

A PLEA FOR COHERENCE: MAKING SENSE OF FACTUAL CAUSE

David Cheifetz

Faculty of Law, University of
Oxford

June 2017

Revision of PowerPoint
Presentation, at Vancouver,
May 5, 2017
Peter Allard School
of Law, U. B. C.,
"Cdn Law of Obligations"
Symposium

The components of the cause of action

- Duty of Care
- Breach/Standard of Care
- Damage
- Cause-in-Fact
- Remoteness
 - Proximate Cause
 - Cause in Law
 - Legal Causation

(see Justice R. Brown, Cause-in-Fact, CLE-BC, Vancouver, May 2015)

Cause-in-Fact ≠ Cause-in-Law

- **Factual Causation (Cause-in-Fact)**
 - What happened?
- **Legal Causation (Remoteness)**
 - Judgment Call
 - Is it fair?

(see Justice R. Brown, Cause-in-Fact, CLE-BC, Vancouver, May 2015)

“On its own, proof by an injured plaintiff that a defendant was negligent does not make that defendant liable for the loss. The plaintiff must also establish that the defendant’s negligence (breach of the standard of care) caused the injury. That link is causation.”

Clements v Clements, 2012 SCC 32 at para 6

What Tests, Once – Prior to 1990 - 1

How did we prove Factual Causation?

- According to *Athey* (a likely accurate enough summation of what the SCC majority might have said in *Horsley v McLaren* if asked have since the SCC issue was duty and breach not causation and there's no discussion of what test is to be applied).
- “The general, but not conclusive, test for causation is the “but for” test, which requires the plaintiff to show that the injury would not have occurred but for the negligence of the defendant: *Horsley v. MacLaren*, [1972] S.C.R. 441.”

Athey v. Leonati, [1996] 3 SCR 458 at para. 14

What Tests, Once – Prior to 1990 - 2

How did we prove Factual Causation?

Horsley's SCC text

- “It seems to me that, if a person *by his fault* creates a situation of peril, he must answer for it to any person who attempts to rescue the person who is in danger. He owes a duty to such a person above all others. The rescuer may act instinctively out of humanity or deliberately out of courage. But whichever it is, so long as it is not wanton interference, if the rescuer is killed or injured in the attempt, he can recover damages *from the one whose fault has been the cause of it.*” (emphasis in original)

Horsley v. MacLaren, [1972] SCR 441 at 444-45

What Tests, Once – Prior to 1990 - 3

How did we prove Factual Causation?

Horsley's SCC text

■ In the present case a situation of peril was created when Matthews fell overboard, but it was not created by any fault on the part of MacLaren ... and before MacLaren can be found to have been in any way responsible for Horsley's death, it must be found that there was such negligence in his method of rescue as to place Matthews in an apparent position of increased danger subsequent to and distinct from the danger to which he had been initially exposed by his accidental fall. In other words, any duty owing to Horsley must stem from the fact that a new situation of peril was created by MacLaren's negligence which induced Horsley to act as he did.

■ *Horsley v. MacLaren*, [1972] SCR 441 at 444-45

What Tests, Once – Prior to 1990 - 4

How did we prove Factual Causation?

Something other than but-for? If so, what & when?

- I am not prepared to say that the trial judge was wrong in finding that the absence of adequate mats contributed to the injury. ... It is not, in my view, incumbent upon the plaintiff in a case such as this to prove positively that the presence of the crash mat would have prevented the injury. The plaintiff is bound to prove, according to a balance of probabilities, that the failure of the school authorities to provide more adequate matting and insist upon its use contributed to the accident.” (emphasis added)

- *Myers v. Peel County Board of Education*, [1981] 2 SCR 21 at 34-35

What Tests, Once – Prior to 1990 - 5

How did we prove Factual Causation?

Something other than but-for? If so, what & when?

■ “As to the absence of supervision, again I am not prepared to accept the proposition advanced by the respondent that the presence of a teacher supervising at the time of the accident would not have prevented the accident, nor that it is incumbent upon the appellant to prove that the presence of the teacher would have prevented the accident. On a balance of all the probabilities it was the opinion of the trial judge, which in my view of the evidence was justified, that the absence of supervision contributed to the cause of the accident. (emphasis added)

■ *Myers v. Peel County Board of Education*, [1981] 2 SCR 21 at 35

What Tests, Once: 1990-1996 - 1

How did we prove Factual Causation?

