CAUSATION ON TRIAL – A CALL FOR CHANGE IN HOW WE THINK ABOUT CAUSATION IN TORT

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> *"Every thing must be at rest which has no force to impell it; but as the least straw breaks the horse's back, or a single sand will turn the beam of scales which holds weights as heavy as the world; so, without doubt, as minute causes may determine actions of men, which neither others, nor they themselves are sensible of; but certainly something must determine them, or else they could not be determined; and it is nothing to the purpose to say, that their choice determines them, if something else must determine that choice; for let it be what it will, the effect must be necessary".*
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> ■ *John Trenchard (anonymously), Cato's Letters London, 1724.*

INTRODUCTION

To say that an event is the cause of an effect sounds simple enough. It can be simple, but often it is not. An event, on its own, may not be enough to bring about an effect, and may need to follow or combine with another event to bring about an effect. More than one event may be needed to bring about an effect. Further, the magnitude of an event may be modest, yet sufficient to bring about the effect – "the least straw that breaks the horse's back".

We make causal connections each and every day, without so much as a second thought, sometimes with more and sometimes with less confidence in the conclusions we draw. If we explain the cause of an effect that has already occurred, our conclusion is an explanation for what has occurred. If we consider the future outcome from an event or series of events, we are engaged in causal prediction. It is this latter exercise that the law must engage in when determining causation, although the prediction will always be imagined, never real. A mere glance at the caselaw will quickly reveal how perplexing the notion of causation can be in tort law.

It is decidedly too ambitious, and assuredly futile, to attempt to craft a flawless paradigm for addressing causation in all scenarios. Afterall, for decades, and longer, every academic and every court that has set out to tackle the matter has failed in the endeavour. Indeed, these failed attempts have actually contributed more to the confusion and uncertainty surrounding causation than they have in resolving it. This paper is rather less ambitious and more realistic. By re-defining what is meant by the legal test for causation, and by clarifying how to apply that test in some more challenging factual scenarios, we may hope for some relief from the seemingly endless distractions and misdirections on the issue that currently exist in the caselaw.

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[1] January 26, 2021 ver. 4.3.

If my contention that causation remains poorly understood and inadequately defined is accepted, despite extensive treatment in the legal literature and courts over the last few decades, one might still be justifiably skeptical about the prospect that this article might clear up anything. With no small degree of trepidation, the attempt will be made.

At the outset, I think we should accept that a comprehensive and all-encompassing definition of causation may remain elusive, but something less extensive will suffice for the vast majority of cases that confront lawyers and courts. There is a scarcity of reported cases where causation is truly a problem. Thus, the objective of this paper is practical. It is to clear up the true meaning of cause-in-fact in tort for virtually every fact scenario that most of us will encounter in our legal careers. To do so, I think it is important to get to the root of causation – the counterfactual. The counterfactual seeks to determine cause by hypothetically altering a fact, or facts, and asking if the harm would have been avoided.

Every tort lawyer knows that the traditional test for causation is the but-for test. The provenance of this test, however, is the counterfactual, and the way the but-for test has been used has been both too narrow and too limiting, ignoring its roots. It may be convenient to call the test by that name, but using the words "but-for" to define the test can lead to no end of difficulty, particularly as multiple factors often play a role in causing phenomena. A review of the cases covered in this paper will demonstrate, quite clearly, that a test for causation that ignores its roots in the counterfactual, that is the conventional recitation of the but-for test in modern caselaw, is a test that will fail to identify causation where it clearly exists. It is time to re-evaluate how we define that conventional test, and rework its current definition.

In its simplest terms, the counterfactual asks whether the harm suffered by the plaintiff would have been avoided had the wrongful act of "the specified" defendant not occurred. The hypothetical is asked in relation to a particular wrongdoer because tort liability is based on individual responsibility. That is, once a breach of duty is found against a wrongdoer, the causal question tends to ask whether the "specified" breach of duty by the "specified" wrongdoer caused the harm. To ask this question in relation to a one wrongdoer is to single out or "individuate" the causal question. The question is asked, inappropriately in some cases, in isolation from other possible *contributors* to the harm. Asking if the factor is "the cause" is to ignore the factor as "a cause", the result of which would be a failure to capture some causes. Where a phenomenon is the result of a sequence of events, whether acting successively or cumulatively, the individuation of the first causal question inappropriately ignores how phenomena actually occur.

Thus, the test for causation becomes difficult to apply, if not impossible to apply, where factual scenarios are made more complex with the addition of more potential causative events attributed to more actors, whether innocent or wrongful. As individuation of liability breaks down with the conventional but-for test in these latter situations, courts and academics have suggested that an alternative to the but-for test is needed. To make this issue clear, as the law

stands since the Supreme Court of Canada decision in *Clements v. Clements*[2], the compulsion for finding an alternative to but-for arises when the test fails to attribute causation where causation is known to exist. The test appears to fail, and an alternative test applied, where there are two or more wrongdoers, both parties defendant, and one or more must have caused the harm, but it is impossible to know which wrongdoer did. This result is untenable, if it is indeed how the test functions.

An alternative to the but-for test has been referred to as the "material contribution" test or, more recently, the "material contribution to risk" test, as the test was revised and articulated in *Clements*. The material contribution test is based on the notion that it would be unfair to deprive the plaintiff of a remedy where causation can be clearly attributed to one or more defendants. In this sense, however, there are two points to make: first, in the scenario described, one or more of the defendants caused the loss; and, second, the alternative is not a test for cause-in-fact at all, but merely "proves" what has already been decided.[3]

With regard to proof of cause-in-fact, this paper makes three essential arguments. First, the material contribution test, as defined by the Supreme Court of Canada in *Clements*,[4] is incapable of addressing the shortcomings of the traditional but-for test. Second, material contribution, as defined in *Clements*, is not a test of causation at all. This fundamental interpretation needs to be explicitly recognized. Rather, it is a policy-based rule that entirely relieves the plaintiff of the burden to prove causation. This makes a principled application of such a test too open-ended and random. Third, material contribution, used properly, is an adjunct to an appropriately formulated counterfactual, to be subsumed within what we understand to be the but-for test.[5] In that sense, material contribution should be taken as defining the threshold of proof, in more difficult factual scenarios, required to satisfy a test of cause-in-fact. That is, where cause-in-fact is determined by inference, a contributing factor is causal only when its role in creating a phenomenon is more than *de minimis*. That the finding by inference is made on the basis of material contribution is no less cause-in-fact than when used in the simplest factual scenario.

With regard to the first point, that an alternative to a but-for does not work, this can be demonstrated using various factual scenarios that will be described. Taking each wrongdoer as a separate legal entity, as one must do in tort law, requires that their conduct, alone, be evaluated against the rights of the person said to be injured. Where two or more tortfeasors might be to blame for the plaintiff's injury, it may be possible to prove only that one or more in the group caused the loss but identifying the individual or individuals responsible is impossible. In such a scenario, the but-for test is satisfied insofar as the group is concerned, or "globally". The point here is that material contribution, as defined, will shed no more light on the issue

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[2] *Clements v. Clements*, 2012 SCC 32, [2012] 2 S.C.R. 181.

[3] A phrased I borrowed from Wright, R. Causation in Tort Law, 73 Calif. L. Rev. 1735 (1985), at page 1788.

[4] See *Clements*.

[5] I find important and significant support for my assertion that material contribution is a principle that is part and parcel of the but-for test in multiple tortfeasors cases from the Ontario Court of Appeal decision in *Donleavy v. Ultramar*, 2019 ONCA 687, at paragraph 72. I provide a more detailed analysis of this later in the paper.

than the but-for test has already done. Thus, it is hopeless to think that material contribution can ferret out the actual wrongdoer. The matter becomes more problematic when there are both innocent and guilty factors causing the same phenomenon.

In *Clements,* McLachlin CJ's notion of "impossibility" in relation to wrongdoers who are named parties to a lawsuit as the trigger required to invoke an alternative to the but-for test simply does not work as a test of causation and is not really expressed as an alternative, but is to be used in conjunction with but-for.

When the reference is made to "global" proof of cause in *Clements*, requiring that cause be attributed to "one or more tortfeasors", in reality that amounts to but-for having been proven as against the group of defendants. "Impossibility" in this sense is only about attribution once but-for is proven. Of course, this breaks down when impossibility includes both wrongful and innocent factors, and the approach is thus lacking in principle.

If the exception finds its origins in the English case of *McGhee*, which I argue against, and is expanded in the English case of *Fairchild*, which I also refute, then "impossibility" would relate only to the wrongful or specified factor, regardless of whether innocent factors are also at play. It should not matter, however, as illustrated in another English case, per Lord Hoffmann in *Barker*,[6] that one cause is innocent and the other guilty. Such a test, to be invoked in a principled way, must operate when "the impossibility of proving that the defendant caused the damage arises out of the existence of another potential agent which operated in the same way".[7] This impossibility arises, as do the arguments in support of an exception, whether the other potential cause is innocent or guilty. This points out a rather dramatic flaw in the reasoning in *Clements*, which I will discuss when I take a closer look at the case.

As to the second point, if material contribution is incapable of identifying cause-in-fact, then attribution of liability to a defendant is made in the absence of proof of cause-in-fact. It is high time that we recognize that if there are scenarios where attribution of cause, and therefore liability, is imposed where traditional but-for or even an expanded but-for fails, it is because the plaintiff has been relieved of the onus of proof entirely. That relief from the onus to prove causation arises out of exceptional circumstances that will be described when discussing *Clements*. The failure to recognize that relieving the plaintiff of the burden of proof of causation, which is actually the practical effect of the alternative test described in *Clements*, is at the core of our confusion about causation in the case law. It is for this reason that I contend that material contribution is not a test of cause-in-fact at all and should, therefore, be neither proclaimed nor mistaken as such. If there is a justification for departing from the but-for test, in the form reviewed in this paper, and that must be seen to occur in the rarest of circumstances, the preferrable approach, I suggest, would have been to follow the reasoning of

[6] See *Barker v. Corus* [2006] 3 All ER 785 paragraphs 14 and 24.
[7] See *Barker* paragraph 24.

Justice Sopinka in *Snell v. Farrell*,[8] by shifting the burden of proof.[9] Before shifting the burden of proof, one must have regard to the robust and pragmatic approach to causation, described by Justice Sopinka in *Snell*, which gives rise to my third point.

The third point asserts that material contribution is merely part and parcel of a cause-in-fact analysis of causation, which we describe imprecisely as "but-for", but which has its roots in the counterfactual. For the most part, the notion that the but-for test might be extended or that an alternative might be found has its genesis in *McGhee*.[10] The facts in *McGhee* were challenging, and the case will be dealt with extensively later in this paper. It is my view that *McGhee* did not extend the but-for test in any sense. It is the overly rigid application of the traditional but-for test, touched on in *Snell*, that is at the root of the problem. It is also the failure to properly adapt the causation question for the more complicated factual scenarios that has muddled the notion of cause-in-fact. We must have resort to the counterfactual to sort through these issues.

THE DILEMMA STARTS HERE

Two hunters fire their rifles almost simultaneously at some game. Mr. Lewis happened to be in the way and was struck by pellets from only one of the two rifles. It is impossible to tell which hunter shot Mr. Lewis. One of the hunters shot Mr. Lewis. One of the hunters did not.[11] The traditional test for causation at law, the "but-for" test, applied strictly, would relieve both hunters of liability. This legal test asks the same question of each hunter as an independent legal entity: had hunter A not breached his duty by firing his rifle in the direction of Mr. Lewis, would Mr. Lewis, on a balance of probabilities, have avoided his gunshot injury? Not knowing which hunter shot Mr. Lewis, the question cannot be answered affirmatively with regard to either hunter. The means of proving cause is not available to Mr. Lewis because both hunters fired their rifles simultaneously in his direction.

Thus, neither hunter could be shown as a but-for cause of Mr. Lewis' injury.[12] Each hunter can point to the other. It is widely accepted that to deny Mr. Lewis a remedy offends reasonable notions of fairness.[13] Is this due to a failure of the legal test for causation? With cause

[8] *Snell v. Farrell*, [1990] 2 S.C.R. 311

[9] The notion of shifting the burden of proof merits its own paper. In *Snell*, Justice Sopinka asserts that the burden of proof is not immutable, but the issue is more involved than that. There may well be phases or stages in the burden of proof, with the initial burden of proof always resting with the plaintiff as a fixed legal principle. This initial burden, called the "risk of nonpersuasion" by Wigmore (see Wigmore, Evidence in Trials at Common Law, volume 9, paragraph 2489), may well be followed by a secondary burden that would be imposed on the defendant in appropriate circumstances.

[10] *McGhee v National Coal Board* [1972] UKHL 11

[11] Wright calls this a "alternative-causation" case. See page 1816. See footnote 2.

[12] Tort law provides that a wrongdoer bears responsibility for only his own wrong and the results that flow from that wrong. Where there are two wrongdoers, but it is known that one could not have caused the harm, that wrongdoer escapes liability.

[13] Attempts by judges and academics to address this fundamental unfairness have failed to provide a cogent formula to address this unfairness. Some have promoted a shift in the onus of proof to the defence: See *Cook v.*

determined globally, is there any legal obstacle for imposing liability? Is there an alternate test for causation at law to address this anomaly? Is unfairness, or corrective justice, enough to attribute liability jointly to the two hunters? Is it really unfair to deny Mr. Lewis a remedy? The compulsion to provide Mr. Lewis with a remedy was inextricably linked to the breach of the duty of care. It was felt that both hunters, in firing their rifles in Mr. Lewis' general direction, were in breach of a duty to Mr. Lewis. The fact that the breaches of duty occurred at the same time was the very reason why Mr. Lewis was deprived of the means of proof. Had only one hunter fired his rifle, proof would be easily established. Minor alterations to the facts of that case, however, might undermine the duty of care analysis and its link to causation. Arguably, it is striking Mr. Lewis that invokes the breach of duty. If one hunter missed Mr. Lewis by a country mile, as may have occurred, where is the breach of duty?[14] Is it merely firing the gun at the same time, and the mystery of not knowing who struck Mr. Lewis, that compelled the conclusion that both hunters breached a duty of care?

This scenario figures prominently in much of the academic and judicial writing on the subject of causation. It is stark illustration of the dilemma arising out of the strict application of the but-for test and its yielding an apparently unjust result. I suggest that the analyses provided, by judges and academics alike, are remarkable for their failure to identify a principled approach to address this difficult fact situation. In part, the challenge arises because of the individuation of tort liability. The issue in tort is the conduct or duty of a potential wrongdoer as a separate legal entity towards the interests or rights of the plaintiff. Liability is imposed only for the particular defendant's conduct towards the injured party. Once a breach of duty is found, one must determine if there is a causal connection between that particular breach of duty and the harm complained of. Does the requirement for individuation hamper the ability of tort law to attribute liability based on the traditional test for causation? Can the counterfactual be constructed so as to overcome these challenges?

As unsatisfactory as it might be to those seeking an answer to the causation dilemma in the two-hunters case, I submit that we accept two propositions: first, that there is no way to determine cause on the facts of this case; and, second, for the vast majority of cases, the solution to that case does not matter. With regard to the first proposition, as the answer is not to be found on any theory of causation, if a remedy is required, courts may, only rarely, need to invoke a shift in onus, provided it is accepted that the burden of proof is not immutable. As for the second proposition, the proof of causation is satisfied in all but the most unusual cases through a principled application of a but-for test that is based on a proper application of the counterfactual, without the need to posit or resort to any phantom alternative test.

Lewis, per Rand J. Professor Wright argues for the NESS principle (necessary element of a sufficient set), but as will be illustrated later, this approach also fails to adequately address the issues. Other authors have ignored the issue entirely: see Professor Stapleton.

[14] The case seems to equate the breach of duty with causation. Professor Wright argues that it is a mistake to equate causation with the breach of duty. See Wright, page 1742.

THE COUNTERFACTUAL AS PROVENANCE FOR BUT-FOR

Imagining an outcome from a fictionally altered version of the facts is to invoke the "counterfactual". That is, we hypothetically reverse the factor (a "specified factor"), which is alleged to have caused a phenomenon, to determine if the phenomenon would thereby be avoided.[15] We are all familiar with the counterfactual, as we inevitably use it each and every day, considering the "what-ifs" of a certain action or choice we might make. In asking the what-if in this way, we invoke the counterfactual prospectively, knowing that there are a variety of outcomes that might ensue. At law, we invoke the counterfactual, knowing the outcome, but asking how that outcome might have changed had events occurred differently. In performing this exercise, we assume the specified factor, a guilty factor in our tort counterfactual, to be false. That, however, is an oversimplification of the counterfactual, and the way but-for is used perpetuates that oversimplification. We must explore what is meant by the counterfactual in more complex fact scenarios. To determine causation, particularly in overdetermination cases, discussed below, we must not be confined to an imagined world that only alters the specified factor in composing the counterfactual.

