

Comment on J. Akbarali "Causation: Pick Your Theory please!", *Lawyers Weekly* (Lexis/Nexis), May 28, 2010 edition, p. 9.

<http://www.lawyersweekly-digital.com/lawyersweekly/3004?folio=9#pg10>.

The Lawyers Weekly published an article recently that has significant errors. I wrote to it pointing out some of the errors. TLW said they'd publish a letter so long as it was no more than about 450 words long. It declined to raise the limit. I declined to reduce what I sent them below about 1100 words.

The first part of this file is the correspondence, in reverse chronological order. The second part is the short version that The Lawyers Weekly said was too long and asked me to revise to about 450 words. The third part has is a longer version covering more issues.

PART I

From: Fraser, Natalie (LNG-CAN)

Sent: Thu 03/06/2010 2:53 PM

To: David Cheifetz

Subject: RE: The Lawyers Weekly - May 28/10 edition, p. 9, article by Ms. Akbarali

I've consulted with our Managing Editor, and unfortunately we will not be able to proceed with more than 450 words.

Thanks for your interest,

Natalie Fraser,

Focus Editor

The Lawyers Weekly (www.lawyersweekly.ca)

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Markham, Ont. L3T 7W8

natalie.fraser@lexisnexis.ca

From: David Cheifetz [mailto:dcheifetz@bbburn.com]

Sent: Thursday, June 03, 2010 12:15 PM

To: Fraser, Natalie (LNG-CAN)

Subject: RE: The Lawyers Weekly - May 28/10 edition, p. 9, article by Ms. Akbarali

Dear Ms. Fraser,

Are you familiar with what Emperor Franz Joseph is supposed to have said to Mozart?

I don't claim my note matches anything Mozart ever wrote, but your request isn't realistic.

dcheifetz@bbburn.com

Ms. Akbarali's article is more than 450 words. It is substantially wrong. I appreciate that The Lawyers Weekly relies on its contributors to police their own content, but it is clear enough that in this case that hasn't been adequately done. My note has 1,500 words in it now. It might be possible to reduce the piece to something in the 1000-1100 word range, keeping the issues outlined in the note. The errors I listed aren't the only problems with the article. An adequate outline of all of them requires about 5,000 words.

In any event, 450 word comment would have to be limited to one or two points - say the point of the first paragraph, the Walker Estate issue, and a statement that there are additional substantive errors which space does not permit me to outline. I am not prepared to write that sort of comment.

If you are interested in a proper response, please back to me. If not, at 450 words, no thank you.

Yours truly,

David Cheifetz

From: Fraser, Natalie (LNG-CAN)

Sent: Thu 03/06/2010 11:18 AM

To: dcheifetz@bbburn.com

Subject: The Lawyers Weekly - May 28/10 edition, p. 9, article by Ms. Akbarali

Hello Mr. Cheifetz.

Thank you for your comments on Jasmine Akbarali's article. We would like to publish them as a letter to the editor. However, we would need you to shorten your commentary down to 450 words. Please let me know if you're interested in proceeding on this basis.

Regards,

Natalie Fraser,

Focus Editor

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PART II

From: David Cheifetz [mailto:dcheifetz@bbburn.com]

Sent: Monday, May 31, 2010 6:18 PM

To: Wilbur, Tim (LNG-CAN)

Subject: The Lawyers Weekly - May 28/10 edition, p. 9, article by Ms. Akbarali

Dear Sirs:

I write about the article on p. 9 of the May 28/10 edition titled "Causation: Pick Your Theory, Please". The article contains significant errors.

The first sentence is wrong, even if it had been restricted to tort law, which it was not. However, unfortunately for the profession and doctrine, it is very easy to find decisions in cases having causation issues, even appellate decisions, where the decision was made without any reference to *Resurfice*; indeed, using terminology that predates *Resurfice*. In some of these cases, there is reason to wonder if *Resurfice* was before the court at all.

The next error is in the fourth paragraph. Ms. Akbarali is correct to say that *Resurfice* does not permit a judge or jury to find that the findings of fact satisfy both the requirements of the but-for test and the *Resurfice* material contribution doctrine. However, she is wrong to assert that plaintiffs cannot argue these two different modes of establishing legal causation in the alternative. With due respect to the Ontario Court of Appeal in *Frazer v. Haukioja*, 2010 ONCA 249 – assuming it meant what Ms. Akbarali asserts, which I doubt - this is not "sucking and blowing" at the same time, let alone at different times. It is the proper assertion of alternative theories. The assertion that there is necessarily some inconsistency in arguing the alternatives may be due to some deficiency in Ms. Akbarali's understanding of the meaning of the *Resurfice* material contribution doctrine. There is certainly reason to question the explanation given in *Frazer*, as I explain briefly below.

Whatever else the material contribution doctrine means, it is not a method by which the court makes a determination that negligence *was* a factual cause of (did cause the) injury. The doctrine is premised on the assumption that the negligence is a possible cause. It is a doctrine that permits the court to find that legal causation has been established even though the plaintiff cannot prove factual causation beyond mere possibility. I refer to two recent enough British Columbia Court of Appeal decisions: *Sam v. Wilson* 2007 BCCA 622 and *Chambers v. Goertz* 2009 BCCA 358. I return to these cases below.