■ “Both the trial judge and the Court of Appeal relied on McGhee, which (subject to its re-interpretation in the House of Lords in Wilsher) purports to depart from traditional principles in the law of torts that the plaintiff must prove on a balance of probabilities that, but for the tortious conduct of the defendant, the plaintiff would not have sustained the injury complained of. In view of the fact that McGhee has been applied by a number of courts in Canada to reverse the ordinary burden of proof with respect to causation, it is important to examine recent developments in the law relating to causation and to determine whether a departure from well-established principles is necessary for the resolution of this appeal.

■ *Snell v. Farrell*, [1990] 2 SCR 311 at 319-20

What Tests, Once: 1990-1996 - 2

How did we prove Factual Causation?

- “The question that this Court must decide is whether the traditional approach to causation is no longer satisfactory in that plaintiffs in malpractice cases are being deprived of compensation because they cannot prove causation where it in fact exists.
- Causation is an expression of the relationship that must be found to exist between the tortious act of the wrongdoer and the injury to the victim in order to justify compensation of the latter out of the pocket of the former. Is the requirement that the plaintiff prove that the defendant's tortious conduct caused or contributed to the plaintiff's injury too onerous? Is some lesser relationship sufficient to justify compensation?
[con't on next slide]

What Tests, Once: 1990-1996 - 3

How did we prove Factual Causation?

■ “I have examined the alternatives arising out of the McGhee case. They were that the plaintiff simply prove that the defendant created a risk that the injury which occurred would occur. Or, what amounts to the same thing, that the defendant has the burden of disproving causation. If I were convinced that defendants who have a substantial connection to the injury were escaping liability because plaintiffs cannot prove causation under currently applied principles, I would not hesitate to adopt one of these alternatives.” (emphasis added)

[continues on next slide]

■ *Snell v. Farrell*, [1990] 2 SCR 311 at 326

What Tests, Once: 1990-1996 - 4

How did we prove Factual Causation?

■ “In my opinion, however, properly applied, the principles relating to causation are adequate to the task. Adoption of either of the proposed alternatives would have the effect of compensating plaintiffs where a substantial connection between the injury and the defendant's conduct is absent. Reversing the burden of proof may be justified where two defendants negligently fire in the direction of the plaintiff and then by their tortious conduct destroy the means of proof at his disposal. In such a case it is clear that the injury was not caused by neutral conduct. It is quite a different matter to compensate a plaintiff by reversing the burden of proof for an injury that may very well be due to factors unconnected to the defendant and not the fault of anyone.” (emphasis added)

■ *Snell v. Farrell*, [1990] 2 SCR 311 at 326

What Tests, Once: 1990-1996 - 5

How did we prove Factual Causation?

- [explaining Wilsher] Lord Bridge interpreted *McGhee* as espousing no new principle. Instead, *McGhee* was explained as promoting a robust and pragmatic approach to the facts to enable an inference of negligence to be drawn even though medical or scientific expertise cannot arrive at a definitive conclusion. ...

...

- I am of the opinion that the dissatisfaction with the traditional approach to causation stems to a large extent from its too rigid application by the courts in many cases. Causation need not be determined by scientific precision. It is, as stated by Lord Salmon in *Alphacell Ltd. v. Woodward*, [1972] 2 All E.R. 475, at p. 490:

- ... essentially a practical question of fact which can best be answered by ordinary common sense rather than abstract metaphysical theory.

- *Snell v. Farrell*, [1990] 2 SCR 311 at 328

What Tests, Once: 1996-2005 - 1

How did we prove Factual Causation?

- “The general, but not conclusive, test for causation is the “but for” test, which requires the plaintiff to show that the injury would not have occurred but for the negligence of the defendant: *Horsley v. MacLaren* ... (emphasis added)
- “The “but for” test is unworkable in some circumstances, so the courts have recognized that causation is established where the defendant’s negligence “materially contributed” to the occurrence of the injury: *Myers v. Peel County Board of Education*... *Bonnington Castings, Ltd. v. Wardlaw* ... *McGhee v. National Coal Board* ... A contributing factor is material if it falls outside the *de minimis* range: *Bonnington* ..., *R. v. Pinsky* (SCC, 1988)” (emphasis added)
 - *Athey v. Leonati*, [1996] 3 SCR 458, 1996 CanLII 183 at paras. 14, 15

What Tests, Once: 1996-2005 - 2

How did we prove Factual Causation?