The pretended outcome is entirely a matter of speculation – it did not come to pass. The confidence with which we can assert the probability of the pretended outcome will depend on the factors at our disposal when considering the counterfactual. For example: "Had you applied the brakes, you would not have struck the rear of the car in front of you", might be said with confidence. The facts are simple; there is one actor involved and a single act. Where more factors are added, determining causation is less certain, and we may express a conclusion about causation with less confidence.

Given that both innocent and guilty factors may give rise to an outcome, factual causation must consider the contribution of each to the outcome. The word "contribution" however, has been a source of considerable confusion in the long history of jurisprudence on causation. The word has been used in many different contexts, without adequate consideration for its intended meaning. It is this confusion, primarily, that I hope to resolve. A proper test of cause-in-fact must incorporate "contribution" as an element. In doing so, the conclusion we come to is no less a conclusion about cause-in-fact.

The factors that are altered tend to be those said to be wrongful, tortious or "guilty".[16] There may be one or more guilty factors that must be altered. Factual antecedents that are not wrongful, or that are part of the ordinary nature of things, can be called "innocent" factors, and will not change in the determination of causation. Guilty factors are no more and no less an influence on outcome than are innocent factors. Moreover, both innocent factors and guilty

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[15] See Stapleton, J. An 'Extended But-For' Test for the Causal Relation in the Law of Obligations, Oxford Journal of Legal Studies, Vol. 35, No. 4 (2015), page 706.

[16] I will use the term "guilty" as it has been used in the long line of toxic tort cases from the UK, including *Fairchild v. Glenhaven*.

factors, working in succession or concurrently, might be required to bring about a particular outcome or phenomenon.

THE CAUSAL INQUIRY

Assume there were two events, A and B, with the result C that follows. In simple terms, the possibilities include:

1. Neither A nor B caused C;
2. A, but not B, caused C;
3. B, but not A, caused C;
4. Either A or B was sufficient to cause C on their own; or
5. Neither A nor B on their own was sufficient to cause C, but the occurrence of both A and B were necessary to cause C (A and B are interdependent).

For possibilities 1, 2 and 3, determining causation may be straightforward, and the but-for test is generally equal to the task. The problem is that the two-hunters scenario arises under possibilities 2 and 3 taken together, where it cannot be determined which of A or B was the cause of the loss. In that scenario, however, it is known that one of A and B is the cause-in-fact of the loss. Insofar as A and B are concerned "globally", but-for causation is proven. It is only when we individuate the causal question to a single wrongdoer that we encounter a dilemma. Where the actors that cause C are parties-defendant, the loop on causation is closed and we are confident that the guilty party is a member of the group of defendants. It is not the but-for test that fails us, but the individuation in its application.

What is the process by which liability might be attributed in the two-hunter scenario? The options are two: first, knowing that "a" defendant is the but-for cause of the loss, the burden of proof ought shift to the defendants to refute that their actions caused the loss; or, second, matters of causation are not immutably individuated, allowing causation to be found "globally" as against the group of actors known to include the wrongdoer, but where the wrongdoer cannot be individually identified. That will raise problems with attribution of fault, dealt with under the discussion of the *Barker* case. The only other alternative is to deprive the injured party of a remedy. The shift in the burden of proof has largely been rejected as the remedy, even though that is effectively what courts have contemplated, if the test is applied as set out in the caselaw.

Imposing responsibility for "global" causation, where only one member of the group can possibly have caused the loss is to impose liability, however, on a defendant who did not cause the loss. As will be seen, the rationale adopted by some courts for attributing liability in this scenario is founded on the fact that it was the defendants' own breaches of duty to the plaintiff that made causation elusive.[17] As between the injured, innocent party and the defendants who caused or may have caused the impossibility of proof, fairness demands that the defendants

[17] This is canvassed extensively in *McGhee* and *Fairchild*.

bear the burden of loss. This approach, however, has its own problems. Consider a slight alteration of the facts, where the hunters simultaneously fire their rifles in completely opposite directions, and sometime later Mr. Lewis is found with a gunshot injury that must have come from one or the other of the hunters, but which cannot be determined. As one of the hunters did not fire his rifle in Mr. Lewis' direction, presumably that hunter committed no breach of duty. That hunter is neither guilty of a breach of duty, nor guilty of causing harm. Mr. Lewis still faces the same causal dilemma, but the injustice of sharing liability amongst the two hunters is also obvious. Does fairness still demand that Mr. Lewis have a remedy against the two hunters?

The outrage that Mr. Lewis, who is entirely innocent, might be without a remedy may be misplaced in either scenario. Perhaps the answer to this dilemma will turn on the specific facts. The actions of both hunters must be a possible cause of injury (which can't occur if they fire in opposite directions) and those possible causes, considered together, must explain the loss. Care must be taken not to tie the duty of care too closely to the causation analysis. These are distinct subjects.

Importantly, what does emerge from the two-hunters scenario is that an alternative to the but-for test is of no value. There is no alternative test, including the *Clements* material contribution test, that has been proposed to address this factual scenario. Thus, while this scenario is the classic illustration of a major deficiency in the application of the but-for test, no alternative test has been articulated to resolve the conundrum. The objective of this paper is to show that we can clear up most of the confusion on causation, without solving this particular dilemma.

Possibility 4 is problematic and is referred to as an "overdetermination" scenario, also called "duplicative causation". The classic illustration of an overdetermination case is that involving two merging fires, each of which, on its own, is sufficient to cause the loss, but which combine before the loss occurs. A strict application of the but-for test results in a circular argument on causation, where neither fire is found to be a but-for cause of the loss. Neither fire is *necessary* for the occurrence of the loss because the same loss is suffered with either.

In overdetermination cases, the conventional or traditional but-for test applied to a single specified factor, which asks if that factor was a *necessary* cause of the phenomenon, results in a finding of no causation where causation clearly exists. Again, an untenable situation.

Possibility 5 illustrates the challenge in properly posing the counterfactual question. If any one cause, A, is insufficient on its own to cause the loss, and A needs to combine with B for the loss to occur, then causation cannot be determined by asking whether A was the but-for cause of the loss. The question must be, did A plus B cause C? In this sense, both A and B must be recognized as "a" cause of C, but neither is "the" cause of C. It follows that neither is, on its own, *sufficient* to cause the harm, but together they are *sufficient*. As one adds more potential causes, the permutations and combinations increase, as does the complexity. The task becomes more challenging when some guilty factors combine with innocent factors. Therefore, composition of the counterfactual must take heed of these basic realities.

To illustrate, consider the following example:

> A, B and C, acting independently but simultaneously, each negligently leans on Paul's car, which is parked at a lookout at the top of a mountain. Their combined force results in the car rolling over a diminutive curbstone and plummeting down the mountain to its destruction. The force exerted by the push of any one actor would have been insufficient to propel Paul's car past the curbstone, but the combined force of any two of them is sufficient.[18]

Looking at the actions individually, none was *necessary*. But some combination of wrongdoing was necessary: either A + B, A + C, or B + C were needed to be *sufficient*. Applying the narrow but-for test, causation cannot be established against A, B or C, where individuated. Insofar as the group is concerned, but-for is established. But the acts of two of the wrongdoers were necessary. But-for any combination of acts from two wrongdoers, the loss does not occur.

If only A and B were pushing on Paul's car, and the combined force of both was required to push the car over the edge, no one cause was necessary; both causes were necessary and sufficient. If the question is asked whether the act by A was a but-for cause of the harm, where the act of A is necessary, but insufficient, A's act would not be found to be a cause. The act of B is needed to properly address the causal question. Either the test is faulty, or we are asking the wrong questions. I maintain, for the most part, that the problem is the latter.

Consider the scenario where the force of three people is required to push the car over the edge, with A, B and C pushing on the car, but where A's actions are innocent. This is a scenario not contemplated by the *Clements* formulation of the alternative test, but must be accounted for by a counterfactual that properly addresses causation.

The challenge is to properly pose the counterfactual for item 5. Asking first whether A caused C, and then whether B caused C, would result in a negative answer on both counts. The counterfactual must ask whether the occurrence of both A and B together, whether cumulatively, successively, or redundantly, caused C. Both A and B are necessary factors to cause the phenomenon. Thus, both A and B must be included as factors in the counterfactual that looks at C as the phenomenon. The counterfactual posed about A is dependent on the counterfactual posed about B. The two counterfactuals are interdependent and cannot be answered independently. How one models the counterfactual, in the context of tort law, is crucial to reliably determining cause-in-fact.

To understand the interplay between causes, it is necessary to know the characteristics of the cause, how many causal events there are, and the role of each in the outcome. In her article "An Extended But-For Test for the Causal Relations in the Law of Obligations", Australian Law Professor Jane Stapleton seems under no compulsion to adopt an alternative test to but-for. Rather, she proposes what she describes as an "extended but-for test". I contend that an

[18] This example was plagiarized from Stapleton at page 710.

extended but-for test is not to propose a change in the law, but, rather, is to ask the proper causal question that will lead to determining cause-in-fact.

As described by Professor Stapleton, there are two ways to describe causal facts: first, there is the straightforward situation where a phenomenon (the harm) would not have existed had the factor (guilty cause) not been present; and, second, "contributions" to the production of the phenomenon which are not captured by the simple but-for relationship.[19] In this regard, there is recognition that the guilty cause is part of a set or group of events that give rise to the loss, although, according to Stapleton, a contribution need not be 'necessary' on its own in order for it to be causal. In contrast, Professor Wright argues that necessity modifies the set of factors that explain the outcome, making an individual factor necessary as part of a necessary set.[20]

Thus, Stapleton proposed an extended but-for test as follows:

> A specified factor is a cause of the existence of a particular phenomenon (as that phenomenon is individuated by the law) only if, but for that factor alone, (i) the phenomenon would not exist or (ii) an actual contribution to an element of the positive requirements for the existence of the phenomenon would not exist.[21]

While the extended but-for test might assist in the multi-factorial cause cases, it fails to provide a principled answer for the two-hunters case. As I said, we should be satisfied with a test that can be applied to most cases, even if the two-hunters' case remains a challenge.

Stapleton proposes the new extended but-for test for causation, which she asserts would address the shortcomings of the strict application of the current test that she largely attributes to the way the law individuates the causation question. Is this proposed extended but-for test really new, or is it an extension of the current law?

PHANTOM ALTERNATIVE CAUSATION TESTS

In circumstances where the traditional but-for test for causation is wanting, it is clear that the courts in Canada have contemplated an alternative test, the implication being that but-for causation need not be proven in some *exceptional* circumstances. There is, in fact, not a single case where the *Clements* material contribution test for causation has been invoked by the Supreme Court of Canada, despite decades of endorsing such a test, in various forms. Insofar as cause-in-fact is concerned, the test is a mere phantom.

For those who argue for the existence of a material contribution test for causation based on the series of decisions from the Supreme Court of Canada, starting with *Athey v. Leonati*[22] in 1996

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[19] See Stapleton at page 698.
[20] See Wright below.
[21] See Stapleton page 725.
[22] *Athey v. Leonati*, [1996] 3 S.C.R. 458.

and culminating with *Clements*[23] in 2012, I contend that the description of this putative test has evolved, in the way it has been described by that court, to the point where it cannot be seen as a test for causation in any sense. Based on the decision in *Clements*, the material contribution test has devolved to describe an exceptional factual background against which the plaintiff will be relieved of proving causation entirely. As such, this does not reflect a principled approach for proving cause-in-fact, but, rather, permits loose considerations of policy or fairness to supplant a test of cause-in-fact.

This is not to deny the limitations of the traditional but-for test – they are real and confounding. It is merely to point out that the material contribution alternative, as it has been described by our courts in the last few decades, is no answer. Neither is it helpful to engage in esoteric mental gymnastics, as some authors have done[24], in order to transmogrify the but-for test to fit every unusual factual scenario. It will take only a moment to realize that the material contribution test completely fails to resolve the causation challenge posed in the two-hunters case.

Sopinka J, in *Snell,* was much closer to identifying an approach that resolved the more difficult and exceptional cases, on a principled basis. A far simpler and more elegant solution to the two-hunters case can be found in Sopinka J's statement that the burden of proof for causation is not immutable. The shift in burden of proof was considered as a possible solution to the two-hunters' case, but was not the reason for deciding the case in favour of the plaintiff.[25]

For many courts and academics, the modern origins of the proposed alternative causation test can be traced back to the English case of *McGhee*. That case has been seen by some as an extension of the but-for test, or as allowing an exception to the but-for test. I will review *McGhee* here, as well as the later English cases of *Wilsher*, *Fairchild* and *Barker*.

I will argue that the imposition of liability on the defendant in *McGhee* was entirely and properly supported by the traditional but-for test, invoking a reasonable inference from the facts, which the trier of fact was entitled to draw. The reasoning in *McGhee* is not unlike the approach taken by Sopinka J in *Snell*, where an inference may be made on the basis of very little positive evidence, where all the evidence that could be called was called, and no more likely alternative cause prevailed. To make this argument, the comments about *McGhee* made by Lord Bridge in *Wilsher*[26], must be endorsed, as they were by Justice Sopinka in *Snell*, and doubt must be cast on the reasoning and approach taken by the House of Lords in *Fairchild*, as well as *Barker*.[27]

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[23] *Clements v. Clements*, 2012 SCC 32, [2012] 2 S.C.R. 181

[24] See Weinrib, E. Causal Uncertainty, Oxford Journal of Legal Studies, Vol. 36, No. 1 (2016).

[25] See *Cook v. Lewis*, per Rand J at 833.

[26] *Wilsher v Essex Area Health Authority* [1987] UKHL 11

[27] *Fairchild v Glenhaven Funeral Services Ltd & Ors* [2002] UKHL 22 and *Barker v. Corus* (UK) Plc [2006] UKHL 20.

McGhee v. National Coal Board

McGhee is concerned with liability arising out of the cumulative effect of an innocent event followed by a guilty event. There was a single wrongdoer in this case. All the evidence on causation that could have been called was called, but it was impossible to prove, directly, the contribution of the innocent and guilty events to the outcome.

The plaintiff worked in brick kilns where he was exposed to brick dust. He developed dermatitis from his exposure to brick dust while at work and after departing work. There was no breach of duty in exposing the plaintiff to brick dust while at the kilns – the innocent dust. The defendant employer, however, did breach a duty of care to the plaintiff by failing to provide showers that allowed him to wash off the brick dust prior to riding his bicycle home – the guilty dust. The evidence was that the longer he was exposed to brick dust, the greater the chance of developing dermatitis. That is, the cumulative effect of the innocent dust and the guilty dust created a greater chance of contracting dermatitis.

Crucially, the expert evidence could not go so far as to say that the guilty dust was the probable cause of the dermatitis. The most the medical expert could say was that the guilty dust *increased the risk* of dermatitis in a material way. This left the possibility that the dermatitis was caused by the innocent dust alone, the cumulative effect of the innocent dust and the guilty dust, or the guilty dust alone. This created an "evidential gap" in that none of the possibilities could be shown to be more likely than any other, at least based on testimony.[28] The issue in the case was whether this evidential gap could be overcome, and a finding made for the plaintiff. There is inconsistency in the reasoning of the various decisions from the House of Lords. While Lord Wilberforce rejected the notion that this evidential gap could be overcome by inference, it is my belief that inference is precisely how the gap was bridged. This, I suggest, is essentially what Lord Kilbrandon found in his reasons.

The factual context of the case is important. The duty owed by the employer to the plaintiff, which was breached, was to instal showers so that innocent dust could be washed away before it became guilty dust. The reason for the employer's duty was that it was well-known that the failure to provide showers could convert innocent dust to guilty dust. It was known that because of the cumulative effect that this had on the risk of disease, it was essential that guilty dust be avoided. By failing to prevent the guilty dust, the employer had to know that the risk of injury increased. Although the employer was in breach of its duty to prevent the guilty dust, the employer sought to rely on the inability of science to prove definitively how and when dermatitis was contracted, and thereby avoid liability. The House of Lords was offended that the result that flowed from an apparent (but I say, no real) evidentiary gap would allow the employer to ignore its legal duty with impunity.

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[28] Other cases have considered the "evidential gap" and concluded that some special rule was needed to jump the gap. In doing so, they have failed to follow the reasoning of Sopinka J in *Snell*, where it is established that a trier of fact is entitled to draw an inference about causation after weighing all the evidence, notwithstanding an apparent evidential gap. In this way no leap is required, and causation can be found as a fact. See *Clements*.

In *McGhee*, the plaintiff had done all that could be done to prove the case. It was proven that the employer knew that showers were required as a precaution to reduce the risk of disease. The employer failed to take those precautions. The plaintiff then suffered the very disease that the precautions were intended to avert. As Lord Kilbrandon pointed out, it is probable that the disease is more likely to occur in the circumstances that include the presence of guilty dust. The inference that guilty dust was a necessary cause of the disease is open to the trier of fact, even though the expert evidence was not able to go that far.