The next error is Ms. Akbarali's assertion that *Fallowka v. Pinkerton's*, 2010 SCC 5 "recognized the fundamental inconsistency that comes from trying to assert both theories of causation at the same time." The Court did no such thing. It did not discuss whether any sort of "fundamental inconsistency" existed in the *assertion* of both theories. All the Court held was that the but-for test was the applicable test and that the trial judge's *Athey* material contribution based analysis and findings of fact were not capable of being understood as a valid but-for based analysis and findings of fact. *Fallowka* is also not

support for her assertion that a plaintiff “necessarily weakens the plaintiff's cause by arguing both theories.” There is no weakening, no fundamental inconsistency, provided one understands, correctly, what the but-for test is and is not, and what the material contribution doctrine is and is not. After that? It all depends on the basis for arguing in the alternative. There is, let us not forget, a distinction between asserting mutually inconsistent theories and relying on the theory established by the court's findings of fact, and arguing that both theories can apply, concurrently, to the same facts. The latter is not what either the trial judge did or the *Fallowka* plaintiffs argued.

Ms. Akbarali is correct that the ONCA said, in *Frazer*, that the trial judge “erred in applying the material contribution test after he successfully reasoned his way through the ‘but for’ test.” However, the court’s statement is based on an incorrect reading of what the trial judge did. He did not find that the material contribution doctrine applied *in addition to the but-for test and as an alternative*. He held that if he was wrong on the findings of fact that he held amounted to a cause that satisfied the but-for test, so that there was a gap in the evidence, the reason for the gap was a problem in the evidence required to establish factual causation on the balance of probability that satisfied the “impossibility” requirement of the *Resurfice* material contribution doctrine (see 2008 CanLII 42207 at para. 217-222). As such, *Frazer* differs significantly from decisions such as *B.S.A. Investors Ltd. v. DSB*, 2007 BCCA 556, *Jackson v. Kelowna General Hospital*, 2007 BCCA 129 and, of course, Ontario's own *Barker v. Montfort Hospital*, 2007 ONCA 282. In these cases, the gap in the evidence existed because the plaintiff failed to call necessary causation evidence which existed or at least could exist, or failed to adduce evidence that the causation evidence was not available (that the gap existed) for a reason that could trigger *Resurfice* material contribution.

It is worth mentioning that, if *Resurfice* did not alter the state of the law on causation, then there is authority that is binding on the ONCA to the effect that both the material contribution doctrine and the but-for test can apply to the same facts. The case is well known: *Walker Estate v. York Finch General Hospital*, 2001 SCC 23

It may be that *Frazer* makes the mistake it did about what the trial judge did because an Ontario Court of Appeal panel again misunderstood and mistated the meaning of *Resurfice* material contribution. *Frazer* states at para. 41: “Factual causation can be established in two ways: the “but for” test and the “material contribution” test. Only one of these tests will apply in any given case. The differences between the two tests was recently clarified in *Resurfice Corp. v. Hanke ...*”. Part of the quotation is capable of being understood to be correct about what *Resurfice* seems to say: that only one or the other of the two doctrines will apply to a particular set of facts. However, the quotation is wrong in asserting that the result of the application of the *Resurfice* material contribution doctrine is a finding of factual causation. The *Frazer* panel did not cite authority for this view of the meaning of *Resurfice*. However, the error is likely based on *Barker v. Montfort*, where a different panel wrote, about *Resurfice*, that “this decision simply asserted ‘the general principles that emerge[d] from the cases.’ It did not alter the state of the law on causation. Rather it confirmed that ‘the basic test for determining causation remains the ‘but for’ test’ ...” (2008 ONCA 282 at para. 51). If *Resurfice* did not

more than clarify, did not alter, the state of the law on causation, then the *Resurfice* material contribution doctrine is nothing more than a clarification of the circumstances under which the material contribution test, as declared in *Athey*, applies. *Athey's* version, whatever else it mean, was understood to be an alternative method for establishing factual causation on the balance of probability. Curiously, however, in *Fisher v. Victoria Hospital*, 2008 ONCA 759, a different panel of the Court of Appeal declined to say anything about whether or not *Resurfice* altered the law of causation, even though it cited *Barker* on another point.

The problem is that *Resurfice* did alter the state of the Canadian law on causation. It did so significantly. It changed the meaning and purpose of the material contribution doctrine. *Resurfice* material contribution is not a method of establishing factual causation. As pointed out by the British Columbia Court of Appeal in *Sam and Chambers*, the *Resurfice* material contribution doctrine "does not signify a test of causation at all; rather it is a policy-driven rule of law designed to permit plaintiffs to recover in such cases despite their failure to prove causation. In such cases, plaintiffs are permitted to jump the evidentiary gap ... because to deny liability would offend basic notions of fairness and justice: *Resurfice* ..." (internal quotation marks omitted). In addition, the text of the reasons, if taken as written, changes the meaning of the but-for test in significant ways. It is unlikely that the Court intended the latter.