■ “With respect to negligent donor screening, the plaintiffs must establish the duty of care and the standard of care owed to them by the CRCS. The plaintiffs must also prove that the CRCS caused their injuries. The unique difficulties in proving causation make this area of negligence atypical. The general test for causation in cases where a single cause can be attributed to a harm is the “but-for” test. However, the but-for test is unworkable in some situations, particularly where multiple independent causes may bring about a single harm.” (emphasis added)

■ *Walker Estate v. York Finch General Hospital*, [2001] 1 SCR 647, 2001 SCC 23 at para 87

What Tests, Once: 1996-2005 - 3

How did we prove Factual Causation?

■ In cases of negligent donor screening, it may be difficult or impossible to prove hypothetically what the donor would have done had he or she been properly screened by the CRCS. The added element of donor conduct in these cases means that the but-for test could operate unfairly, highlighting the possibility of leaving legitimate plaintiffs uncompensated. Thus, the question in cases of negligent donor screening should not be whether the CRCS's conduct was a necessary condition for the plaintiffs' injuries using the "but-for" test, but whether that conduct was a sufficient condition. The proper test for causation in cases of negligent donor screening is whether the defendant's negligence "materially contributed" to the occurrence of the injury. In the present case, it is clear that it did. "A contributing factor is material if it falls outside the *de minimis* range" (see *Athey v. Leonati*, [1996 CanLII 183 \(SCC\)](#), [1996] 3 S.C.R. 458, at para. 15). As such, the plaintiff retains the burden of proving that the failure of the CRCS to screen donors with tainted blood materially contributed to Walker contracting HIV from the tainted blood. (emphasis added).

■ *Walker Estate v. York Finch General Hospital*, [2001] 1 SCR 647, 2001 SCC 23 at para. 88

What Tests, Now: 2005 to date - 1

How do we prove Factual Causation?

- **“The test for showing causation is the ‘but for’ test.”**
Clements v Clements, 2012 SCC 32 at para 8.
- **“Causation is assessed using the ‘but for’ test”**
Ediger v Johnston, 2013 SCC 18 at para 28.

What Tests, Now: 2005 to date - 2

How do we prove Factual Causation?

Resurfice (2005)

- “ First, the basic test for determining causation remains the “but for” test. This applies to multi-cause injuries. The plaintiff bears the burden of showing that “but for” the negligent act or omission of each defendant, the injury would not have occurred. ... ”

Resurfice Corp. v. Hanke, [2007] 1 SCR 333, 2007 SCC 7 at para. 21

What Tests, Now: 2005 to date - 3

How do we prove Factual Causation?

Resurfice (2005)

- “This fundamental rule has never been displaced and remains the primary test for causation in negligence actions. As stated in *Athey v. Leonati*, at para. 14, per Major J., “[t]he general, but not conclusive, test for causation is the ‘but for’ test, which requires the plaintiff to show that the injury would not have occurred but for the negligence of the defendant”. ...

Resurfice Corp. v. Hanke, [2007] 1 SCR 333, 2007 SCC 7 at para. 22

What Tests, Now: 2005 to date - 4

How do we prove Factual Causation:

Is there another test for factual causation?

***Resurfice* does not answer the question**

- Note the wording in *Resurfice*: the but-for test is “the primary test for causation in negligence actions.”
- Literally not the primary test for factual causation.
- Causation is factual causation plus legal causation
- But the issue in *Resurfice* was ONLY factual causation
- So on standard *stare decisis* rules that part of *Resurfice*'s has to be understood to be dealing only with whether the but-for test applied
- Not with whether there is an alternative test applicable, in some instances, to determine the existence of factual causation

What Tests, Now: 2005 to date - 5

How do we prove Factual Causation: Is there another test for factual causation?

- Which means *Resurfice* has to be understood to imply the existence of a secondary test for factual causation.
- What is that test the secondary test for factual causation?
- That used to be *Athey* material contribution to injury (MCI) but *Clements* holds that MCI should have always been understood to mean material contribution to risk (MCR) which does not produce a finding of factual causation on the balance of probability

What Tests, Now ... 6: When I use a word it means

- A but-for cause is a necessary cause, nothing less and nothing more.
- 8. “The test for showing causation is the ‘but for’ test. Inherent in the phrase ‘but for’ is the requirement that the defendant’s negligence was necessary to bring about the injury — in other words that the injury would not have occurred without the defendant’s negligence.” (emphasis added)
- (*Clements v Clements*, 2012 SCC 32 at para 8, cited in *Ediger v Johnston*, 2013 SCC 18 at para 28.)