Importantly, the court found that it is not necessary to prove that the guilty dust was the only cause. It is also not necessary to prove that the guilty dust, on its own, was a sufficient cause. Where the guilty dust, together with other factors, is found to be a necessary cause, the counterfactual is proven. Moreover, if one were to allow the possibility that it was the cumulative effect of innocent dust and guilty dust that was required to cause the disease, then neither the innocent dust nor the guilty dust, on its own, was either necessary or sufficient. Therefore, a properly framed counterfactual must address the cumulative effect of the innocent and guilty dust, where the guilty dust is the "straw that breaks the horse's back".

Despite all the confusing references to *McGhee*, I think it is a case where the but-for test was satisfied. Lord Kilbrandon says:

> It is admittedly more probable that disease will be contracted if a shower is not taken. In these circumstances I cannot accept the argument that nevertheless it is not more probable than not that, if the duty to provide a shower had been neglected, he would not have contracted the disease. The pursuer has after all, only to satisfy the court of a probability, not to demonstrate an irrefragable chain of causation, which in a case of dermatitis, in the present state of medical knowledge, he could probably never do.[29]

Despite the quintuple negatives in that statement, it seems to me that an additional negative has been omitted. In my view, Lord Kilbrandon is merely saying that the failure to provide a shower in the circumstances of the case, has been proven to be a part of a necessary set of circumstances resulting in disease, and the burden of proof resting on the plaintiff was satisfied. Therefore, the but-for test has been established. It is an inference that the trier of fact is permitted to draw from all the evidence, the plaintiff having led all the evidence relating to causation that was in his power to do.

As Lord Salmon said:

> It is not necessary, however, to prove that the defenders' negligence was the only cause of injury. A factor, by itself, may not be sufficient to cause injury but if, with other factors, it materially contributes to causing injury, it is clearly a cause of injury."

[29] *McGhee v National Coal Board* [1972] UKHL 11.

It is important to point out that using material contribution in this context serves not as a substitute for but-for, but as a sufficient basis to satisfy but-for. In this way, material contribution is an adjunct to the causal test.

If the guilty act is seen as a necessary step to harm, even the straw that broke the horse's back, it is a material contribution. But does material contribution to risk involve a risk that becomes greater than 50%, having regard to the plaintiff's burden of proof? Lord Salmon asserts that the courts below had confused the balance of probabilities test with the nature of causation. This implies that a material cause may be less than 50% (just not *de minimis*) but the balance of probabilities is met. This must be because the addition of the guilty cause, can be seen as necessary to result in the harm. This is the true nature of material contribution and material contribution to risk, which directly answers the cause-in-fact inquiry.

McGhee is a difficult case, since the dermatitis could have occurred from innocent brick dust, the cumulative effect of innocent and guilty brick dust, or from guilty brick dust alone. It is also possible to have occurred from a single abrasion alone, making any cumulative effect irrelevant. Despite the possibilities, there was no evidence that could support any one theory. Causation, therefore, needed to be decided on the basis of exposure to risk. On the whole of the evidence, the exposure to guilty brick dust "materially" increased the risk of dermatitis. Once the evidence has established this fact, the but-for test can be met by inferring causation. The inability of the plaintiff to specify which scenario resulted in his disease allows a trier of fact to find guilty dust a cause of disease. The absence of evidence to show more is no fault of the plaintiff, as it is not scientifically provable with more precision. The defendant's own breach of duty precluded the defendant from relying on the lack of scientific evidence to refute the causation inference. To avoid liability, the defendant would need to call positive evidence of an innocent cause being more likely.

Lord Reid rejected the distinction between material contribution to risk and material contribution to harm, saying:

> Nor can I accept the distinction drawn by the Lord Ordinary between materially increasing the risk that the disease will occur and making a material contribution to its occurrence.
>
> There may be some logical ground for such a distinction where our knowledge of all the material factors is complete. But it has often been said that the legal concept of causation is not based on logic or philosophy. It is based on the practical way in which the ordinary man's mind works in the everyday affairs of life. From a broad and practical viewpoint I can see no substantial difference between saying that what the defender did materially increased the risk of injury to the pursuer and saying that what the defender did made a material contribution to his injury."[30]

[30] See *McGhee v National Coal Board* [1972] UKHL 11, pp 4-5.

Lord Reid rejected the finding in the court below that the plaintiff had to prove that guilty brick dust was the probable cause of the disease. In the circumstances of the case, and on the medical evidence, there were two causes – the innocent brick dust and the guilty brick dust. The importance of the innocent brick dust could not be ignored, but Lord Reid held that the guilty brick dust "itself would have been enough to cause him injury". The presence of the guilty brick dust increased the risk of disease materially. Lord Reid rejected any distinction between "materially increasing the risk of disease" and making a "material contribution to the disease". One might suppose that there is a distinction, with the former falling short of actual proof of a causal relationship, while the latter implies a causal relationship. Having said that, a material contribution to risk may, as argued elsewhere in this paper, be reasonably inferred to result in a material contribution to disease or harm. Either way, Lord Reid was prepared to find that the guilty brick dust materially contributed to the disease.

Lord Wilberforce adopted a slightly different approach which included a suggestion that the burden of proof would shift to the defendants in a case of this nature. The shifting of the burden of proof, however, has been rejected by subsequent decisions and was not required for a finding of liability in *McGhee*. Lord Wilberforce characterized the causal issue as balanced: the plaintiff could not prove that the guilty brick dust caused his dermatitis and the defendant could not disprove that it did on a balance of probabilities. At first glance, as the burden rests with the plaintiff, the claim must, therefore, fail. Lord Wilberforce responded in two ways. First, by virtue of its breach of duty, the employer created a risk of harm. That harm, having materialized, should be attributed to the creation of risk in the absence of evidence proving the contrary. Second, the judge discussed a shifting of the burden of proof.

Lord Simon was satisfied that the plaintiff's claim could be proven on a balance of probabilities. He describes the plaintiff's causation burden as proving on a balance of probabilities that the breach of duty contributed substantially to causing the injury. He goes on to say that it does not matter whether the factors operate concurrently or successively in causing the harm. In using the words "contributed substantially", which is not different than "material contribution", it should not be taken that Lord Simon is proposing a departure from the but-for test or any shift in the burden of proof. Lord Simon's decision should be taken to mean that, in the circumstances of *McGhee*, the court was entitled to infer that the guilty brick dust was a but-for cause of the disease.

While duty of care and causation are separate and distinct entities, Lord Simon points to the undisputed fact that the duty to prevent the guilty brick dust is imposed precisely because it is known that guilty dust, added to innocent brick dust, increases the risk materially that disease will occur. The employer was required to provide showers as a precaution against guilty brick dust causing disease. Although innocent brick dust exposes the plaintiff to a risk of disease, innocent brick dust plus guilty brick dust increases that risk in important ways. If it could have been proven that innocent brick dust would have caused dermatitis without the guilty brick dust, the claim would have failed.

Lord Simon's comment, that a stark distinction between duty of care and causation is "unreal", is of some concern. As I said, they are distinct entities. The point to be taken from this comment is that the two concepts are inextricably linked when the duty of care is to avoid the very outcome that might ensue from its breach.

Lord Salmon points out that a factor, by itself, may not be sufficient to cause injury, but may be important as part of a sequence or group of factors. Therefore, the guilty factor need only be "a cause" and not "the cause".

I propose, therefore, that *McGhee* was a case where the but-for test could be applied and was applied. The trier of fact was entitled to infer from all the evidence, on a balance of probabilities, that, by exposing the plaintiff to the material risk, the cumulative effect of both the innocent and the guilty brick dust resulted in the disease. The materiality of the guilty event goes to whether it is permissible to conclude, by inference, that it was causal of the outcome. Once it is permissible to so conclude, insofar as this case is concerned, materiality is no longer important, and cause is determined as a fact. The dermatitis would not have occurred "but-for" the exposure to guilty brick dust. On the facts, this conclusion was open to the trier of fact to make once all the evidence that could be called was called. Moreover, the guilty cause need not be the primary cause, but merely "a" cause.

Material contribution, as subsumed in a proper cause-in-fact analysis, describes the process of reasoning that may be required to determine if there is a causal effect from the wrongful act complained of and the resulting harm. It speaks to the reasonableness of inferring a connection between cause and effect where it would otherwise be impossible to do so with confidence. Only then can material contribution qualify as a genuine test for cause-in-fact. Once the inference is made, however, cause in fact is proven for the purposes of the case under consideration. The word "material" refers only to the sufficiency of the evidence to support a relationship between cause and effect, factor and phenomenon.

If *McGhee* can be reasonably seen as a case that found cause-in-fact based on an allowable and principled application of the counterfactual, then it is difficult to reconcile the reasoning in that case with that in *Clements*. There was no requirement in *McGhee* that all causes be tortious, like that required in *Clements* (but not in *Athey*). Considerable assistance in understanding and applying the principles from *McGhee* can be derived from the Supreme Court of Canada decision in *Snell*. Before dealing with *Snell*, I will discuss another important English case – *Wilsher*.

Wilsher v. Essex Area Health Authority

<u>Wilsher</u> is a medical malpractice case decided by the House of Lords in 1988. The trial judge, finding in favour of the plaintiff, had determined causation on the basis that the onus had shifted to the defendant to disprove negligence. There were multiple possible causes for the blindness suffered by a premature newborn shortly after birth, only one of which was a guilty one (caused by an error in the monitoring of the partial pressure of oxygen in arterial blood).

Lord Bridge, for a unanimous House of Lords, held that had the trial judge directed himself to the proper onus and still found for the plaintiff, the finding would have been unassailable. I pause here to note that such a conclusion, properly arrived at, could only be made by inference from scientific evidence of great imprecision. A new trial was ordered.

Wilsher is important for Lord Bridge's interpretation of *McGhee*, with which Justice Sopinka agreed in *Snell*, but with which the House of Lords took exception in *Fairchild*. Preserving a principled and understandable approach to causation that is capable of application in all but the most singular cases requires, in my view, the adoption of Lord Bridge's reasoning and interpretation in *Wilsher*.

In regard to the reasoning in *McGhee*, Lord Bridge stated:

> But where the layman is told by the doctors that the longer the brick dust remains on the body, the greater the risk of dermatitis, although the doctors cannot identify the process of causation scientifically, there seems to be nothing irrational in drawing the inference, as a matter of common sense, that the consecutive periods when brick dust remained on the body probably contributed cumulatively to the causation of the dermatitis. I believe that a process of inferential reasoning on these general lines underlies the decision of the majority in *McGhee's* case. [emphasis added]

After citing passages at some length from *McGhee*, Lord Bridge makes the following important statement:

> The conclusion I draw from these passages is that *McGhee*…laid down no new principle of law whatever. On the contrary, it affirmed the principle that the onus of proving causation lies on the pursuer or plaintiff. Adopting a robust and pragmatic approach to the undisputed primary facts of the case, the majority concluded that it was a legitimate inference of fact that the defenders' negligence had materially contributed to the pursuer's injury. The decision, in my opinion, is of no greater significance than that and the attempt to extract from it some esoteric principle which in some way modifies, as a matter of law, the nature of the burden of proof of causation which a plaintiff or pursuer must discharge once he has established a relevant breach of duty is a fruitless one.[31] [emphasis added]

On this approach, cause-in-fact has been established. The impossibility relating to scientific proof does not preclude the trier of fact from weighing the entirety of the scientific evidence proffered to arrive at a finding of fact. That such a finding is based on inference or common sense does not detract from its sagacity. The later interpretation of *McGhee*, in both *Fairchild* and *Barker*, promoted an unnecessary and complicated distortion of *McGhee*. The case of *Barker* illustrates how complicated the matter can become. Before reviewing the cases of

[31] *Wilsher v Essex Area Health Authority* [1987] UKHL 11

Fairchild and *Barker*, I will turn to the Canadian case of *Snell v. Farrell,* as I contend that the reasoning in that case is consistent with my analysis of *McGhee* and *Wilsher*.

Snell v. Farrell

Snell is a medical malpractice case. The plaintiff suffered atrophy to her optic nerve following eye surgery. There were any number of explanations for her injury, including natural causes and surgical misadventure. The expert evidence fell short of determining a cause with any certainty.

The question that the court had to decide was whether the traditional but-for test of causation was no longer satisfactory, as it operates to deprive plaintiffs in medical malpractice cases of compensation because they cannot prove causation where it in fact exists.[32] While this is precisely how the problem of but-for can be described in the two-hunters' case, *Snell* is a different spin on the same issue. Posing the issue in this way, it presupposes that proof of causation is impossible. As will be seen, the court had no trouble drawing an inference of causation.

The case considered the House of Lords decision in *McGhee* and came to a different conclusion about the significance of that case than the House of Lords did in the subsequent case of *Fairchild*, referred to below. Justice Sopinka notes the comments of Lord Bridge in *Wilsher* and the view that *McGhee* espoused no new principle of causation.[33]

Sopinka J describes two theories of causation arising out of *McGhee*. First, the plaintiff is only required to prove harm that came within the risk created by the defendant. Second, an inference of causation was warranted because there is no distinction between materially contributing to risk or to the harm itself.[34] It is important to note that the reference to material contribution in this case is in the context of drawing an inference, not some new test for cause-in-fact. In this context, Sopinka J states:

> 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.[35]

From this, Sopinka J is of the view that the theory of causation that emerges from *McGhee*, and the one ultimately applied in that case, is that where a risk of harm is created by the defendant's breach of duty, an inference of causation may be drawn.[36] For the purposes of

[32] See *Snell* page 326.
[33] See *Snell* page 324.
[34] See *Snell* page 323.
[35] See *Snell* pages 326 to 327.
[36] See *Snell* page 335.

Snell, it is sufficient to say, as in *McGhee*, that inferring causation from the available evidence was a finding open to the trier of fact, and in conformity with the traditional but-for test of a properly formulated counterfactual.

Cases have generally rejected the notion of a reserve onus.[37] Rather, once a *prima facie* case has been made, liability will attach in the absence of a more likely explanation coming from the defendant. Sopinka J does refer to the challenge posed by the two-hunters' case. Presumably because there is no other clear principle that would resolve the apparent injustice posed in that unusual scenario, Sopinka J says:

> Reversing the burden of proof may be justified where the 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.[38]

Though shifting the onus of proof has not been adopted in any scenario, and rejected explicitly in *Fairchild*, Sopinka J observes that "it has long been recognized that the allocation of the burden of proof is not immutable".[39]

For Sopinka J, the controversy regarding the traditional but-for test for causation did not arise from the test itself, but, rather, from an overly rigid application of the test. Sopinka J said:

> 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 page 490:
>
> > …essentially a practical question of fact which can best be answered by ordinary common sense rather than abstract metaphysical theory.
>
> Furthermore, as I observed earlier, the allocation of the burden of proof is not immutable. Both the burden and standard of proof are flexible concepts. In *Blatch v. Archer* (1774), 1 Cowp. 63, 98 E.R. 969, Lord Mansfield at p. 970:

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[37] It is beyond the scope of this paper to get into the notion of a shift in the burden of proof. The burden of proof is connected with the calling of evidence, first required by the plaintiff and, subsequently, usually required by the defendant, intended to persuade the trier of fact. Arguably, the motivation for the alternative to the but-for test -- issues of policy and fairness -- would be more appropriately directed at the burden of proof issue than at the cause-in-fact issue. See Wigmore, vol. 9, paragraph 2486, page 291.
[38] See *Snell* page 327.
[39] See *Snell* page 321.

> It is certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted.[40]

The practical significance of this passage is unclear. The *Snell* case itself establishes that challenges to proof need not result in a shift of the burden of proof. Having said that, it is certainly preferable, as in the two-hunters' case, to resort to a shift in the burden of proof, rather than resort to a new and uncertain test, like that described in the cases from *Athey* to *Clements*, as an alternative to but-for. It would be far more principled to say that in the truly exceptional cases where the plaintiff faces manifest injustice, essentially as a result of the impossibility of proof created directly by the defendant's own breach of duty, a court will allow a reverse onus. This, however, will prove difficult to apply.