Ms. Akbarali ends her article with the plea to plaintiffs' counsel to "pick your theory of causation ... please". This is a worthwhile plea. But it is nothing more than a statement that lawyers should know the facts and law applicable to their case before they go to court. The judges of this country would increase the likelihood of that occurring if they would decide, clearly, what the material contribution doctrine means. One reasons for that is because, in doing so, should the conclusion be that the material contribution doctrine is not a method for establishing factual causation on the balance of probability but, instead, is a doctrine that permits the plaintiff to satisfy the legal causation requirement of the tort in the absence of proof of factual causation on the balance, judges would have to consider two very important questions: (1) whether the compensable injury under the material contribution doctrine is the injury sustained by the plaintiff, or the increased risk of that injury and (2) whether liability for the compensable injury is solidary (the substantive meaning of joint and several) or proportional.

In England, in *Barker v Corus*, the House of Lords decided that, under its version of the material contribution doctrine – ironically a more circumscribed version of the doctrine that appears in *Resurfice* - that the extent of liability where the material contribution doctrine applies is proportional, not joint. Under the English version, ff the material contribution doctrine is the basis upon which the causation requirement of the tort is satisfied, as against a particular defendant, then that defendant's liability in tort (excluding vicarious liability for the actionable conduct of another) is the amount of the compensable damages multiplied by the percentage by which the defendant's conduct increased the risk of the occurrence of the injury which occurred. The end result is proportional liability, not solidary (joint, joint and several) liability.

It is certainly true that, sometimes, part of a loaf of bread is better than none. However, it seems to this writer that if plaintiff's counsel had to choose between 100% recovery under but-for, and partial recovery under material contribution, they might well be inclined to be very careful about what they wish for, lest they get it.

I refer readers interested in more detailed discussion of the effect of *Resurfice* on the Canadian law on factual causation in tort to my articles: Cheifetz, "*Tales of Sound and Fury: Factual Causation in Tort after Resurfice*," in 2008 LSUC Special Lectures (Irwin Law, 2009), c. 8. The Special Lectures article is a succinct enough summary of the more detailed analysis, current through mid-2008, available online at the following link: www.bbburn.com/articles/Resurfice_staus.pdf.

PART III

Comment on J. Akbarali “Causation: Pick Your Theory please!”, *Lawyers Weekly* (Lexis/Nexis), May 28, 2010 edition, p. 9.

<http://www.lawyersweekly-digital.com/lawyersweekly/3004?folio=9#pg10>.

“Since neither counsel cited the binding decisions of the Court of Appeal (or indeed, any authority at all), neither party is entitled to costs of this motion.”
Wilson v Bobbie. 2006 ABQB 22 at para. 42.

An article titled “Causation: Pick Your Theory please!” appeared, recently, in *The Lawyers Weekly* (Lexis-Nexis / Butterworths). The article appeared on the first page of the tabloid’s “Focus: Civil Litigation” feature. It is about proof of causation in tort since *Resurfice*. Unfortunately, the article contains significant errors. I deal with the most significant.

It is a good thing that the legal tabloids think it important enough to solicit, or accept if not solicited, articles about undoubtedly arcane, esoteric, metaphysical, subjects such as proof of factual causation in tort. There must be arcane *etc.* aspects to the subject because, as the Supreme Court recently reminded us, there are extensive debates which need not be catalogued. It is, similarly, a good thing that there are people who are prepared to provide that content. However, it is not a good thing where the the content is egregiously wrong and the tabloid is not willing to publish a suitable correction.

An article writer had better be very sure of his or her facts, or have somebody lower on the food chain to blame, when, in this day of online caselaw databases, the opening sentence in her article is: “Not a causation case in the country gets adjudicated without reference to *Resurfice Corp v. Hanke*”. That sentence is provably false, even if were restricted to tort law, which it was not. All one has to do is spend less than a few moments searching any of the databases.

Unfortunately for Ms. Akbarali, the profession, and the consistency of doctrine, it is far too easy to find reasons for judgment in cases having causation issues where the decision was made without any reference to *Resurfice*; indeed, using terminology that predates *Resurfice*. In some of these cases, there is reason to wonder if *Resurfice* was before the court at all. All one has to do is run a search, on any of the case-law databases, for any case with *Athey* and a significant causation term - any of cause, causation, materially contributed - in the same paragraph and without *Resurfice* anywhere in the text. For example, this search syntax: “causation /p *Athey*) NOT *Resurfice*” on CanLII for cases since January 1, 2009 produces 19 cases. Some instances are irrelevant. Many are not. The same search on CanLII done on appellate courts, only, from March 1, 2007, produces 12 cases. Some are recent. There may or may not be an implicit reference to *Resurfice* in a few of them. Again for some of them, it is possible to argue that the issue was damages

assessment and not injury causation; however, not for all of the cases. Another search example is “(negligence /p "material contribution") NOT Resurf* NOT Hanke” on CanLII which produces 10 hits just for 2010 and 33 adding 2009.