What Tests, Now... 7: When I use a word it means

- A but-for cause is a **necessary cause**, nothing less and nothing more.
- “If it was necessary to have both the accidents and the pre-existing back condition for the herniation to occur, then causation is proven, since the herniation would not have occurred but for the accidents. **Even if the accidents played a minor role, the defendant would be fully liable because the accidents were still a necessary contributing cause.**
- (*Athey v Leonati*, [1996] 3 SCR 458, 1996 CanLII 183) at para. 41 (2) underlining emphasis in original, bold added

What Tests, Now... 8: When I use a word it means

- A but-for cause is a necessary cause, nothing less and nothing more, right?

Separately insufficient but cumulatively necessary causes?

12. "In some cases, an injury — the loss for which the plaintiff claims compensation — may flow from a number of different negligent acts committed by different actors, each of which is a necessary or "but for" cause of the injury. ... "

■ *Clements*, para 12.

What Tests, Now... 9: Exactly what I say it means, nothing more nothing less

June 2017

Introducing More Substantial Incoherence What does substantial mean?

“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.” (emphasis added)

Resurfice Corp. v. Hanke, [2007] 1 SCR 333, 2007 SCC 7 at para. 23

What Tests, Now... 10: Substantial Incoherence

- What does substantial mean in relation to necessary? In the context of the but-for test?
- Can a wrongdoer say conduct not a factual cause because not substantially necessary?
- Recall Athey's: necessary is necessary even if the cause played a "minor role" – 41(2) "Even if the accidents played a minor role, the defendant would be fully liable because the accidents were still a necessary contributing cause.
- What are degrees of necessity?

What Tests, Now... 11: When I use a word it means

■ Substantial means ?

- The plaintiff in *Snell* had undergone surgery to remove a cataract. Bleeding occurred. When the bleeding cleared up nine months later, it was found that the plaintiff's optic nerve had atrophied, causing loss of sight in her right eye. Neither of the expert witnesses was able to state what caused the atrophy or when it had occurred. The trial judge, upheld by the Court of Appeal, did not apply the usual "but for" test, but applied a reverse onus test. **This Court affirmed recovery, but on the basis of a robust and common sense application of the "but for" test.** However, Sopinka J. suggested that had it been necessary and appropriate, a material contribution to risk approach might have been applicable:
 - I have examined the alternatives arising out of [*McGhee*...]. They were that the plaintiff simply prove that the defendant created a risk that the injury which occurred would occur. Or, what amounts to the same thing, that the defendant has the burden of disproving causation. If I were convinced that defendants who have a substantial connection to the injury were escaping liability because plaintiffs cannot prove causation under currently applied principles, I would not hesitate to adopt one of these alternatives. In my opinion, however, properly applied, the principles relating to causation are adequate to the task. [Emphasis added; pp. 326-27.]
- *Clements v. Clements*, [2012] 2 SCR 181, 2012 SCC 32 at para. 20

What Tests, Now... 12: ... exactly what I said it means

- “Sopinka J. [in Snell)] went on to underline the importance of establishing a *substantial connection* between the injury and the defendant’s negligence. The usual requirement of proof of “but for” causation should not be relaxed where the result would be to permit plaintiffs to recover in the absence of evidence connecting the defendant’s fault to the plaintiff’s injury. Thus, Sopinka J. stated that if the injury likely was brought about by “neutral” factors, that is, it would have occurred absent any negligence, the plaintiff cannot succeed. To allow recovery where the injury was the result of neutral factors would neither further the goals of compensation, fairness and deterrence, nor comport with the theory of corrective justice that underlies the law of negligence. (italics emphasis in original, bold added)
 - *Clements v. Clements*, [2012] 2 SCR 181 at para. 21

What Tests, Now... 13:

Other tests for factual causation after Clements?

What is the status of *Walker Estate*'s “alternative” sufficient condition material contribution to injury *ratio*? (which by the way was the primary *ratio*)

87 ... “The general test for causation in cases where a single cause can be attributed to a harm is the “but-for” test. However, the but-for test is unworkable in some situations, particularly where multiple independent causes may bring about a single harm.”

88 ... Thus, the question in cases of negligent donor screening should not be whether the CRCS's conduct was a necessary condition for the plaintiffs' injuries using the “but-for” test, but whether that conduct was a sufficient condition. The proper test for causation in cases of negligent donor screening is whether the defendant's negligence “materially contributed” to the occurrence of the injury. ... (Emphasis)

Walker Estate v. York Finch Gen Hosp [2001] 1 SCR 647 at paras 87 and 88

What Tests, Now... 14:

Other tests for factual causation after Clements?