Where the plaintiff has challenges to the proof of causation, despite having called all the evidence that was in her power to produce, the but-for test is still equal to the task. As Sopinka J says:

> In many malpractice cases, the facts lie particularly within the knowledge of the defendant. In these circumstances, very little affirmative evidence on the part of the plaintiff will justify the drawing of an inference of causation in the absence of evidence to the contrary. [41]

In difficult factual scenarios where the plaintiff, having called all the evidence that was in their power to call, faces a burden of proof of causation that is difficult to surmount, some have argued for a shift in the burden of proof. Some cases have talked about a secondary or evidential burden of proof. Sopinka J, has articulated the best description of the evidentiary burden in these scenarios. He says:

> These references speak to the shifting of the secondary or evidential burden of proof or the burden of adducing evidence. I find it preferable to explain the process without using the term secondary or evidential burden. It is not strictly accurate to speak of the burden shifting to the defendant when what is meant is that evidence adduced by the plaintiff may result in an inference being drawn adverse to the defendant. Whether an inference is or is not drawn is a matter of weighing the evidence. The defendant runs the risk of an adverse inference in the absence of evidence to the contrary….In my opinion, this is not a true burden of proof, and use of an additional label to describe what is an ordinary step in the fact-finding process is unwarranted.
>
> The legal or ultimate burden remains with the plaintiff, but in the absence of evidence to the contrary adduced by the defendant, an inference of causation may be drawn although positive or scientific proof of causation has not been adduced. If some

[40] See *Snell* page 328.
[41] See *Snell* pages 328-329.

> evidence to the contrary is adduced by the defendant, the trial judge is entitled to take account of Lord Mansfield's famous precept. This is, I believe, what Lord Bridge had in mind in *Wilsher* when he referred to a 'robust and pragmatic approach to the … facts' (p. 569).
>
> It is not therefore essential that the medical experts provide a firm opinion supporting the plaintiff's theory of causation. Medical experts ordinarily determine causation in terms of certainties whereas a lesser standard is demanded by the law.[42]

I think it is clear that *Snell* is not a departure from the traditional counterfactual approach to causation. The case demonstrates that the evidence from which causation is established may be more or less direct, and more or less certain. The degree of confidence with which an imagined causal connection is made will vary depending on the strength of the evidence. What has been described as an "evidential gap" is no more than indirect evidence, from which common sense inferences may be reasonably drawn. The same reasoning applies to *McGhee*. It was within the realm of reasonableness in that case for a trier of fact to conclude that guilty brick dust contributed to the injury. There is support for these assertions in *Wilsher*, but the interpretation I suggest here was rejected by the House of Lords in *Fairchild*. Later, the case of *Barker* made matters even more complex. I now turn to these cases.

Fairchild v. Glenhaven Funeral Home

Fairchild concerned three cases under appeal: *Fairchild, Fox,* and *Matthews*. The reasons begin with a description of the essential question under appeal, describing an overdetermination case, which might involve either duplicative causation (either of two causes cause being sufficient together, separately, or cumulatively) or pre-emptive causation (A would have caused the disease, but B intervened).

In each case, an employee contracted mesothelioma from inhaling asbestos dust, the source of which came from two distinct employers at different times. Both employers breached their duty of care to take measures to prevent inhalation of asbestos dust by the employee. It was impossible to prove whether the employee contracted his mesothelioma while employed at the first employer or the second.

In the Court of Appeal, the claims were dismissed based on the application of the conventional "but-for" test. The employee could not prove that but for the breach of one or the other employer his mesothelioma would not have occurred. The matters were appealed to the House of Lords.

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[42] See *Snell* page 330. I think that Justice Sopinka has borrowed rather heavily here, and without attribution, from Wigmore, volume 9.

Lord Bingham asks, at the outset, whether the "special circumstances" of this case require or justify a modified approach to the proof of causation based on principle, authority or policy.[43] In asking the question in this way, it must be assumed that he agrees with the Court of Appeal that the conventional but-for test operates to deprive the employee of a remedy, though, for Lord Bingham, unjustly. Thus, having decided that the plaintiff is entitled to a remedy, that outcome requires a legal justification.

They also admitted that he had been exposed to the inhalation of asbestos fibres by breach of their duty of care. It is admitted that the extent of exposure to the dust was such as was likely to be injurious to Mr. Fairchild.[44] Mr. Fairchild's widow sued. For Mr. Fairchild, there were two sources of guilty dust.

For Mr. Fox, the facts were slightly different from those for Mr. Fairchild. Mr. Fox was negligently exposed to high levels of asbestos dust at his first job with a named defendant for a period of about two years. He then worked for a second employer for a further 34 years, where he would have been exposed to unknown quantities of asbestos dust from unidentified employers. He did not sue any party associated with his second place of employment. It was only after leaving the second job that Mr. Fox developed symptoms of mesothelioma, which was caused by asbestos dust. He died, and his widow sued the first employer only. For Fox there was a short exposure to guilty dust, followed by a far more lengthy exposure to additional guilty dust generated by employers not party to the litigation. These facts do not lend themselves to the issues as initially described in the case.

Mr. Matthews was employed by Maidstone Sack and Metal between 1965 and 1967, where he was exposed to asbestos dust; by British Uralite from January to February 1973, where he was exposed to asbestos dust; and, by Associated Portland Cement from 1973 to 1981, where he was exposed to asbestos dust. Only the two later employers, British Uralite and Associated Portland, were sued. The judgment indicates that Maidstone Sack could no longer be sued, for reasons not expressed. Each of the two employers sued admitted that it had exposed Mr. Matthews to asbestos dust in breach of the duty of care it owed him.

The evidence established the following in regard to asbestos dust:

1. It is injurious to inhale significant quantities of asbestos dust;
2. Asbestosis is a disease that is influenced by the total amount of dust inhaled;
3. Asbestosis can be made worse by subsequent exposure to dust;
4. Asbestosis dust can also lead to mesothelioma, a malignant tumour and:
    a. Mesothelioma may be latent for 30-40 years;
    b. Mesothelioma occurs through genetic changes, followed by death in 1 to 2 years from diagnosis;

[43] See Lord Bingham at para 2. *Fairchild v Glenhaven Funeral Services Ltd & Ors* [2002] UKHL 22

[44] See *Fairchild* para 3.

c. It is not known what level of exposure to asbestos dust can be tolerated without significant risk of developing mesothelioma;
d. The greater the quantity of dust inhaled, the greater the risk of the disease;
e. But, mesothelioma can be caused by a single asbestos fibre or multiple fibres.

By virtue of the nature of the disease, there is no way to identify the source of the dust or fibre that resulted in mesothelioma. Given that the disease could be from a single fibre and lie dormant for years, where there are two possible sources of the offending fibre, it may be that only one of those sources can be causative or guilty. The two-hunters case revisited, but with a twist.

Like *McGhee*, the employees in *Fairchild* suffered the very harm that it was the duty of the employer to protect them from. The difference is that in *McGhee* there was a single wrongdoer, a clearly identified innocent dust and a clearly identified guilty dust, the cumulative effect of which was to increase the risk of disease. It was open to the court in *McGhee* to find, by inference, that the guilty dust was a cause of the harm. In *Fairchild*, however, assuming two sources of guilty dust, it may be that one did cause the loss and one did not.

Fairchild addresses the notions of "material contribution to harm" and "material contribution to risk". Despite the breaches of duty by each of two employers, where a single fibre of unknown origin can cause the harm, one of the two employers may not have materially contributed to the harm, even though they created material risk. It is a situation where the material risk caused by one employer is proven to not materially cause the harm. This might also serve to challenge the comments in *McGhee* suggesting no difference between material contribution to harm and to risk.

As Lord Bingham points out, had Mr. Fairchild worked for only a single employer, resulting in only a single source of asbestos dust and fibre, he would have been able to establish causation based on the but-for test.[45] Applying the but-for test against two tortfeasors, however, means that he could not prove causation against either and would be deprived of a remedy. If that is the effect of a "mechanical application" of the test for causation, it follows that there must be doubt about the appropriateness of the test.[46]

This, however, is far too narrow a view of the controversy. What if there were two employers, but one of the employers exposed Mr. Fairchild to innocent asbestos dust while the other exposed him to guilty asbestos dust? In this scenario, we do not know whether innocent asbestos dust or guilty asbestos dust caused his mesothelioma. Even if we invoke the exposure to risk argument in this scenario, there may be no cumulative effect when it comes to mesothelioma and an inference would be much more difficult to justify. It is no more probable that the guilty fibre caused the disease than it is the innocent fibre that was the cause.

[45] See *Fairchild* para 9.
[46] Ibid

Lord Bingham makes reference to the conundrum that arises from the two-hunters case, which is the factual scenario most analogous to *Fairchild*, but provides an incomplete analysis.[47]

Lord Bingham saw the obligation of the House of Lords to review the applicability of the but-for test to the circumstances in *Fairchild*. To abide by the rule would "yield unfair results".[48] In support of this approach, he has cited a passage from *Blatch v. Archer*, also cited in *Snell v. Farrell*, that is actually no support at all:

> "It is certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other side to have contradicted".[49]

Lord Bingham then devotes considerable time to a case called *Bonnington Castings Ltd v. Wardlaw*, a case involving a single employer and both innocent dust and guilty dust.[50] The *Wardlaw* case has much in common with *McGhee*, but little in common with *Fairchild*.[51] In *Wardlaw*, the cumulative effect of innocent dust and guilty dust would have operated to convert the innocent dust to guilty dust due to the extended period of exposure. In *Fairchild*, any single fibre of asbestos could have resulted in the mesothelioma, and would not have been worsened or been more likely to result in disease with additional exposure.

Lord Bingham then writes a rather detailed review of the *McGhee* case.[52] He maintained that *McGhee* could not show, on the facts of the case, whether the wrongdoing had probably caused the loss. In my view, *McGhee* established just that. Lord Bingham was not satisfied with the notion that an inference of causation could be drawn due to the fact that the medical experts who testified were not prepared to express that causal conclusion with scientific certainty.[53] Lord Hoffmann[54] and Lord Rodger did likewise.[55] In doing so, I believe they have erred. Notably, Lord Hutton appears to disagree with Lord Bingham on this issue.[56] There is no legal requirement that an expert has to express an opinion on the ultimate issue in order to permit the trier of fact to do so. The scientific burden of proof is much higher than the legal burden. Causation need not be determined with scientific precision.[57] This proposition of law is well-recognized. Lord Bingham said that the causal conclusion was "expressly contradicted" by the medical experts, when, in reality, they were simply not prepared to venture into the

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[47] See *Fairchild* para 27.
[48] See *Fairchild* para 13.
[49] See *Fairchild* para 13.
[50] See *Fairchild* para 14.
[51] So too does the case of *Nicholson v. Atlas Steel Foundry and Engineering Co Ltd*, cited at para 15.
[52] See *Fairchild* starting at paragraph 17.
[53] See *Fairchild* para 21.
[54] See *Fairchild* para 70.
[55] See *Fairchild* para 150.
[56] See *Fairchild* para 94.
[57] See *Snell v. Farrell*.

probability question based on the state of the science.[58] The "impossibility" that might trigger an exception to but-for, therefore, was a creation of Lord Bingham's flawed reasoning.

Lord Hutton made a rather perplexing assertion that "there is little, if any, difference between a *prima facie* presumption and an inference".[59] For the purposes of *Fairchild*, the distinction is important. The *prima facie* assumption in *Fairchild*, as will be discussed below, is that causation is proven because the plaintiff is entitled to a remedy – a notion unconnected with cause-in-fact.

Lord Bingham went on to conclude that the pursuer faced an insuperable obstacle to the proof of causation, requiring that the orthodox test of causation be "adapted" to "meet the particular case". This, in my view, is not what occurred in *McGhee* and was not necessary to arrive at the outcome. The extensive analysis of *McGhee* in *Fairchild* is an unnecessary and very protracted tangent from the real issue. So too is the extensive reference to the House of Lords decision in *Wilsher*.[60]

While I have argued for the wisdom and prudence of Lord Bridge's commentary on *McGhee* in *Wilsher*, Lord Bingham argues that "much difficulty" is caused by those comments.[61] Lord Bingham concludes that Lord Bridge's statement that *McGhee* did not lay down a new principle and merely drew an inference on the facts "should no longer be treated as authoritative".[62] An unfortunate position, the repercussions of which can be seen in the later case of *Barker.*

The possible ways to overcome the dilemma posed in *Fairchild* are:

1. Draw an inference that the increased risk caused the disease;
2. Shift the burden of proof to the defendants; or
3. Rely on policy considerations for attribution of fault, ignoring cause-in-fact entirely.[63]

In *Fairchild*, the injustice of imposing liability on a defendant for damage not caused by that party is magnified by the fact that not all the employers who may have caused exposure to asbestos fibres were before the court.

In the end, Lord Bingham imposes liability which is "consistent with principle, and also with authority (properly understood)"[64] – another unjustified snipe at Lord Bridge. How can one

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[58] I believe Lord Hoffmann has made the same error at para 70 of *Fairchild*. Whereas Lord Hutton has held the contrary, saying at para 100, "I consider that this approach, whereby the layman applying broad common sense draws an inference which the doctors as scientific witnesses are not prepared to draw, is one which is permissible."
[59] See *Fairchild* para 97.
[60] See *Fairchild* para 22.
[61] Ibid.
[62] Ibid.
[63] See *Fairchild* para 32.
[64] See *Fairchild* para 34.

infer a material contribution to disease in relation to two possible causes, when it is known that one cannot be causal? This is why, quite inappropriately, Lord Bingham rejects the view that factual inference is the justification for the outcome in *McGhee*.[65] As for authority, is it doubtful that it was properly understood in Lord Bingham's analysis. Insofar as principle is concerned, if the answer is only that as between the innocent plaintiff and the wrongdoing defendants, it seems that fairness requires that the defendants, collectively, bear the burden of loss, it is a principle that is poorly defined and challenging to apply. A slight alteration to the facts demonstrates the weakness of this approach, as does the later case of *Barker*, discussed below. What if there was one earlier innocent exposure to guilty dust? What if there were 12 earlier exposures to innocent dust? How is the principle applied? How does it work in Mr. Fox' case, where only one wrongdoer is sued?

Lord Hutton does appear to disagree with Lord Bingham on the issue of whether inference was at the foundation of the causation result in *McGhee*. Lord Hutton quotes a passage from the British Columbia Court of Appeal with approval, *Haag v. Marshall*.[66]

In *Haag*, the BC Court of Appeal plainly found that *McGhee* is not a case where the onus of proof shifted, but where an inference was drawn.[67] In that case, the court makes it clear that where circumstances make proof of causation difficult, an inference of causation is permissible and constitutes a finding of cause-in-fact, although the route the *Haag* case took looks more like a shift in onus than it does an inference case.[68]

A careful look at *McGhee* confirms that it was an inference case. It is this important feature that distinguishes it from *Fairchild*, a case where the facts may or may not have permitted an inference. Lord Hutton struggles with the notion of inference in his reasons in *Fairchild*.[69] In doing so, he attempts some legal contortions to make inference fit with the facts in *Fairchild*, and in so doing adopts an entirely different tack to that taken by Lord Bingham and Lord Nicholls. To avoid the gaps in principle that flow from the reasoning of the other members of the court, Lord Hutton believes inference is saved by the evidence that the disease could be caused by "multiple fibres".[70] If this were true, and accepted in support of an inference of causation, there would be no reason to craft an alternative to a comprehensive but-for test.

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[65] See *Fairchild* para 35. See *Haag v. Marshall* a BC case correctly holding that *McGhee* was an inference case. At page 378-379.

[66] See *Fairchild* para 103. See *Haag v. Marshall*, 1989 CanLII 236 (BC CA).

[67] See *Haag* page 1.

[68] See *Haag* page 13. In this case, the court is not saying that weighing all the evidence, one might draw an inference of causation. Rather, the court is saying that where all the indicia of impossibility of proof of causation are there, "it is more in keeping with a common sense approach to causation as a tool of justice, to let the liability fall on the defendant". Thus, the reasoning of this case on the effect of *McGhee* is internally inconsistent. The court considers this conclusion in light of the two-hunters' case, but the facts are quite different in *McGhee*. The availability of the inference, according to the BC Court of Appeal, depends on whether it is in accordance with "common sense and justice". Cause-in-fact has nothing to do with justice and nothing to do with inference drawing.

[69] See *Fairchild* para 106.

[70] See *Fairchild* para 112.

Why the other judges were not persuaded by this reasoning, and opted for a less principled approach, is unclear. The medical expert had testified that it could have been one fibre, it could have been the other fibre, or it could have been both.[71] The evidence on this point is perhaps a bit shaky, which may be why it was not followed by the other judges.

Like Lord Bingham, Lord Nicholls also acknowledged the importance of a principled basis for departing from the traditional rules for proving causation to "avoid the reproach that hard cases make bad law".[72] Having referenced the requirements of the but-for test, Lord Nicholls held that the plaintiff's burden of proof is to say that the injury would not have occurred without the impugned act, but "exceptionally this is not so".[73] He describes a lesser test when the outcome flows from "one or the other of two alternate causes".[74] The very notion that loss flows from one or the other leads to the corollary, that loss does not flow from one or the other. To find liability, the standard for proving causation, in the words of Lord Nicholls, "justifies a relaxation".[75]

But what does that relaxation look like? Is it enough that the benefit of a remedy for the plaintiff outweighs the injustice imposed on the party defendant who did not cause the loss? Does the breach of duty justify tipping the scales in favour of a finding of liability where cause cannot be established, even by inference? This balancing act is a "value judgment", without adequate guidance on how to make the judgment. While the circumstances where the causation threshold is relaxed are said to be exceptional, it is only because the trier of fact is not satisfied with the outcome after applying "traditional" legal principles.