Ms. Akbarali is right to this extent: most cases in which factual causation, in tort, is in issue (other than Quebec cases) explicitly or, by necessary implication, refer to *Resurfice* in some way. Some of the references are, being polite, of questionable accuracy and utility. Others are worse. Still others, though textually accurate, might as well be quotations from the “*Necronomicon*” or, if one prefers texts that are more readily accessible, any version of Noah’s plans for the construction of the Ark or Carroll’s “*Jabberwocky*”. That is, some of the words considered separately seem to have some meaning that might be applicable in some context yet to be revealed. An unfortunate paradigm of that situation appears in *Meehan v Holt*, 2010 ABQB 287 starting para 221. Are you familiar with circumstances under such “substantial” means the same as “minor”? I’m not.

A different form of paradigm – what I call the “belt & suspenders, cover all bases, toss in the kitchen sink, and the laundry room sink, too” approach – in which *Resurfice* is mentioned, is found in *Lamont v Stead* 2010 BCSC 432 at para. 25. The trial judge wrote: “I am satisfied that the evidence establishes that the plaintiff’s neck pain was caused by the defendant’s negligence, in the sense that it directly caused or materially contributed to it. There is a substantial connection between the plaintiff’s chronic neck pain and the collision, and the plaintiff has shown, on a balance of probabilities, that but for the negligence of the defendant, she would not have chronic neck pain: see *Resurfice Corp. v. Hanke*, 2007 SCC 7, [2007] 1 S.C.R. 333.” Ontario paradigms (since Ms. Akbarali is an Ontario lawyer) of the failure to mention *Resurfice* case include *Marchand v. Jackiewicz* 2010 ONSC 1796 (March 25, 2010) and *Cartner v. Burlington (City)*, 2010 ONCA 407 (June 7, 2010). More often than not, the quotation from *Resurfice* is often the first and last time there is any discussion of doctrine.

The next error is in the fourth paragraph. Ms. Akbarali is correct to say that *Resurfice* does not permit a judge or jury to find that the findings of fact satisfy both the requirements of the but-for test and the *Resurfice* material contribution test. However, she is wrong to assert that plaintiffs cannot argue these two different modes of establishing legal causation in the alternative. It is open to plaintiffs to argue (1) that the judge or jury should find that the facts satisfy the but-for test and (2) if the judge or jury finds that the facts do not, then the judge or jury should find that the reason the facts do not is a reason that qualifies under what the meaning happens to be of the “impossibility” test. And (3), it is certainly should be open to a judge to say in his or her reasons that he or she accepts that the evidence satisfies the requirements of the but-for test but that, if he or she is wrong about that, the reason why the evidence does not satisfy the but-for requirements is a reason that satisfies the material contribution test’s impossibility requirement. (I’ll return to this point below.)

With all due respect to Ms. Akbarali, and the Ontario Court of Appeal, this is not "sucking and blowing" at the same time, let alone at different times. It is the proper assertion of alternative theories. There is certainly nothing intellectually dishonest about plaintiff's counsel arguing alternative theories. It would be professional negligence for plaintiff's counsel to not argue alternative theories in the proper case. Similarly, there is absolutely nothing wrong with a judge making alternative findings in the event he or she was wrong about some key aspect of the case. Trial Judges do that all the time, where appropriate, to avoid the case being sent back for a new trial if the primary finding is reversed. It is surprising, to this writer, that the Court of Appeal should find fault with Justice Moore for making the alternative finding in the manner that he did and on the grounds that he did.

The next error occurs in Ms. Akbarali's suggestion that the Supreme Court of Canada said anything in *Fallowka v. Pinkerton's*, 2010 SCC 5 that in any way begins to clear up any of the mess it created in *Resurfice*, and has declined to clean up since. That's because the Court decided there was no breach of duty and said nothing more than that the but-for test was the applicable test on the issue of proof of factual causation. Ms. Akbarali is correct that the SCC wrote that "it was not impossible to prove causation on the 'but-for' standard". However, that statement is not support for her claim that the SCC "recognized the fundamental inconsistency that comes from trying to assert both theories of causation at the same time." The SCC did not such thing. It did not discuss whether any sort of "fundamental inconsistency" existed. All the Court held was that the but-for test was the applicable test and that the trial judge's *Athey* material contribution based analysis and findings of fact were not capable of being understood as a valid but-for based analysis and findings of fact.

Fallowka is also not support for her assertion that a plaintiff "necessarily weakens the plaintiff's cause by arguing both theories." One reason for her error is that there is no fundamental inconsistency, provided one understands, correctly, what the but-for test is and is not, and what the material contribution doctrine is, and is not. After that? It all depends on the basis for arguing in the alternative.

