing effort to clarify causation.