Lord Nicholls sought to bring the facts of *Fairchild* within the reasoning in *McGhee*, by asserting that so long as each employer wrongfully exposed the employee to asbestos dust and the risk of injury in a way that was "not insignificant"[76] (read "material"), the causal connection is made. As this case is not analogous to *McGhee*, it must be thought to be a new standard of causation. Like Lord Bingham, and contrary to sound legal doctrine, Lord Nicholls also held that the court was not permitted to draw an inference of causation in *McGhee*.[77] In doing so, this judge has unwittingly wandered into the area of "linguistic ambiguity" that he had criticized.

Lord Hoffmann noted the frequent assertion that causation is a question of fact, yet feels compelled to analyze this proposition "in order to avoid confusion".[78] This attempt to avoid confusion can only sow confusion when trying to manipulate the proposition to fit the facts of the *Fairchild* case. He then goes on to confuse the concept of causation with the duty of care, further muddled by talk of the burden of proof. Having noted that matters of causation are

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[71] See *Fairchild* para 113.
[72] See *Fairchild* para 36.
[73] See *Fairchild* para 37.
[74] Ibid.
[75] See *Fairchild* para 39.
[76] See *Fairchild* para 43.
[77] See *Fairchild* para 44.
[78] See *Fairchild* para 50.

questions of fact, Lord Hoffmann holds that "causal requirements for liability are always matters of law…driven by the recognition that the just solution to different kinds of cases may require different causal requirement rules."[79] The inescapable conclusion from these remarks is that the desired outcome, the "solution", will dictate the test for causation at law, which would not be a sound approach to causation. The discussion that follows is mere obfuscation, attempting to cobble together an analysis to fit the difficult facts of the case (although later he cautions against adapting causation requirements to an individual case[80]).

Lord Hoffmann's approach involves starting at the end and working backwards. He promotes that the court determine a just and reasonable result and then ensure that the analysis of causation fits with the desired outcome. Under this analysis, causation can be skipped entirely. For Lord Hoffmann, "the concepts of fairness, justice and reason underlie the rules which state the causal requirements of liability for a particular form of conduct".[81] If he is referring to the burden of proof or foreseeability, one might adopt his reasoning. But if causation is covered by this statement, then causation is no longer a question of fact at all.

Lord Hoffmann leads us further astray in the following passage:

> …if it is thought just and reasonable to impose a duty of care to protect someone against harm caused by the informed and voluntary act of another responsible human being, it would be absurd to retain a causal requirement that the harm should not have been so caused.[82]

This tautological statement presumes causation so that causation need not be found. It assumes harm *caused* by a wrongdoer.

The elements that so compelled the House of Lords to find liability in *Fairchild* included: there was a duty to protect against unnecessary exposure to dust; the duty was breached; the greater the exposure to dust, the greater risk of getting the disease; science cannot determine which exposure to dust caused the disease; and, the plaintiff has the disease that the duty of care was to guard against. For Lord Hoffmann, the elements mean that liability must be imposed, or it would "empty the duty of content".[83] Significantly, he notes that where there is a single employer, the plaintiff would succeed. In *Fairchild* there were multiple employers who had exposed the plaintiff to guilty dust, some of whom were not before the court. As well, there was some exposure to innocent dust.

I would propose that the elements described by the House of Lords, and relied upon to impose liability, are missing one essential element that should be required for the proposed departure from traditional rules for causation. The element is that any departure from the traditional test

[79] See *Fairchild* para 52.
[80] See *Fairchild* para 60.
[81] See *Fairchild* para 56.
[82] See *Fairchild* para 57.
[83] See *Fairchild* para 62.

is justified even where it will be known that the breach of one or more defendants saddled with liability could not have caused the harm at all. This is what distinguishes *Fairchild* and the two-hunter cases from *McGhee* and other cases.

These same elements would be present had there been multiple employers, but only one exposure to guilty dust. How far can one take the "empty duty" argument? Lord Hoffmann is not promoting a principled analysis of causation at all. This approach deprives causation of its status as a question of fact. Rather, the approach presumes causation as a matter of "fairness", thereby relieving the plaintiff of proving causation, when the elements are matched. I do not argue against the appeal of fairness for the plaintiff in these circumstances, but only that we call it what it is – it is an exceptional set of circumstances where we relieve the plaintiff of the burden of proving causation. This is not the robust and pragmatic approach advocated in cases like *Snell*. Nor is it the material contribution approach that flows from *McGhee*, allowing an inference to be made from the best available evidence.

As the law of causation would deprive the plaintiffs of a remedy, effectively emptying the duty of care of content, Lord Hoffmann promotes the formulation of a new causal requirement for "this class of case".[84] For the formulation of this 'new' causal requirement, Lord Hoffmann turns to *McGhee* and, in so doing, tries to fit the square peg of *Fairchild* into the round hole of *McGhee*.[85]

The facts in *Fairchild* may assist in understanding whether there is any distinction to be made between a material increase in risk and a material contribution to the harm. Any distinction was not important on the facts of *McGhee*, but may be critical for *Fairchild*. For Lord Hoffmann, a distinction between the two is to resort to "legal fictions".[86] Allowing a distinction would have undermined Lord Hoffmann's reasoning in *Fairchild* and his effort to bring *Fairchild* within the reasoning in *McGhee*. There is, I suggest, an important distinction that is well-illustrated by the facts in *Fairchild*. As any exposure to asbestos dust risks contracting mesothelioma, and as only a single fibre could trigger the disease, each exposure could be treated as a material risk to harm. But, as only one fibre might actually be the guilty fibre, it follows that every other fibre is non-causative, even if the exposure to non-causative fibres is due to a breach of duty. Thus, non-causative fibres would be a material increase in risk, but may not be a cause of disease, and therefore did not materially contribute to the harm.

Take the scenario where there are multiple employers, all parties defendant to the lawsuit, and each had exposed the plaintiff to guilty asbestos fibres, but a single fibre caused the disease. These parties are the only parties responsible for exposing the plaintiff to asbestos. Insofar as the defendants are concerned, as a group, the plaintiff's mesothelioma could not have occurred but for the breach of duty of the group. Each made a material contribution to risk, but only one caused the harm. Not only has the burden of proof for causation been met as against the

[84] See *Fairchild* para 62.
[85] See *Fairchild* para 64.
[86] See *Fairchild* para 65.

group, but there is certainty that one of the group, but only one, was the cause of harm. What is the principled approach to causation that applies in this scenario? How does it change where one member of the guilty exposure group is not named? How does it change where there are innocent exposures, also materially increasing risk? What if there are dozens of wrongdoers, some financially solvent and others not? Unfortunately, *Fairchild* provides us with no guidance on how its approach to causation is to be applied.

Lord Hutton brings *Fairchild* within the reasoning of *McGhee* based on inference and accepting that it might be the cumulative effect of multiple fibres that caused the disease. In that case, no new rule is needed.[87] He concluded that the breach of duty of *each* defendant both materially contributed to the risk and materially contributed to the disease, squarely bringing the case within a counterfactually based but-for test as applied in *McGhee*.[88]

Despite Lord Hutton's valiant effort to essentially preserve a principled approach to causation by invoking inference as it was done in *McGhee*, those efforts were undermined by Lord Rodger, who preferred to find that *McGhee* made new law.[89] Lord Rodger was persuaded that policy issues justified an alternative to the traditional but-for test, in my view an unnecessary venture into uncertain territory.[90]

Lord Rodger also notes that the evidence was that it was not known whether a single asbestos fibre or multiple asbestos fibres triggered the malignant disease.[91] An inference that the disease was caused by multiple fibres from multiple employers and that the cumulative exposure increased the risk (in case of innocent fibres) is necessary to bring the case within traditional causation principles. It is possible that mesothelioma is triggered by a single fibre, which, if accepted to have occurred in this case, makes it impossible for the plaintiff to prove causation.[92]

Lord Rodger finds the parallels between *McGhee* and *Fairchild* "striking",[93] but the ways in which they diverge[94] are considerably more important to the analysis. As Lord Rodger points out, there was only one employer in *McGhee* and that was the only source of dust, both innocent and guilty. In *Fairchild*, the defendants were only some of the wrongdoers that exposed the plaintiff to guilty dust. As well, the plaintiff would have been exposed to innocent dust as well. Lord Rodger is unduly dismissive of this divergence, calling it immaterial, preferring to focus on the impossibility of scientific proof of cause and the breach of duty.[95]

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[87] See *Fairchild* para 113.
[88] See *Fairchild* para 116.
[89] See *Fairchild* para 150.
[90] Ibid.
[91] See *Fairchild* para 120.
[92] See *Fairchild* para 121.
[93] See *Fairchild* para 152.
[94] See *Fairchild* para 153.
[95] Ibid.

Lord Rodger suggests that the principles from *McGhee* are more easily applied to *Fairchild* because "it is not disputed that the men developed mesothelioma as a result of a tort by one of their employers".[96] On the contrary, *Fairchild* is a far more difficult case, depending on the facts that are accepted. The problem that his Lordship ignores is that one of the employers who may have caused the disease was not before the court.

Barker v. Corus

Barker is another toxic agent case, decided in 2006 by the House of Lords. The case illustrates the difficulties that will be encountered on an interpretation of *McGhee* and *Fairchild* that allows for an exceptional and less demanding test of causation than but-for. Like *Fairchild*, this was a mesothelioma case. There were three cases under appeal.

Mr. Barker was negligently exposed to asbestos while working for two employers, followed by a period of self-employment, where he failed to take the necessary precautions to protect himself. Therefore, Mr. Barker's own negligence was a factor in increasing his risk of harm.

In the other two appeals, all the exposures to asbestos were from employers who had breached their duty to the workers.

With regard to Mr. Barker's appeal, given his own contributory negligence, the court had to consider apportionment of liability following the application of the *Fairchild* exception. There had been no apportionment of liability in *Fairchild*, a case where the plaintiffs were not negligent themselves. *Barker*, however, raises the issue of apportionment even in a *Fairchild*-like scenario, illustrating troubling repercussions to the *Fairchild* "exception" that were not adequately thought through by the court in that case. The troubling repercussions also raised an issue, once apportionment amongst the defendants has been determined, with respect to whether the *Fairchild* "exception" called for several liability only as a further modification to the alternative test. By further extension, this also raises the issue as to whether an innocent factor, or the existence of an unidentified contributor, might affect the application or operation of the exception and the apportionment of fault.

The Court of Appeal held the two employers jointly and severally liable for the plaintiff's damages, after a reduction of 20% for the Mr. Barker's own negligence. One of the employers was insolvent, thus, the other would have been responsible to pay the entirety of the judgment against the defendants jointly.[97] On both Mr. Barker's appeal and the other two appeals, the issue was raised whether liability should be joint and several or only several. On the latter issue, it appears that the court was guided by the liable defendants' ability to pay, a factor that ordinarily would not be a relevant consideration.

[96] Ibid.
[97] See *Barker* para 3.

Much of *Barker* is devoted to the joint and several issue. Though beyond the scope of this paper, I offer some brief comments on the joint and several issue as determined by the court. Lord Hoffmann, through a convoluted analysis, held that the defendants should only be responsible for their several liability, and the cases were remitted back to reassess damages exposure based on the "proportion of risk attributable to" each breach of duty.[98] Ordinarily, the wrongdoers would be jointly and severally liable for the entirety of the loss. For Lord Hoffmann, the fact that the imposition of liability was "exceptional" meant that the same principle used to impose liability demanded attribution of damages only to the extent of the probability that a particular breach of duty caused harm.[99] Given the impossibility of determining causation that gave rise to the need to invoke an exception to the usual requirements of proof, it is difficult to imagine an equitable way to apportion fault. The point I wish to make here is merely that *Barker* demonstrates an unwelcome extension of the *Clements* superfluous review of this putative exception.

For Lord Hoffmann, no matter what difficulty will inevitably flow from the attempt to determine several liability in cases where it is impossible to establish cause, the compulsion to do so is a result of the need to "smooth the roughness of justice which a rule of joint and several liability creates" in cases where the exception is applied.[100] Although Lord Rodger would have none of this specious reasoning.[101] In other words, the exception risks that a defendant, not liable, will pay damages for harm they did not commit. The reason for invoking the exception, in the first place, was that holding the wrongdoers liable, for the totality of the plaintiff's loss (jointly and severally), was seen as more just than depriving the plaintiff of a remedy. Now, for Lord Hoffmann, it seems that the exception will provide no more than a partial remedy to the plaintiff, no matter the plaintiff's innocence. In the case of Mr. Barker, his own negligence should be taken into account. But for the other two appeals, the plaintiff was entirely blameless. Even more crucial is that mesothelioma, a disease that may be caused by a single asbestos fibre, could have been caused entirely by just one of the wrongdoers. One or the other of these defendants may have caused the entirety of the loss.

It can be seen, at once, that the motivation for adopting a several liability approach was based on the fact that the exposures to toxic agents may occur after many years, with some potential defendants disappearing, or going bankrupt. This would mean that the solvent defendants would be left holding the bag for the entirety of the loss. This, however, is no justification for several liability. Surely, the ability of the defendants to pay is not a factor in establishing causation. The problem, as described by Lord Walker, arises from the fact that the route taken to find liability for the plaintiff in *Fairchild* was a "radical departure", calling for another radical departure to adjust apportionment.[102] This is just one part of the slippery slope of the *Fairchild* extension, as it is interpreted.

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[98] See *Barker* para 49.
[99] See *Barker* para 43.
[100] Ibid.
[101] See *Barker* para 90.
[102] See *Barker* para 113.

As Lord Scott describes the effect of *Fairchild*, causing a material risk suffices to impose liability, without any inference drawn of actual causation.[103] Once again, if the mere exposure to risk is enough, one need not engage in a true analysis of causation, except to be satisfied, as in *Fairchild*, that the defendants created the risk. It follows, however, that if there is an innocent factor, it must be deemed to have contributed to the harm, even though there is no means to differentiate the actual or relative contribution of the innocent factor in relation to the guilty factors.

The reasoning the court goes through to attribute responsibility is a bit of a sham. It assumes that the degree of risk caused by each employer to the developing of mesothelioma can be measured, but the exceptional rule is invoked precisely because it cannot. Indeed, it may be that only one of the employers actually caused the loss. This notion that each employer has created "an identifiable part of the damage" is equally fictional.[104] It also ignores the underlying rationale for the *Fairchild* exception, a point recognized by Lord Rodger leading to his disagreement with his colleagues and his view that there should be no apportionment.[105]

Even in *Barker*, the judges were not in agreement regarding the rationale for the decision in *McGhee*.[106] The controversy over the effect of *McGhee*, and of *Fairchild* for that matter, is unresolved. *Barker*, with all its complications and flawed reasoning, highlights the importance of a more principled approach to causation based on a properly formulated counterfactual. If there are to be exceptions, these exceptions must be acknowledged as justifying that the plaintiff be relieved from the burden of proving cause-in-fact.

Lord Walker considered the impact of Mr. Barker's own negligence on the applicability of the *Fairchild* exception.[107] In his view the notion of fairness that so motivated the easing of proof in *Fairchild* would be less compelling where the defendants are also exposed to some unfairness given the chance that the plaintiff's own neglect in fact caused the harm. Having said that, Lord Walker was still of the view that the balance of fairness favoured invoking the *Fairchild* exception. One must then ask how the *Fairchild* exception applies, and how liability should be apportioned, when an innocent third party has added to the risk.

The reasoning for departure from imposing liability *in solidum* is, in my view, also flawed, but, once again, beyond the scope of this paper. Suffice it to say, that the underlying principle for invoking a *Fairchild* exception is the fact that fairness favours the plaintiff, and it follows that a wrongdoer should bear the burden of another wrongdoer's inability to pay. If that is the principle in the straightforward case of two tortfeasors, adding complexity to the scenario should not detract from the principle. In the end, if liability needs to be apportioned amongst

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[103] See *Barker* para 52.
[104] See *Barker* para61.
[105] See *Barker* para 102.
[106] See *Barker* paragraph 80, where Lord Rodger notes that Lord Bingham, in *McGhee*, found that the plaintiffs had proved that the defendants caused the harm. Likewise, Lord Nicholls, in *McGhee*, found the exposure to risk as sufficient to show a causal connection.
[107] See *Barker* para 117.

the wrongdoers, this should not deprive the plaintiff of recovering the entirety of the loss, unless proximate cause arguments would do so. Insofar as the defendants are concerned, contributory negligence rules will allow them to adjust their individual exposure, but the insolvency of one does not affect the joint and several liability of all who do wrong to the plaintiff.