It is not clear, at least to me, from Ms. Akbarali's article, that she adequately grasps the difference between a finding of factual causation which is tested by the but-for test, and the finding of legal causation made after the application of the *Resurfice* material contribution doctrine. It may well be that that misunderstanding explains her assertion of "fundamental inconsistency." I do not intend to take up much space, here, explaining the two doctrines in detail. I've done that elsewhere. I expect that I'm one of the people who have spilled the ink that *Resurfice* found "neither necessary nor helpful to catalogue". Two sources, one of which is both readily accessible and free, are: Cheifetz, "*Tales of Sound and Fury: Factual Causation in Tort after Resurfice*," in 2008 LSUC Special Lectures (Irwin Law, 2009), c. 8 and Cheifetz, "Scraping the Surface", www.bbburn.com/articles/Resurfice_staus.pdf. The online article is quite long, and intended to

be used online. It discusses most of the issues and contains hyperlinks to the cases. It is current through mid 2008. The Special Lectures article is a succinct enough summary.

What is important to emphasize is that neither but for, or material contribution, whatever these tests (or doctrines) mean are methods by which factual causation is established. What but-for has always been, and what the causation portion of material contribution - the "contribution" portion - purportedly was before *Resurfice*, are methods of testing the validity, in fact, of the judge's or jury's conclusion, arrived at by making findings of fact and deductions or inferences from the findings, that the evidence satisfies the judge or jury, on the balance of probability, that the negligence did cause the injury. If negligent conduct is a cause of injury, it is not self-sufficient. It is always part of a bigger set of facts.

In some cases, the evidence that the court is entitled to accept, and does, establishes that there is only one such set, so that the factual question is simply (and only) whether the judge or jury is satisfied, on the balance of probability, that the negligent conduct is a necessary part of that sufficient set. We test for that type of necessity (which is a limited type of sufficiency) by asking what would happen if the defendant had acted properly. If the injury would not have occurred, we say it would have happened but-for the negligence.

But, sometimes, there will be more than one sufficient set of facts that amount to a cause, and the negligence is not a necessary part of each of those sets. What then? The but-for test is logically, doctrinally, "unworkable" in those situations, as a test for the validity of the decision that the set is a cause, because each sufficient set prevents any other set from being "necessary" in the but-for sense; that is, each sufficient set prevents any other sufficient set (so including any set of which the negligence is a necessary part) from being a but-for cause. Law, then, needs a another test for these situations of multiple independently sufficient causes. Such a workable test exists. It is called NESS. It's certain that the Supreme Court knows that test exists. One can't know about the debates which the Court said it didn't have to catalogue and not know about NESS. NESS is based on the concept of sufficiency, not necessity. The but-for test, properly understood, is an application of the NESS test. NESS means Necessary Element of a Sufficient Set. The material contribution doctrine, as it was before *Resurfice*, could have become Canadian law's label for the NESS test. Cases such as *Aristorenas v. Comcare Health Services*, 2006 CanLII 33850 (ONCA) leave to appeal denied 2007 CanLII 10550 (S.C.C.) and *Cottrelle v. Gerrard*, 2003 CanLII 50091 (ONCA) pointed the way.

The point is that all of these sufficient sets are factual causes. Whether the law will treat any one or more of them as legal factual causes is a different issue. What law, then, has to do, then, is decide what the effect of all of the other causal sets is on the actionable causal status (for law) of the set that includes the negligence. While it is not at all clear that this question is what Major J. meant by the first reference to material contribution in *Athey* (at

para. 15) it does seem to be what Major J was referring to at para. 41.3 It also seems to be the meaning given the material contribution doctrine by the ONCA in *Aristorenas* and, earlier, *Cottrelle*.

The point is that any factor that contributes to the occurrence of some consequence - the harm, the injury - is a cause of that injury. If one is then going to talk about the materiality of that contribution - outside the *de minimis* range (whatever that means) in *Athey* terms - one has gone past factual causation and into decisions based on responsibility: decisions which deal with the question of whether law ought to impose liability on a person. What Canadian tort jurisprudence called the material contribution test (before *Resurfice*) is, in substance, an almost 100 year old U.S. doctrine called the "substantial factor" test. That test originated in a law journal article as a test for proximate cause, not factual causation. American jurisprudence, early on, transformed it into a doctrine to be used by juries, in some cases, instead of the but-for test. Most American tort professors agree the "substantial factor" test has no coherent content. It is not without irony that, over the decade plus that Canadian tort law was "developing" its *Athey* material contribution jurisprudence, without (to my knowledge) any reported indication that any judge was aware of a vast body of case law that could have been helpful, leading American tort scholars were discussing discarding the "substantial factor" test. The American *Restatement of Torts* (3d) has discarded the "substantial factor" test.

The point here, assuming it needs to be made explicit, is that there can be no relevant difference between "substantial" - meaning substantial enough - and material.