Walker Estate v. York Finch General Hospital, para 88 (complete)

88 In cases of negligent donor screening, it may be difficult or impossible to prove hypothetically what the donor would have done had he or she been properly screened by the CRCS. The added element of donor conduct in these cases means that the but-for test could operate unfairly, highlighting the possibility of leaving legitimate plaintiffs uncompensated. Thus, the question in cases of negligent donor screening should not be whether the CRCS's conduct was a necessary condition for the plaintiffs' injuries using the "but-for" test, but whether that conduct was a sufficient condition. The proper test for causation in cases of negligent donor screening is whether the defendant's negligence "materially contributed" to the occurrence of the injury. In the present case, it is clear that it did. "A contributing factor is material if it falls outside the *de minimis* range" (see *Athey v. Leonati*, [1996 CanLII 183 \(SCC\)](#), [1996] 3 S.C.R. 458, at para. 15). As such, the plaintiff retains the burden of proving that the failure of the CRCS to screen donors with tainted blood materially contributed to Walker contracting HIV from the tainted blood.

What Tests, Now... 15: Duplicative Causation

Multiple independent causes - duplicative causation

- Means the evidence shows there is more than one unique set of facts sufficient to be a cause of the harm
- “where multiple independent causes may bring about a single harm”
- 2 separate fires each sufficient to destroy the house (1) merging before reach house (2) reaching house concurrently (3) consecutively
- 2 trucks hit a 3rd vehicle: the forces of each impact alone are sufficient (without the other) to cause the damage the vehicle sustained (or the injury the passenger in the vehicle sustained)
- each example has evidence applicable to each event that shows that each separate event is sufficient to cause the harm without the other event (so it isn't a Clements insufficiency of evidence leading to finger pointing problem)
- Even in Canada events have to have causes, right?

What Tests, Now... 16: Alternative Tests For Factual Causation

- **Extent of “involvement” tests**

- **Modified versions of the but-for test (Jane Stapleton, Sarah Green, Sandy Steel)**
 - based on a concept of necessity in the circumstances

- **The NESS test? (Richard Wright)**
 - Based on the concept of sufficiency in the circumstances
 - Necessary Element of a Sufficient Set

What Tests, Now... 17: Principle or Principal

If the law is incoherent, is it enough that the decisions may be supportable on the evidence, assuming we knew all the evidence?

What Tests, Now... 18: Principle or Principal

Rhetorical Question:

What opinion do you have on the (statistical) likelihood of this situation:

1. between *Athey* and *Resurfice* (1996 and 2007) we have all the cases where trial judges held it was impossible to apply but-for validly so found factual causation established on *Athey* material contribution to injury
2. Not even one reported (or anecdotal) case since *Resurfice* where a trial judge said that before *Resurfice* “I would have found factual causation established on an material contribution (to injury) basis but since that test is not longer available the plaintiff has failed to establish factual causation on but-for but on the evidence cannot.”
3. No indication that more cases are failing on the basis that plaintiffs have failed to establish but-for on the balance of probabilities.

Assume I'm correct that this is the situation.

What Tests, Now... 19: Principle or Principal

Rhetorical Question:

What conclusion do you draw from the fact that, at least in respect of proof of factual causation, the better conclusion is that all that has changed since 2007 is words that judges use.

Again, assume I'm correct in this statement.

What Tests, Now... 20: Leaves of Grass

- the famous lines from Whitman's *Leaves of Grass* (*Song of Myself*) stanza 51:
 - Do I contradict myself?
 - Very well, then, I contradict myself;
 - (I am large — I contain multitudes.)

- Are wonderful in poetry but bad for law.

THE END

- Logical inconsistencies and internal contradictions may be acceptable, even desirable, in poets and poetry. They are generally not, at least within one area of law, unless somehow justice may be said to require that state of affairs. George Orwell coined “doublethink” in the classic dystopia, *1984*. “Doublethink” is “the power of holding two contradictory beliefs in one's mind simultaneously, and accepting both of them.” The ability to convincingly make contradictory arguments at different times is a hallmark of the able lawyer (hence the able judge). The ability to make and believe contemporaneously concurrent contradictory arguments is a hallmark of the more able lawyer or judge. By that standard, the judges of the Supreme Court of Canada have shown themselves remarkably able.