Again, the message is simply that the way down the "material contribution to risk exception to the but-for test" road is a dangerous and bumpy one. If principle will allow us to avoid its perilous path, one must do so. At a minimum, *Barker* represents a partial retreat by the House of Lords based on a rationale that is difficult to justify and even more challenging to apply.

Rejecting an approach to these exceptional factual scenarios employing a shift in the onus of proof was characterized by Lord Walker as a manipulation, or some other fiction.[108] The disagreements and contorted reasoning in *Barker* alone are compelling reasons to adopt a shift in onus as a more readily applied and principled approach where these exceptional cases arise.

In contrast to McLachlin CJ in *Clements*, Lord Rodger in *Barker* held that the *Fairchild* exception should extend to cases where the guilty exposure had been preceded by an innocent exposure.[109] This is a matter that Lord Rodger had reserved upon in *Fairchild*. A usable paradigm must not ignore fact scenarios that involve guilty and innocent factors, or cases where not all wrongdoers are party to the lawsuit. Before turning to *Clements*, I will comment on the development of the Canadian version of the material contribution exception.

MATERIAL CONTRIBUTION IN THE SUPREME COURT OF CANADA

The 1996 case *Athey v. Leonati*[110] can be seen as the decision that kick-starts the confusion that plagues us today; confusion about a material contribution test as an alternative test for causation when the but-for test fails. While later decisions from the Supreme Court of Canada saw reason to alter the proposed exception to the causal rule, *Athey* was closest to getting it correct. Like each and every case that followed in the Supreme Court of Canada, *Athey* was not a case where but-for failed and an alternative test to but-for was indicated. It was, however, a case where an inference was drawn to conclude that the tortious act "contributed" to the harm, meaning outside the *de minimis* range, such that liability was found. It is also a case that involved only one guilty cause and at least two other causes that, for the purposes of this analysis, can be considered innocent. Despite liability being determined using the but-for test, the court then went on to discuss an alternative material contribution test for cases when but-for is unworkable. Notably, therefore, the word "material" is used in *Athey* in both contexts covered in this paper. The first is to demonstrate the sufficiency of a cause to satisfy the but-for test, the only principled use of the word in my view. The second is in relation to the elusive

[108] See *Barker* para 104.
[109] See *Barker* para 97.
[110] *Athey v. Leonati*, [1996] 3 S.C.R. 458

alternative to the but-for test, an alternative never found to apply by this court, and incapable of addressing the shortcomings of but-for in any event.

It may be tempting to continue to refer to the test as the "material contribution to risk" test, but even that title falls dramatically short of describing the "rule" as set out in these cases. Material contribution must be thought of in one of two contexts. In one form, a factor is called a contributor by inference (like *Snell*, or *McGhee* properly interpreted). In its other form, a factor is a contributor and a cause when the proper questions are asked to identify its "role" in causing the harm, based on the proper counterfactual. In no form is material contribution a "new" test, an "alternative" test, or a "relaxed" test.

In the 2007 case of *Resurfice Corp v. Hanke*[111], the Supreme Court of Canada again describes a material contribution test as an alternative to but-for, in a case where but-for was equal to the task. In setting out the circumstances in which the material contribution test might apply, McLachlin CJ sets out two requirements. First, the impossibility of proving causation under the but-for test. Here she gives as an example the case where proof is outside the limits of scientific knowledge. As has been discussed, Sopinka J's approach in *Snell* is a preferable approach. The second requirement cited by McLachlin CJ is that the injury suffered by the plaintiff must be one within the ambit of risk created by the defendant's breach of duty. Once again, inference under the traditional rule allows causation to be determined. In the name of "clarification", the rule was further modified in *Clements*.

Clements v. Clements

The facts in *Clements* are quite simple. Mr. Clements was driving his motorcycle with Mrs. Clements as a passenger. The motorcycle was overloaded by 100 pounds. Mr. Clements was driving in excess of the speed limit. Mr. Clements was not aware that there was a nail in one of his tires. When he attempted to pass another vehicle, the nail fell out, the tire deflated, the motorcycle wobbled uncontrollably, he crashed, and Mrs. Clements suffered a traumatic brain injury. The possible causes for the crash are the overloaded motorcycle (guilty cause), the speed (guilty cause), or the sudden deflation of the tire (innocent cause), or some combination of these. The defence called an expert to testify that the innocent cause would have resulted in the crash without any of the guilty causes.

Problems began with the trial judgment. The trial judge rejected the conclusion offered by the defence expert that the crash would have happened without any negligence on the part of Mr. Clements. The judge held that the but-for test should be "dispensed" with and the material contribution test applied because it was impossible for the plaintiff to prove the precise contribution of each factor to the crash. This illustrates the problem with an alternative test for causation that is triggered by the "impossibility" of proof. What constitutes impossibility?

[111] *Resurfice Corp. v. Hanke*, [2007] 1 S.C.R. 333

The British Columbia Court of Appeal found that but-for was the proper test and that test had not been met. The judgment in favour of the injured plaintiff was set aside.

In defining the legal issue, the majority of the Supreme Court of Canada stated:

> The legal issue is whether the usual "but for" test for causation in a negligence action applies…or whether a material contribution approach suffices…[112]

By defining the legal issue in this way, the SCC has perpetuated the notion, by implication, that both tests are available in tort law to determine cause-in-fact. Indeed, the entire judgment implies a material contribution test as an alternative to the but-for test, albeit in exceptional circumstances. But, as I hope I have already demonstrated, the alternative test is not a test for causation at all. In so doing, the opportunity for guidance and clarity on the law of causation was missed.

The SCC points out, correctly, that causation is a factual inquiry.[113] Accepting this as so, as one should, an alternative test that depends on notions of fairness and policy is not a factual inquiry. Therefore, where other tests are adopted, the factual inquiry is displaced or omitted in favour of achieving the desired outcome. Any alternatives are not intended to determine cause, but only to impose liability.

The court holds that inherent in the but-for test is the requirement that the wrongdoer's breach of duty was *necessary* to bring about the injury. Certainly, in the case of a single wrongdoer and a single cause under consideration, *necessity* is easily applied to connect the cause to the effect.

What is not as clear, however, is the role that necessity plays in matters where multiple causes exist, whether the sufficiency of any one factor is not enough to cause the loss – the overdetermination cases. The place of *necessity* in the law of causation merits further consideration. The focus on necessity, individuated, distracts one from the counterfactual foundation of the causal question. Where the factor under consideration is one in a set of factors needed to bring about a phenomenon, or where there are duplicative causal factors, a counterfactual based on considering a single factor in isolation will never meet the requirement of necessity without composing the counterfactual in recognition of this challenge.

With regard to multiple acts and necessity, a particular act may not be "the" cause of the harm, but only "a" cause. The impugned act may be one of a number of causes that are together required to bring about the effect. One must not ask, therefore, whether the harm results but-for a single wrongful act when that act alone is insufficient to bring about the harm, but instead whether it was a necessary component in a series of acts to cause the harm.

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[112] See *Clements* para 5.
[113] See *Clements* para 8.

Unfortunately, McLachlin CJ adopts too narrow a view of necessity. In describing the scenario of multiple factors at play in causing the plaintiff's loss, she refers to "a number of different negligent acts…each of which is a necessary or 'but for' cause of the injury" [my emphasis].[114] Phrasing the matter this way is unhelpful, as this ignores that a single factor on its own may not be 'necessary' in the sense that word is used here, but is still a cause of injury. As we have already seen from *McGhee*, there may be necessary factors that are not negligent, acting cumulatively with guilty factors to cause the injury. Further, applied to an act in isolation, necessity cannot be demonstrated in multiple factor cases. *Clements* presents a change in the material contribution alternative previously described, reaching back to *Athey*, now requiring all of the contributing causes to be guilty causes.

It can be seen, however, that the *Clements* formulation of the exception, necessitating, as it does, that every wrongdoer be before the court, requires that the but-for test in fact be satisfied. That is, on this formulation, it is known that at least one of the wrongdoers before the court caused the harm. In such a case, cause is proven. The exception, therefore, permits attribution of fault to the members of the group responsible for causing the injury. This formulation of the exception is deficient and does not address the factual nuances that will arise, in cases like *McGhee* and *Barker*, where McLachlin CJ's endorsement of corrective justice, as the underpinning of the exception, would likewise apply. Even attribution of liability is not achieved in any principled sense, because the only option is that the defendants share liability. The test does not permit one to determine the degree of responsibility for any defendant, despite the fiction created by the House of Lords in *Barker*.

The SCC describes the "material contribution to risk of injury" test as sufficient to prove causation, without showing factual "but-for" causation.[115] This alternative test to but-for is exceptionally available where "it is impossible to determine which of a number of negligent acts by multiple actors in fact caused the injury, but it is established that one or more of them did in fact cause it".[116] The justification for this alternative rule of causation is to prevent one wrongdoer from pointing to another wrongdoer to escape liability. The same principles that underlie the "exception", however, would justify preventing a wrongdoer from pointing to another cause, even if innocent.

The SCC characterizes the but-for test and the material contribution to risk tests as "two different beasts".[117] But-for is once again characterized as a factual inquiry, whereas material contribution is policy driven and permits the plaintiff to jump the "evidentiary gap" between the facts and the outcome.[118]

[114] See *Clements* para 12.
[115] See *Clements* para 13.
[116] Ibid.
[117] See *Clements* para 14.
[118] Ibid.

The SCC also cites *Snell* in canvassing Canadian cases under the material risk heading.[119] The court in *Clements* suggests that Sopinka J, in *Snell*, was prepared to adopt, if necessary, "a material contribution to risk" approach.[120] The beast that Sopinka J is referring to and the beast that the Chief Justice in *Clements* is referring to are two very different animals. For Sopinka J, "material contribution" is as that phrase is described in *McGhee* and interpreted by Lord Bridge in *Wilsher*. It is an adjunct of the but-for test that allows inference to result in a but-for finding of causation. For McLachlin CJ, however, material contribution is separate and distinct from but-for. Thus, she has compared apples to oranges.

The fact is that the Supreme Court of Canada has never determined a case based on material contribution as an alternative to the but-for test.[121] Yet the court felt compelled to preserve the possibility for resort to "relaxing" the requirements for but-for causation.[122]

In referring to the cases from the UK dealing with exposure to toxic agents from multiple wrongdoers, McLachlin CJ states:

> In each case, the plaintiff would not have contracted the disease, "but-for" the negligence of the defendants as a group.[123]

This characterization of the toxic agent cases raises further complications, and is not entirely consistent with the facts of those cases. In *Barker*, the plaintiff was responsible for carelessly exposing himself to asbestos. In *Fairchild*, Mr. Fox only sued one employer out of multiple exposures to asbestos. In *McGhee*, there was innocent exposure to brick dust. There may be contributors to the exposure to toxic agents that are not part of the group, whether innocent or guilty.

The court approves resort to the "material contribution to risk" test as an alternative to the but-for test when it is "impossible" for the plaintiff to prove causation under the but-for test. In defining what constitutes "impossible", the court makes reference to *Cook v. Lewis*. While the but-for test fails on the facts of *Cook v. Lewis*, so too will the material contribution test. Impossibility does not merely refer to the failure of the plaintiff to meet the burden of proof, but the failure to meet the burden of proof having called all the evidence that could have been called in proof of causation. That "impossibility" is not cured by a *Clements*-like alternative.

The conditions described in *Clements* that will trigger the impossibility that allows resort to an alternative material contribution test are neither comprehensive nor satisfactory. The court suggests that the answer to what has emerged from the cases provides the answer to what constitutes impossibility. In *Clements*, the court has recreated the criteria, in a failed attempt to clarify the concept. The court says that this alternative causation test typically arises when:

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[119] *Snell* at pages 326-327
[120] See *Clements* para 20.
[121] See *Clements* para 28.
[122] Ibid.
[123] See *Clements* para 32.

1. There are a number of tortfeasors;
2. All are at fault, or one or more has in fact caused injury;
3. The plaintiff would not have been injured "but-for" their negligence, viewed globally;
4. It is impossible for the plaintiff to show on a balance of probabilities that any one of them in fact caused the injury.

On the approach of *Clements*, the but-for test is satisfied, but only insofar as the group is concerned. In this setting, it is not clear why resort must be had to an alternative test for causation. Invoking a "material contribution to risk" test has nothing to do with whether one of a member of a group of wrongdoers actually caused injury.

McLachlin CJ asserts that in multiple tortfeasor cases, the but-for test will be met when the wrongdoers are viewed as a group, thus breaking down only when individuated.[124] This approach fails when innocent causes may be at play too.

How does this new formulation in *Clements* help us to understand the causal analysis in these cases? Why must there be more than one wrongdoer? What do multiple wrongdoers have to do with whether any single wrongdoer materially contributed to harm, as in *McGhee*?

Perhaps most troubling is the reference to the material contribution to risk test, as described in *Clements*, as not intended to prove "factual" causation but rather "legal" causation. This is really a concession that causation is not established at all.[125] Given the condition precedent that all wrongdoers be before the court, factual causation must be proven, as least globally. The reference to legal causation can be no more than how liability is attributed to the group, although the majority of the SCC does not tell us how that will be accomplished, which is not causation at all. Therefore, there is a disconnect between the notion of "legal" causation insofar as the individual wrongdoer is concerned, and the proof of "factual" causation as against the group of defendants. I contend that "legal causation" has no relevance to a finding of cause-in-fact.

The majority of the Supreme Court of Canada found that the but-for test could be invoked, yet once again, and unnecessarily, endorsing the existence of the material contribution test, but holding that it had no application in this case. The matter was sent back to the trial judge to consider causation based on the but-for test.

While properly endorsing the robust common sense approach to the but-for test from *Snell*, the court went on to say that there is no need for scientific evidence of the precise "contribution" the conduct of the defendant made to the harm,[126] and in doing so once again perpetuates a misunderstanding of cause-in-fact. Here "contribution" is used in its correct sense, as it was in *Snell*, as an adjunct to but-for. *Snell* is concerned with inferences and the threshold of proof

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[124] See *Clements* para 40.
[125] See *Clements* para 45.
[126] See *Clements* para 9.

needed to satisfy the but-for test having regard to the factual circumstances of a particular case. Once inference allows one to conclude a causal connection between the event and the outcome, that is the end of the cause-in-fact analysis.

More confusion flows from the SCC's assertion that where causation is established "by inference only",[127] it is open to the defendant to call evidence that the harm would have been caused without the defendant's negligence. Arguably, causation is inferred in every case. There is no magic to inference, and a defendant is free to call evidence to attribute harm to a different cause no matter what evidence is called by the plaintiff or how the plaintiff proposes causation be determined.

CAUSATION POST-CLEMENTS

Academics and courts have addressed the material contribution test, as it is described in *Clements*, based on the assumption that it is a real test for cause-in-fact and available to litigants, without critical analysis of its foundation. The focus is on the impossibility of any party being able to prove causation before the material contribution test can be seen as a replacement for the but-for test, but this is a fundamental error in describing the test set out in *Clements*. That the impossibility of proving cause arises out of the breach of duty of the tortfeasors is not proof of contribution, but merely proof that causation cannot be either proven or refuted. This impossibility can exist whether all factors are tortious, or only some are. Further, this state of affairs is relied upon to impose liability on a defendant, weighing the competing interests of fairness, in the absence of proof of cause. Moreover, it is different than material contribution to risk, as creating risk and proving that the harm that might arise from that risk occurred are two different things. As stated earlier, we need to call this what it actually is – relief from onus of proof.

In practical terms, it is difficult to conceive of a factual scenario that comes to the court with any sort of frequency that would show a properly formulated but-for test wanting. It bears repeating that the Supreme Court of Canada has yet to decide on a case that qualifies. Apart from *Cook* v. *Lewis*[128], the two-hunters case, which presents a singular challenge, the leading cases considered in this article do not present such a dilemma. The closest case is *Fairchild*, but even that case, in the end, can be interpreted as applying a properly formulated but-for test in a rather complicated factual scenario.

The threshold question is still the counterfactual. Attribution of fault has nothing to do with causation, and everything to do with evaluating the circumstances that favour the scales of fairness tipping in favour of the plaintiff when difficulties of proof arise from the breach of duty by the defendants. Moreover, the approach to causation in *Clements* utterly fails to solve the identity crisis as to which of two or more tortfeasors caused the harm. The parties are not better informed of the culprit after the causation analysis in the *Clements* alternative than they

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[127] See Clements para 11.

[128] Cook v. Lewis, [1951] S.C.R. 830

were before. So, in the two-hunters scenario, as set out below, the identity of the culprit is unknown prior to the trial. The fact that liability is attributed to both after the trial tells us nothing about the actual culprit.

Clements only describes one scenario, which is akin to the *Cook* case. That is, all the possible causes are tortious and all the possible tortfeasors are before the court. It fails to address any other overdetermination case. Moreover, a test for causation is easy to apply where there are only two tortfeasors. As more wrongdoers are added to the scenario, the rule becomes patently unfair to the defendants collectively, particularly where only a single wrongdoer actually caused the loss.