I now move, briefly, to but-for. *Resurfice* has created a number of problems there, too. It has created (or rather reintroduced, from *Snell*) in but-for doctrine the same sort conflation of factual causation and proximate cause (remoteness) issues as did the "material" portion of "material contribution" by saying this about but-for, at para. 23 : "The 'but for' test recognizes that compensation for negligent conduct should only be made 'where a substantial connection between the injury and the defendant's conduct' is present. It ensures that a defendant will not be held liable for the plaintiff's injuries where they 'may very well be due to factors unconnected to the defendant and not the fault of anyone': *Snell v. Farrell*, at p. 327, *per Sopinka J.*" A connection is a factual cause no matter how slight the connection is. The "substantiality" of a factual cause which has been found to exist is irrelevant to the status of that cause as a factual cause. That there is some aspect of the "substantiality" of the causal connection that leads a judge or jury to conclude that the connection is not substantial enough to be a *legal* factual cause – that it is too trivial, not proximate, too remote - isn't a matter of factual causation at all. Unfortunately, the "substantial connection" passage appears in *Resurfice*'s discussion of causation, not the separate, earlier, discussion of proximate cause and remoteness (under the heading "Foreseeability": see *Resurfice*, paras. 6-12) with no indication that it was not intended to say anything about the process by which Canadian tort law determines whether the negligence is, or is not, a factual cause.

In addition, *Resurfice* baldly (and badly) asserts that the but-for test applies to "multi-cause injuries" (para. 21). This is correct about the current definition of the but-for test (the one affirmed by *Resurfice*) only where the "multi-cause" is a cause composed of a number of necessary factors which, are, themselves, causes. The cause, in this situation, is sometimes called a cumulative cause. *Athey* is an example. The cause of the disc herniation was the combination of the effect of the injuries the plaintiff sustained in the two motor vehicle accidents and the exercise event(s). However, there is a problem if the Court meant to assert that but-for applies to injuries which are "multi-cause injuries" because they have multiple, independently sufficient, causes - what the *Athey* situation would have been if the two motor vehicle accidents (together) and the exercise had each been sufficient, without the other, to cause the herniation. This is not a situation covered in either of the *Resurfice* material contribution examples. The evidence has established a factual cause on the balance of probability. Unfortunately for the but-for test (and the Supreme Court) the evidence establishes more than one.

I'll add another complication. In some cases, but not all, those more than one sufficient sets are mutually exclusive, but there's some reason why the evidence doesn't permit a valid determination of which one. Is that a situation that the SCC intended is covered by the first *Resurfice* material contribution example? It is, in fact, an example of the hypothetical version of the facts in *Cook v Lewis* [1951] S.C.R. 830, 1951 CanLII 26, where we assume that both hunters shot towards the injured person. The evidence in *Cook v Lewis* was that both hunters denied shooting towards the victim. On the evidence, it could have only been one of the two, as the case proceeded on the assumption that all the birdshot came from one gun. The rule in *Cook v Lewis* is that in such cases, the but-for test still applies but the onus is reversed. The onus is on the defendant to establish, on the balance of probability, that the defendant's negligence was not a cause. If the defendant can't, the negligence is a cause. What is, now, the status of the but-for rule in *Cook v Lewis*? It is well understood that, as a matter of logic, the rule in *Cook v Lewis* is not applicable where there are more than two sufficient alternatives. Is the more than two sufficient alternatives one example of what the Supreme Court had in mind in using the hypothetical version of *Cook v Lewis* as an example of the a situation to which the new material contribution doctrine applies?

Ms. Akbarali is correct that the ONCA said, in *Frazer v Haukioja*, 2010 ONCA 249 that Justice Moore "erred in applying the material contribution test after he successfully reasoned his way through the 'but for' test." One problem with the court's statement is that it ignores the basis upon which Justice Moore applied the *Resurfice* material contribution doctrine. He did not find that it applied in addition to the but-for test. He held that if he was wrong on the findings of fact that he held amounted to a cause that satisfied the but-for test, so that there was a gap in the evidence, the reason for the gap was a problem that satisfied the "impossibility" requirement of the *Resurfice* material contribution doctrine (see 2008 CanLII 42207 para. 217-222). As such, *Frazer* differs significant from

decisions such as *B.S.A. Investors Ltd. v. DSB*, 2007 BCCA 556, *Jackson v. Kelowna General Hospital*, 2007 BCCA 129 and, of course, Ontario's own *Barker v. Montfort Hospital*, 2007 ONCA 282 (CanLII). In these cases, the gap in the evidence existed because the plaintiff failed to call evidence which existed, or failed to adduce evidence that the evidence was not available (that the gap existed) for a reason that could trigger *Resurfice* material contribution.

There is, seemingly, another reason why the ONCA, in *Frazer*, made the mistake it did about what Justice Moore did. It is because the court's description of what *Resurfice* material contribution means is wrong. In the writer's view, the mistake is undoubtedly based on the Court of Appeal's earlier mistake in *Barker v. Montfort* where a different panel wrote, about *Resurfice*, that "this decision simply asserted 'the general principles that emerge[d] from the cases.' It did not alter the state of the law on causation. Rather it confirmed that 'the basic test for determining causation remains the 'but for' test' ..." (2008 ONCA 282 at para. 51). In *Frazer*, the court wrote, at para. 41: "Factual causation can be established in two ways: the "but for" test and the "material contribution" test. Only one of these tests will apply in any given case. The differences between the two tests was recently clarified in *Resurfice Corp. v. Hanke ...*".

The problem with the first sentence is the reference to material contribution. The statement that "factual causation can be established [by the] material contribution test" is not what *Resurfice* said. It might well have been the law before *Resurfice*. It isn't the law since. It is what *Barker v. Montfort Hospital* asserted, in effect, that *Resurfice* (and the material contribution test) mean, in the claim that *Resurfice* "did not alter the state of the law on causation." It was (seemingly) Canadian common law before *Resurfice* that the but-for test and the *Athey* material contribution test were usually alternative methods of establishing factual causation. However, they were not necessarily alternative. In *Walker Estate v. York Finch General Hospital*, 2001 SCC 23 (which most readers should recall was an appeal from a decision of the Ontario Court of Appeal), the SCC found that the facts satisfied both the but-for test and the *Athey* material contribution test, and applied both. The SCC asserted that cases involving negligence creating contaminated blood donations were different, and therefore the use of but-for did not have to be "unworkable" but merely difficult.

The next problem is that *Barker* is wrong about *Resurfice* material contribution, as is *Frazer*. The *Resurfice* material contribution doctrine is not about proof of factual causation. *Resurfice* material contribution is not about proof on the balance of probability that the negligence did cause the injury which the plaintiff suffered. It is a method by which the plaintiff may, in some circumstances, satisfy the causation aspect of the tort even though the plaintiff is not able to establish factual causation the balance of probability. Is premised on the existence of a possibility that the defendant's conduct could be a factual cause. This is called general causation: the case must fail if (a) the injury is of a type that the negligence could not possibly cause or (b) if there is no

admissible evidence that the negligence could possible cause. One never gets to either the but-for test or the material contribution test (regardless of what the latter means: *Aristorenas*).

Assuming that general causation exists, the "factual causation" requirement under *Resurfice* material contribution is satisfied by the finding of negligence since, by definition, a finding of negligence requires a finding that there was an unjustifiable (unreasonable) increase in risk of a type of harm related to the impugned conduct; that is, an increase in the possibility of the occurrence of the harm which occurred, which increase was caused by the conduct which was the breach of standard.

Explaining the meaning of the *Resurfice* material contribution *dicta* is almost a cottage industry in British Columbia. BCCA cases, in addition to the two I mentioned above, include the extremely important *Sam v. Wilson* 2007 BCCA 622 and *Chambers v. Goertz* 2009 BCCA 358. A recent Alberta appellate decision is *Nattrass v Weber* 2010 ABCA 64. *Sam* and *Chambers* are particularly important because they hold that the *Resurfice* material contribution doctrine "does not signify a test of causation at all; rather it is a policy-driven rule of law designed to permit plaintiffs to recover in such cases despite their failure to prove causation. In such cases, plaintiffs are permitted to jump the evidentiary gap ... because to deny liability would offend basic notions of fairness and justice: *Resurfice* Corp. v. Hanke, para. 25" (internal quotation marks omitted). If that view is correct, *Resurfice* certainly changed the state of causation law in Canada. According to *Sam*, by the way, at para. 109 and following, the source of the material contribution doctrine espoused in *Resurfice* is the revived meaning of *McGhee v National Coal Board* [1972] UKHL 7, as restated - or better put, revived - by the House of Lords in *Fairchild v Glenhaven Funeral Services* [2002] UKHL 22. *Sam* could have, but didn't, mention *Barker v Corus (UK) Plc* [2006] UKHL. It is worth asking why the Supreme Court did not see fit to mention either of *Fairchild* or *Barker* in its *Resurfice* discussion of the new material contribution doctrine.

The Ontario Court of Appeal has had a number of opportunities, since February 2007, to provide Ontario lawyers with guidance on the meaning of the *Resurfice* material contribution doctrine. It has failed to do so, adequately. In addition, it has apparently failed to consider, let alone mention, the appellate decisions of, at least, British Columbia, and more recently Alberta. That provincial and territorial appellate courts are not bound by decisions of co-ordinate appellate courts is not sufficient justification.

Instead, Ontario lawyers have been given conclusory assertions that *Resurfice* did not change the state of the law of causation, but merely clarified when the but-for test and the material contribution test (or doctrine) - whatever its content is - are applicable: see, for example, *Frazer and Barker v Montfort Hospital*. Curiously, however, another panel of the ONCA declined to say anything one way or the other about the effect of *Resurfice* in *Fisher v. Victoria Hospital*, 2008 ONCA 759, even though the panel referred to *Barker*,

albeit in the context of a discussion of the but-for principle and the plaintiff's obligation, under the but-for test, to provide an "evidentiary foundation" for the finding of the required causal connection between negligence and injury. (*Fisher* at para. 56). In *Fisher*, the court declined to discuss the meaning of *Resurfice* material contribution doctrine. The court held that the but-for test was applicable and the trial judge had erred in not adequately explaining her findings of fact, holding that the but-for test was applicable (paras. 53-59, 64-66, 77-78).