The foundation for our treatment of cause-in-fact in more difficult cases must begin with *Snell*. The burden of proof is on the plaintiff; proof need not be established with scientific certainty; it is open to the trier of fact to infer causation based on very little positive evidence; the plaintiff must call all the evidence on causation that it is within her power to call; and, where, in the rarest of factual scenarios, the plaintiff would truly and obviously be deprived of a just result, the fact that the burden of proof is not immutable would allow a departure so that the burden rested on the wrongdoers. Essentially, the argument is that the counterfactual (but-for, expanded) is always the test for determining cause-in-fact. Our approach to individuation of cause needs to be re-evaluated on a principled and practical basis, in recognition of the reality that multiple factors may be implicated in an identified phenomenon. There is no alternative test that will do any better in finding actual cause than but-for, properly formulated. It follows, therefore, that the notion that material contribution is an alternative test for determining cause-in-fact, must be abandoned entirely.

The answer to the causal question lies, in my view, in how we pose the counterfactual. In the section on necessity, below, I will discuss how the counterfactual inquiry might be modified to address some causation challenges, largely based on the work of Professor Jane Stapleton.

The argument, advanced by the House of Lords in both *Fairchild* and *Barker*, that *McGhee* was decided on the basis of an exception to the but-for test of causation must be resisted. Whether *Fairchild* and *Barker* had to be decided on the basis of a relaxed test is also debatable. The judges in these cases were uncomfortable with the idea that drawing an inference might meet the causal test. Given the complications that arise and are illustrated in *Barker*, the need for severe limitations on this exception should be clear. Although I contend that, even if an exception was truly called for in these cases, the plaintiff was merely relieved of the onus of proving causation. If causation is accepted as a factual inquiry, then the *ad hoc* exception must be seen as unrelated to any notion of cause-in-fact, founded entirely in policy.[129] In a sense, it

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[129] Wright, R. Causation in Tort Law, 73 Calif. L. Rev. 1735 (1985), page 1741. Professor Wright argues, persuasively, that the causal question must be a factual inquiry, not one dependent on policy. It follows that where policy operates to impose liability in the absence of proof of cause-in-fact, the causation step has been skipped and causation presumed. As will be described, this raises all kinds of complications depending on the factual scenario. It is a process subject to manipulation and uncertainty. With regard to the increased risk of injury argument, Wright proposes that these be recognized as a "new type of injury", available only in narrowly

is the opposite of the proximate cause analysis, which limits liability, despite cause-in-fact having been established, on the basis of policy.

Policy has no place in the causal analysis, as Professor Wright points out, because causation is not equivalent to responsibility.[130] For liability to be established, according to Wright, the causal inquiry, entirely a factual one, must combine with the essential question in tort – looking into the defendant's breach of duty – followed by the proximate-cause question, which asks, based on policy considerations, whether, despite proof of causation, the wrongdoer should be absolved of liability.[131]

If the *Clements* formulation of material contribution is, as I contend, not a test of causation at all, then it follows that no alternative test has been proposed that would determine cause-in-fact. In the absence of some principled basis for departing from the usual onus of proof on the plaintiff, the struggle that the cases have had with but-for merely confirms that but-for is unavoidably the only test of causation.[132] Therefore, any determination of cause-in-fact must be based on the counterfactual, properly adapted to the circumstances of each factual scenario. We must take care not to allow the individuation of liability to distract us from composing the apt counterfactuals.

Wright says that courts have searched for alternative tests to but-for only when the but-for test leads to the conclusion that no causation exists in the face of clear evidence of causal contribution.[133] This is indeed the point, but the problem is not with the objective of determining cause-in-fact, which we imprecisely and distractedly call the but-for test, but in failing to apply the counterfactual in a way that can reliably determine cause-in-fact in the vast majority of cases. In most cases, the challenge comes in overdetermination cases, where it is open to the trier of fact to find liability on the basis of a wrongdoer's act *contributing* to the injury.[134]

A case of causal *contribution* does not take away from a finding of cause-in-fact. *McGhee* is a case of causal contribution that can be inferred from all the circumstances. It is helpful to think of *contribution* as causal when it cannot be said that some other factor pre-empted the factor said to have contributed to the harm.[135] In the setting of causal contribution, where cause and effect clearly exist, the courts have tended towards an alternative approach to but-for. My argument is that but-for is no more than the formulation of a counterfactual, but in the most

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circumscribed situations. My approach is that they be ignored for the purposes of this paper. I feel no compulsion to address the rare occasions when they arise for the purposes of cleaning up what is generally wrong with the treatment of causation as it currently stands.

[130] See Wright page 1741.

[131] Ibid.

[132] See Wright page 1788.

[133] See Wright page 1809.

[134] Ibid.

[135] See Wright page 1810.

simplified form of the counterfactual. If we expand our approach, we can still satisfy a properly crafted counterfactual in most cases.

Professor Wright has proposed a test that he claims "is applicable to the entire spectrum of causation cases".[136] This test, called the NESS test, or Necessary Element of a Sufficient Set test, has been the subject of criticism by other academics,[137] but the deficiencies in the NESS test will not be covered in this paper. Wright's test is valuable for guiding us to the correct counterfactual in multiple factor cases in the vast majority of cases.

As mentioned above, Supreme Court of Canada decision in *Snell* is pivotal. In that case, Justice Sopinka expressed the view that much of the difficulty encountered with the but-for test arises out of the unduly rigid application of the rule.[138] Fundamentally, the proper application of the test for causation can be derived from this case insofar as virtually every factual scenario is concerned. Once the proper application is so derived, the futile search for a phantom alternative test to but-for can be abandoned. If those cases which are truly impossible of resolution using the but-for test, properly formulated, exist, the answer is not an alternative test, but a change to how liability can be established. These scenarios, where the test for causation is impossible to apply, are so singular as to be undeserving of the attention lavished on them. Having said that, in a complete analysis, they should not be ignored.

While defining a test to solve the causation problem in the two-hunters case may prove eternally elusive, the factual scenario is sufficiently unusual that the law may be excused from developing a principled approach that is capable of comprehensive application, but is equal to the task in the vast majority of cases. The other challenges that arise out of the but-for test, however, may be more amenable to a principled solution, although caselaw continues to confuse and muddle the issue.

MATERIAL CONTRIBUTION TO HARM AND TO RISK

Risk and harm are not the same things. A material contribution to risk may not result in harm. In the cases that have looked at both (take *McGhee*, *Fairchild* and *Barker*), the results demonstrate that the material contribution to risk was found to result in harm.

Although the *Clements* but-for alternative to causation looks at material contribution to risk as the foundation for attributing cause, my contention that the *Clements* but-for alternative ought not to exist at law does not undermine the importance of the ideas of material contribution to harm and material contribution to risk, applied within the principles of the counterfactual.

I hope I have demonstrated that, despite commentary to the contrary by the House of Lords in *Fairchild*, *McGhee* was decided on the basis of the traditional but-for test without an extension

[136] See Wright page 1788.
[137] See Stapleton, J. Choosing what we mean by "Causation" in the Law, 73 Mo. L. Rev. 433 (2008)
[138] See *Snell* page 328.

of that test. As I have stated earlier, I am not alone in this interpretation.[139] It was the breach of duty by the employer in *McGhee* that exposed the plaintiff to an increased risk of contracting dermatitis from brick dust. Mr. McGhee was exposed to both "innocent" brick dust and "guilty" brick dust. It was open for the court to find that Mr. McGhee would have suffered dermatitis from the "innocent" brick dust alone. It was equally open for the court to find that the cumulative effect of exposure to both innocent and guilty brick dust caused his dermatitis. The scientific evidence could offer nothing definitive on the issue. Nevertheless, it was open to the trier of fact to draw an inference that the added cumulative exposure to guilty brick dust was a factor in the cause of Mr. McGhee's dermatitis. Cause-in-fact is proven. That is, in a material contribution to risk case, the counterfactual permits the trier of fact to infer that had the additional exposure to guilty brick dust not occurred, Mr. McGhee would not have suffered dermatitis. Having exposed Mr. McGhee to the risk of dermatitis through its breach of duty, the employer materially contributed to his harm. The opposite conclusion was also available to the court in that case.

NECESSITY, DUPLICATIVE NECESSITY, CONTRIBUTION AND JURY QUESTIONS

I think that much of the confusion about causation is that courts have defined causation as the but-for test, without delving into what is meant by causation. To say that causation is the but-for test and the but-for test defines causation is tautological. The use of the words "but-for" in jury questions fail to connote any meaning to the words. "But-for", as it is used in the cases, fails to address the required counterfactual analysis that is needed to tease out causation, except in the simplest factual scenarios. The need to prove cause-in-fact should not default to relieving the plaintiff of the burden of proof where constructing the counterfactual is challenging. This is why we must examine but-for fundamentally, based on its provenance in the counterfactual.[140]

The but-for test has been described as a "necessary condition test". There is some question about whether "necessity" is an element of the test given the failure of the test to find a factor as necessary for the overdetermination cases.[141] Professor Wright argues, I think correctly, that the notion of necessity is indispensable to the operation of the but-for test, but the notion of necessity is subordinated to the notion of sufficiency.[142]

Wright argues that the but-for test is wrongly applied in a manner that makes the necessary-condition criterion the exclusive one for determining causal contribution, while failing to subordinate that condition to the sufficiency criterion.[143] This is a complicated way of saying that one must not look at the necessity of a specified factor alone, without looking at that

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[139] See *Snell* and see Lord Bridge in *Wilsher*.
[140] At page 1804 Wright says that "the necessary-condition criterion and its implicit counterfactual assertions are part of the very meaning of causation.
[141] In *Sacks v. Ross* the Court of Appeal for Ontario expressed the view that putting the word necessary to the jury would be confusing. As applied to the facts of that case, there would be no easy way to resolve the confusion.
[142] See Wright page 1788. At page 1803 Wright argues that necessity is fundamental to the concept of causation.
[143] See Wright page 1804

factor as part of a set of factors occurring together that were then sufficient to result in the harm. The but-for test fails because of the way we have defined it in overly simplistic terms, making necessity the only focus. While those overly simplistic terms have great appeal in simple cases, or in our attempt to make the jury's role less intellectually onerous, this approach does not pose a workable counterfactual in overdetermination cases.

Wright says the following:

> In the typical singular causation statement, the causal assertion includes, explicitly or implicitly, only a few of the antecedent conditions but nevertheless asserts that they were part of an incompletely specified (and incompletely understood or known) set of actual conditions that was sufficient for the occurrence of the consequence.[144]

The merged fire example demonstrates that the test for causation must reflect situations where there are a plurality of causes.[145]

The process by which we determine cause-in-fact, and the causal inquiry as a distinct and separate step from the duty of care analysis, is important when considering the appropriate counterfactual. Once the process is understood, it is critical to recognize the different factual scenarios in applying the but-for test in the context of necessity, duplicative necessity and contribution. The nuances to a properly crafted causation counterfactual are clear in the duplicative necessity cases. In such cases, if we pose a counterfactual that changes only a single specified factor relating to one wrongdoer, applying the but-for test will result in failure to prove causation where we know causation exists. If the counterfactual can be adapted so that cause-in-fact can be reasonably determined, there is no need to adopt a *Clements*-like alternative to but-for.

In every case, no matter the factual complications, the first step must be to isolate all potentially wrongful causes. Here, we need not identify all causes, but only those that might be considered wrongful.[146] The potentially wrongful cause may be a single and easily identified cause, or there may be multiple wrongful causes. A cause is considered wrongful if a party, as a separate legal entity, has breached a duty owed to a plaintiff. Once the wrongful acts (or omissions) are identified, we can move on to consider causation.

Having identified the potential wrongful causes, the causal analysis asks whether any of those causes 'contributed' to the harm.[147] It is not helpful to think of a causal factor as "the" cause of harm, because cause can rarely be reduced to consideration of a single factor. The counterfactual must necessarily be broad enough to encompass all the causative factors. Therefore, in multiple tortfeasor scenarios, the counterfactual will ask multiple questions to

[144] See Wright page 1789.
[145] See Wright page 1791.
[146] See Wright page 1744.
[147] Ibid.

account for all the possible variants of the involvement of a single factor as part of a set of causative factors.

For duplicative causation cases, the preliminary question must be the "global" or threshold question – did the actions of two or more tortfeasors cause a set of circumstances that were necessary to result in the plaintiff's injury? As will be seen below, that is essentially what the Ontario Court of Appeal recommended in *Sacks v. Ross*. The same preliminary question must be asked in cases where multiple wrongful factors may be required to explain the injury, whether cumulatively of successively. Cumulative wrongful factors would involve a series of factors that would build on each other to cause the injury (like brick dust in *McGhee*, although only one factor was guilty in that case). Successive wrongful factors are those where the earlier wrongful factor contributed to the loss because subsequent wrongful factors should have intervened to prevent the loss, despite the previous errors (*Sacks v. Ross*).

Let's revisit the duplicative fire example. This is the case where two negligently-caused fires, each insufficient on its own to cause the damage to the plaintiff's property, merge prior to destroying the property. If one poses the counterfactual in the traditional sense, causation cannot be proven against the wrongdoer who caused either fire. Thus, the threshold counterfactual question must be whether the plaintiff has proven, on a balance of probabilities, that the loss was caused by the fire that formed after the two fires merged. Here we have isolated the two tortious factors that are the necessary elements of the relevant counterfactual. That both fires are necessary is obvious, but neither, on its own, is sufficient.

Where both fires are each sufficient on their own to cause the loss, the second branch of the counterfactual will assume a world where one of the fires has not occurred. That is, assuming that Fire A did not occur, would the loss have occurred, on a balance of probabilities, had only Fire B occurred. The affirmative answer makes Fire B necessary, even though the loss would have occurred without Fire B. In this scenario, both fires are sufficient but only one (either one) is necessary. For Wright, both fires are part of a sufficient set of factors resulting in the loss, and are therefore necessary. This makes it plain that constructing the counterfactual one way (Was Fire B a but-for cause of the destruction of the property?) results in a negative answer and no causation, while constructing the counterfactual in another way (In the absence of Fire A, would Fire B have destroyed the property?), results in an affirmative response with a finding of causation. The proper composition of the counterfactual must be the latter question. This also allows one to work around the problem created by individuation.

Assume that one fire was sufficient, one fire was not, but the two fires merged before destroying the property. With regard to the sufficient fire, we ask the counterfactual that assumes the insufficient fire did not occur, and ask if the loss occurs. The answer is affirmative, and the sufficient fire is necessary. With regard to the insufficient fire, it too is a cause as:

> It was necessary for the sufficiency of a set of actual antecedent conditions which included another fire (the first) that was '*at least* large enough to be sufficient for the injury if it merged with a fire the size of the second fire'. The sufficiency of this set is not

affected by the fact that the first fire was so large that it would have been sufficient by itself.[148]

Now take the example where neither fire was sufficient to cause the loss, but only one fire was negligently started. Here the question is whether each fire was "a" cause, but both had to combine to be "the" cause and satisfy necessity. Once again, the negligently started fire would be considered a cause of the loss. This is a scenario that *Clements* does not allow for.

The threshold causation question relating to the combined conduct of two more tortfeasors, the global question, works only as a first step. Asking only that question does not distinguish between duplicative causation cases and pre-emptive causation cases.[149] In the former, liability will be shared. In the latter, the pre-emptive cause will be liable. Thus, further inquiry must be made to drill down to the specific breaches of duty of each tortfeasor.

Further, the initial threshold causation question must include all the factors that are sufficiently relevant to causing the event.[150] These factors, considered globally, may include both innocent and guilty events. For example, in *McGhee* there was a combined exposure to innocent and guilty brick dust. Both must figure into the counterfactual. In *Fairchild*, there were multiple sources of guilty asbestos fibres.

In *Sacks v. Ross*, the Ontario Court of Appeal rejects the notion that a factor must be *necessary* to the creation of harm in order to be said to be causative.[151] In so doing, that court has taken too narrow a view of where necessity fits into the causal equation. To make matters more confusing, a factor may not be sufficient, on its own, to bring about an outcome, but may still be necessary. Further, a factor may be part of a set of factors causing an outcome, on its own not necessary, but duplicative in relation to another factor or factors.