If *Barker v Montfort Hospital* does set out the current state of causation law in Ontario, then Ontario lawyers are required to act on the basis that the law as set out in *Aristorenas* (last summarized for Ontario lawyers and judges, before *Resurfice*, by Justice Lax in *Latin v. Hospital for Sick Children* 2007 CanLII 34) on the meaning of both but-for and material contribution is still the law in this province, subject to whatever alterations are required on account of whatever it is that *Resurfice* said. This is what *Aristorenas* said about material contribution at para. 53 "Thus, it would seem that the "material contribution" test is applied to cases that involve multiple inputs that all have harmed the plaintiff. The test is invoked because of logical or structural difficulties in establishing 'but for' causation, not because of practical difficulties in establishing that the negligent act was a part of the causal chain." Does that capture some aspect of the two requirements that *Resurfice* set out? Is that essentially the justification that *Resurfice* gave? The ONCA in *Fisher* seemed to think so (see footnote 14.) The "multiple inputs" parts standing alone isn't right anymore if it was meant as a standalone problem (seemingly what the Alberta Court of Appeal meant in *Resurfice*) although it is unlikely that the ONCA meant it as a standalone issue.

Ms. Akbarali ends with the plea to plaintiffs' counsel to "pick your theory of causation ... please". This is a worthwhile plea. But is nothing more than a statement that lawyers should know the facts and law applicable to their case before they go to court. The courts of this country would increase the likelihood of that occurring if they would decide, clearly, what the material contribution doctrine means.

One reason for that is because, in doing so, should the courts conclude that the material contribution doctrine is not a method for establishing factual causation on the balance of probability but, instead, that it is a doctrine that permits the plaintiff to satisfy the legal causation requirement of the tort in the absence of proof of factual causation on the balance, the courts would then have to consider two very important questions: (1) whether the compensable injury under the material contribution doctrine is the injury sustained by the plaintiff, or the increased risk of that injury and (2) whether liability for the compensable injury is solidary (the substantive meaning of joint and several) or proportional. In England, in *Barker v Corus*, the House of Lords decided that, under its version of the material contribution doctrine – ironically a more circumscribed version of the doctrine that appears in *Resurfice* - that the extent of liability where the material contribution doctrine applies is proportional, not joint. Under the English version, ff the

material contribution doctrine is the basis upon which the causation requirement of the tort is satisfied, as against a particular defendant, then that defendant's liability in tort (excluding vicarious liability for the actionable conduct of another) is the amount of the compensable damages multiplied by the percentage by which the defendant's conduct increased the risk of the occurrence of the injury which occurred. The end result is proportional liability, not solidary (joint, joint and several) liability.

It is certainly true that, sometimes, part of a loaf of bread is better than none. However, it seems to this writer that if plaintiff's counsel had to choose between 100% recovery under but-for, and partial recovery under material contribution, they might well be inclined to be very careful about what they wish for, lest they get it.

Having said that, lawyers who generally act for defendants in civil cases should consider this. Plaintiffs now have two paths by which the causation requirement of the tort of negligence may be satisfied. Only one of those paths – the but-for path - requires proof of factual causation on the balance of probability. However, plaintiffs are not, since *Resurface*, losing cases that were won before. The “I find there is factual causation” findings of fact that trial judges, and juries, were making, before *Resurface*, applying the *Athey* material contribution doctrine, are now being made as but-for decisions. As to the other path – the new material contribution – which is supposed to be the path to less taken? It is still is. How long that will remain the case is anybody's guess. It has been taken just a few times since February 2007. Three of those instances have been reached appellate courts. In the two instances where the doctrine was (or seemingly was) the sole basis upon which causation was established, one decision was reversed and the action dismissed (*Bohun v. Segal*, 2008 BCCA 23) and the other decision (*Cartner v Burlington*) affirmed but on the basis that the but-for test was the applicable test and the findings of fact findings of act satisfied that test. In the third (*Frazer v Haukioja*), the court overruled the trial judge's alternative (not in addition) application of *Resurface* material contribution while affirming the but-for based conclusion that the plaintiff had established factual causation.

I began this comment by pointing out the major error in the first sentence of the article by Ms. Akbarali. She wrote: “Not a causation case in the country gets adjudicated without reference to *Resurface Corp v. Hanke*”. In fact, many cases do and, including at the appellate level. Unfortunately, the references in too many cases are either wrong or unhelpful. It is an appropriate bookend to conclude by mentioning a recent causation decision which was not only “adjudicated without reference to *Resurface*” but without reference to any causation jurisprudence at all: *MacPherson v. Allen*, 2010 ONSC 3247. The case was not a straight-forward who or what caused damage incident. Nonetheless, the analytical process used by the judge is crystal-clear and the result seems correct on the facts.

Addendum

I refer readers interested in more detailed discussion of the effect of *Resurfice* on the Canadian law on factual causation in tort to my articles: Cheifetz, “*Tales of Sound and Fury: Factual Causation in Tort after Resurfice*,” in 2008 LSUC Special Lectures (Irwin Law, 2009), c. 8. The Special Lectures article is a succinct enough summary of the more detailed analysis, current through mid-2008, available online at the following link: www.bbburn.com/articles/Resurfice_staus.pdf.

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