Consider the example above of Paul's car being pushed off the cliff.[152] Assume there are 10 people pushing on the car, but only the force of 7 people is needed to send it over the edge. It will be seen that the act of any one person is not "necessary" to the harm. Nor is the effort of one person "sufficient" for the harm. Does that mean a contributing cause need not be necessary for liability to attach? This is the duplicative causation scenario, or the overdetermination case. It is not the case that person 1 is not a cause, but only that the act of person 1 was in excess of what was needed to cause the harm. Professor Stapleton's solution is to pose the counterfactual in a way that relates it to this challenging factual scenario. If one is to consider whether person 1 was a necessary contributing cause to the harm, the counterfactual should be posed by asking one to assume that persons 8, 9 and 10 were not

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[148] See Wright page 1793.
[149] See Wright page 1780.
[150] Ibid.
[151] *Sacks v. Ross*, 2017 ONCA 773
[152] This example could also serve as an illustration for the flawed analysis by the House of Lords in *Barker*. The notion that one could avoid imposing liability jointly and severally in a situation where it is impossible to determine cause, makes no sense. It is the straw that broke the horse's back example that demonstrates this.

present (so that we have remaining a sufficient set of 7). In this way the contribution of person 1 is established and necessary, being one factor of a sufficient set of factors to cause the harm.[153]

As the counterfactual conjures up an imaginary world, how we construct the counterfactual leads us to more or less clarity with regard to cause. For Professor Stapleton, investigating the occurrence of a phenomenon requires that we look at the "role of a specific factor…in the existence of the phenomenon".[154] To determine the "role" of a factor, Stapleton suggests that we pose the counterfactual that will identify that factor's "involvement" in creating the phenomenon.[155] By looking at the "role" or "involvement" of the factor, we are at once taking a broader and a narrower account of causation. Broader in the sense that we recognize that a factor may be part of larger set of factors, which we would consider only necessary when the set of factors combine; perhaps the "global" view of causation alluded to in *Clements*, and rejected in *Sacks*. Narrower, in the sense that we need to drill down and define the precise "role" that the factor played if we are to attribute causation to it.

As illustrated above, Stapleton advocates that the counterfactual will not only eliminate the "specified factor", which is the factor caused by a breach of duty, but may also need to eliminate other factors in order to determine the involvement of the "specified factor" in bringing about the phenomenon.[156] In doing so, we can determine if the specified factor is in the form of necessity, duplicate necessity, or contribution, the latter of which, according to her, is subsumed in the others.[157]

This is how we can address the problem that but-for runs into in multiple tortfeasor cases with individuation of liability. The contribution of a specific factor to the creation of a phenomenon is established by posing a counterfactual that filters out the excess factors. The role of the guilty factor can thereby be identified, and the causal question answered. This approach will also permit one to craft the counterfactual in scenarios where both innocent and guilty causes are at play, a scenario entirely ignored by the court in *Clements*.

For Stapleton, "the notions of 'necessity', 'sufficiency' and 'involvement' derive their meaning and coherence from the specificity with which we characterize that investigation".[158] From this, I take her to mean that to address cause-in-fact requires us to drill down sufficiently with the counterfactual we pose to isolate the specified factor from other factors.

As the stated objective of this paper was not to be overly ambitious (though I undoubtedly have failed to achieve this objective, given the subject matter), and solve the unsolvable, a comprehensive look at different approaches to overcome problems with the law of causation is

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[153] See Stapleton2008 page 443.
[154] See Stapleton page 444.
[155] Ibid.
[156] Ibid.
[157] See Stapleton 2008 page 436
[158] See Stapleton 2008 page 451.

not possible. I have already referred to Professor Wright's proposed test for causation, the NESS test (necessary element of a sufficient set). The NESS test is described by Wright as follows:

> …in the NESS test, which in its full form states that a condition contributed to some consequence if and only if it was necessary for the sufficiency of a set of existing antecedent conditions that was sufficient for the occurrence of the consequence.[159]

I mention Wright's test, a test that some academics acknowledge has real value to lawyers for determining causation,[160] because it prescribes a test that has wide scope, can be applied to scenarios involving multiple factors, and, significantly, adopts *necessity* as a key element of the test even in the context of contribution. It is *necessity,* used in the more global sense of the word, in that the factor under consideration is part of a larger set of factors that, together, are required to bring about the phenomenon. Although Wright does not refer to the particular factor as a "contribution" to the harm, I suggest that this is precisely what is intended. In this sense, no matter the factor, necessity is at the core of causation.

This takes us back to Stapleton's formulation and her notion of the "role" or "involvement" of a factor in creating a phenomenon. Stapleton expresses it this way:

> …the Law must be able to identify whenever a specified factor was "involved" in the existence of a particular phenomenon of interest, where the notion of "involvement" identifies that there is a contrast between the actual world and some hypothetical world from which we exclude (at least) that specified factor: this contrast being that, while in the former world the phenomenon exists, in the latter world it does not. We can generate such contrasts of necessity in three ways. For example, when there is this contrast between the actual world and a hypothetical world from which we simply exclude the specified factor, we can convey this information by saying that the factor was involved in the existence of the phenomenon by being "necessary" for it. When there is this contrast between the actual world and a hypothetical world from which we exclude both the specified factor and a duplicate factor, we can convey this information by saying that the factor was involved in the existence of the phenomenon by a relation of "duplicate necessity". In a similar way we can identify a third form of involvement, namely "contribution" to the existence of a phenomenon.[161]

Applying Stapleton's reasoning, the counterfactual in the simpler cases will only require one to remove the specified factor, the breach of duty of one party, to determine cause and necessity. For more complicated cases, those involving overdetermination or duplication, one can pose the counterfactual in a way that removes both the specified factor and duplicative factors, so that the specified factor is isolated. The specified factor may be part of the sufficient set as

[159] See Wright page 1441.
[160] See Stapleton 2008 page 473.
[161] See Stapleton 2008 pages 473-474.

described by Wright. Once again, necessity is determined. Finally, contribution is the third form of involvement, whether of simply necessity or duplicative necessity, but causal nevertheless.

Further elaboration is needed with regard to "contribution" and what Stapleton describes as the "involvement" of a factor, or what Wright describes as a condition, in bringing about a phenomenon, or what he describes as an occurrence. A single factor may be insufficient to explain an occurrence. A set of factors, one of which is the factor in issue, may be required to explain the occurrence. Within the subset of factors, there may be duplicative factors which the counterfactual must disregard in order to determine if the specified factor is necessary for the sufficiency of the sub-set of factors.[162]

A look at some recent cases from the Ontario Court of Appeal may help in understanding how to properly formulate a counterfactual, in all its component parts. I suggest that we move away from formulaic language, in particular by avoiding the use of the words "but-for" and "contribution", in favour of plain language that accurately depicts the counterfactual that will work in the particular factual scenario. That counterfactual must reflect the reality of how phenomena occur and the involvement of multiple factors for any given occurrence. It will be seen that, at least in some cases, the shortcomings of the counterfactual have been saved by the adequacy of a judge's charge to the jury. No matter how correct and comprehensive the judge's charge may be, however, in a multi-tortfeasor case, to ask if a factor is a but-for cause or "the" cause is to confuse the causal issue for the jury. It should never suffice. If the shortcomings of the counterfactual need to be overcome by the adequacy of the judge's charge, I suggest the recognition of this fact is a compelling reason to re-frame the counterfactual to ensure it stands on its own.

Surujdeo v. Melady[163] was medical malpractice case tried before a jury. Two doctors were found to have breached the standard of care. An issue arose at trial and on appeal with respect to the appropriate questions to put to the jury on causation. The treatment of this issue at trial and on appeal illustrates the ongoing imprecision and confusion about the appropriate counterfactual and the role of multiple causes.

Given the involvement of two liable doctors, there may well have been an issue with respect to whether their involvement was over successive events or occurred concurrently. I suggest that the causation question needs to be phrased differently depending on this finding.

Over the objections of counsel for the physicians/appellants, the trial judge allowed the question to read:

> Has the plaintiff established on a balance of probabilities that [the doctor's] breach of the standard of care was <u>a cause</u> of [the] death? (emphasis added)

[162] See Stapleton 2008 page 475.
[163] *Surujdeo v. Melady*, 2017 ONCA 41

At trial, the appellants submitted that the question ran afoul of the requirements of the but-for test under *Clements*.[164] The Court of Appeal agreed that the question did not reflect the applicable law on the but-for test for causation.[165] With respect, I believe the Court of Appeal arrived at this conclusion for the wrong reasons. The question was probably an appropriate second branch of a properly constructed counterfactual.

Counsel for the defendant doctor argued at trial that the plaintiff must prove 5 steps in a "chain of causation" to succeed. In doing so, counsel argued that cause would not be made out unless "each of the steps probably would have occurred".[166] Thus, there were 5 "specified factors" that needed to be altered in the counterfactual if one were to imagine a world that did not result in the harm. If it were a case where altering any 3 of the factors would have been sufficient to make out causation, then the counterfactual must be composed to reflect that reality.

The appellant doctors argued on appeal that including the words "a cause" was to misstate the causation question. The Court of Appeal agreed that this form of causation question did not reflect the applicable but-for test.[167] The Court of Appeal, however, dismissed the appeal, based on the adequacy of the charge in addressing the shortcoming of the causation question.

In *Surujdeo*, the Court of Appeal adopted the analysis of the trial judge in *Sacks v. Ross*, but the jury questions in *Sacks v. Ross* were found to be deficient when that case was appealed to the very same court, with reasons released later the same year. The causation questions put to the jury in *Sacks*, discussed below, cannot possibly reflect the counterfactual that the jury was expected to resolve. The Court of Appeal in *Surujdeo* adopted the trial judge's questions in *Sacks*, yet that same court, albeit a different panel, found those same questions lacking when the appeal in *Sacks* was heard a short time later.

By using the phrase "a cause", one avoids the trouble of the words "the cause", which do not properly express the test for causation. The threshold question for causation in a case where there are "5 steps" necessary to prove causation means that no one step, on its own, is sufficient. It follows that "a cause" reflects that reality, but still fails to articulate the proper counterfactual. The requirement in tort law to individuate liability must not be allowed to divert the trier of fact from the proper counterfactual. The two principles of causation and individuation need to be compatible. As but-for is currently applied, they conflict and contradict in more complex cases.

The threshold question must, therefore, reflect the argument that the harm does not materialize unless there was a delay in diagnosis and treatment attributed to a series of events, alone or in combination. This must be followed by a second question that reflects the fact that

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[164] See *Surujdeo* para 91.
[165] See *Surujdeo* para 93.
[166] See *Surujdeo* para 84.
[167] See *Surujdeo* para 93.

the particular breach might be “a cause” of the harm or may have “contributed” to the harm. That means that the language that conveys the notion of “caused or contributed” ought to be used, where “contributed” is understood not to be an alternative to but-for, but how we described phenomena created by multiple factors.

To ask whether the breach of duty of a specified defendant was the but-for cause of the loss, when there are many other factors at play, is to ask the wrong question. It is like asking whether one of the two fires, where each is insufficient on its own to burn down the plaintiff’s home, was a but-for cause of the fire loss. We know the fires merged to cause the loss. The counterfactual must be put to the jury so that “involvement”, as Professor Stapleton describes it, can be teased out. Only then can a true determination of cause-in-fact be made.

Sacks v. Ross was a medical malpractice case concerned with delayed diagnosis of post-operative infection, and the cumulative errors of multiple nurses and doctors. At trial, a jury found that multiple defendants breached the standard of care, but held that there was no causation. The plaintiff’s case was dismissed.

There were clinical signs of infection post-operatively. These were reported to a nurse. That nurse delayed communicating the symptoms to a doctor. Once informed, the doctor ordered tests. The tests, which suggested infection, were reported late and notice was not given to the right people. Later the surgeon attended the bedside but found nothing out of the ordinary. That same doctor reattended many hours later and ordered further testing, which again raised a red flag for infection. That doctor then delayed starting antibiotic therapy for infection. Finally the patient is taken back to the operating room, but nothing could be done to avoid catastrophic injury.

From the plaintiff’s perspective, the causal question was whether these delays, either alone or cumulatively, resulted in the tragic outcome.

It is important to note the defendants’ theory of causation. This theory was that the infection that caused the serious injuries suffered by Mr. Sacks was rare and could not have been diagnosed or treated. In other words, any breach of duty on the part of the defendants did not cause the loss.

Equally important is the jury finding that five defendants breached their duty of care to Mr. Sacks. The issue for consideration in the context of this case is whether the jury accepted the defence theory of a rare and untreatable cause, or whether the jury rejected that theory, but found, even so, that the effect of the multiple breaches of duty collectively, in some combination or individually, did not cause the loss.

The parties were agreed that the test to be applied was the but-for test. There was no argument for an alternative test. Notably, the Court of Appeal found that “the trial judge should not have rejected the use of the phrase ‘caused or contributed’ in the formulation of the

jury questions".[168] The importance of this finding is critical to the analysis I offer in this paper. This is a clear recognition of the role of "contribution" in the application of the but-for test to multiple tortfeasor cases.

Despite finding that the jury questions should have been framed differently, the Court of Appeal dismissed the appeal. This finding was based on the finding that the defence theory of a completely unavoidable and untreatable infection was clearly accepted by the jury. While these finding may be a matter of controversy, it is not important to the arguments I make here.

Essentially, the flaws in the causation questions to the jury were rescued by the trial judge's charge that success for the plaintiff depended on proof that:

> In an action alleging delay in diagnosis and treatment, such as this one, the plaintiff must establish on a balance of probabilities that the failure to diagnose the anastomotic leak in a timely fashion was a necessary cause of the unfavourable outcome…[169]

That would be an appropriate first step in posing the counterfactual to the jury. I submit that if the counterfactual question put to the jury did not reflect this threshold question, then the jury was misled in terms of the analysis of causation expected of them.

The causation question put to the jury in *Sacks*, after a finding of breach of duty in question 1(a), was asked of each defendant as follows:

> 2(a) If your answer to question 1(a) is yes, have the Plaintiffs proven, on a balance of probabilities, that but for the breach of standard of care, the injuries of Jordan Sacks would not have occurred?
>
> 2(b) If you answer to question 2([a]) is yes, how did the breach of the standard of care cause Jordan Sacks' injuries? Please provide clear and specific answers.[170]

Both questions are highly problematic. Neither question properly frames the correct counterfactual for the circumstances of the case. From these questions, it is inconceivable to me that the jury would have known what they were required to evaluate on the question of causation.

If the answer to question 2(a) is "no', then the jury need not address question 2(b). It is not clear from the judgment of the Court of Appeal whether the jury in fact accepted the defence theory of causation. It may well be, from question 1(a), that the jury misunderstood the causal test for precisely the reason that the court found fault with the first causation question. The

[168]See *Sacks* para 122.
[169] See *Sacks* para 108.
[170] See *Sacks* para 74.

manner in which the Court of Appeal changed the causation question highlights the uncertainty.

Where multiple events, either cumulatively or in succession, might explain the outcome, the first question in the causal analysis must be whether all of these events, taken together, resulted in the harm. The Court of Appeal has rejected this as a "global" test for causation, but this is a mere matter of semantics. The Court of Appeal was correct, in my view, in expressing the threshold question as follows:

> (1) Have the plaintiffs proven, on a balance of probabilities, that a delay in treatment caused Jordan Sacks' injuries?

This question recognizes the fact that the overarching theory of the plaintiff's case is that there was a delay in diagnosis and treatment of infection that resulted from successive breaches of duty by multiple wrongdoers. The failure to pose this essential question was excused by the Court of Appeal on the basis that the trial judge's charge had filled in the necessary gap and by the assumption, which may or may not be justified, that the jury completely adopted the causation theory put forward by the defence. Arguably, the failure to ask this threshold question was a fatal error, demanding a new trial.

The second causation question as re-framed by the Court of Appeal was:

> (2) Have the plaintiffs proven, on a balance of probabilities, that the delay resulting from [this defendant's] breach of the standard of care caused or contributed to the injuries of Jordan Sacks?

Once again, in posing the question in this manner, the Court of Appeal got it right in *Sacks*, and got it wrong in *Surujdeo*. Having said that, I think the question still needs elaboration and clarification given the involvement of five wrongdoers. There are two important features of the question that should be explored. First, the question avoids the words "but-for" that were used in the actual jury question. As I suggested above, using those words in the jury questions are more likely to be misleading than helpful. Second, the Court of Appeal has quite significantly and properly endorsed the use of the phrase "caused or contributed" (although we should use plain language that conveys that message, without those words). In factual scenarios involving more than one possible causal act, the word "contributed", or some other way of expressing the same requirement, is essential. Once again, it is essential to reflect the fact that but-for is satisfied based on a cause that contributes to the outcome that is not *de minimis*.

There still needs to be a discussion about necessity. The Court of Appeal describes a scenario, which I described earlier in the paper, where a contributing factor is not a necessary factor (3 people pushing Paul's car over the cliff). To "contribute" must be seen, however, as necessary in some sense of the word. A factor associated with a phenomenon need not be necessary on its own, but in the overdetermination case, like that used by the court, must be at least part of

a duplicate necessity.[171] The threshold question suggested by the Court of Appeal, in that it was not individuated, addresses the combined acts of the defendants.

Let's identify some problems that might arise in *Sacks*. Let's assume that the injuries suffered by the plaintiff were related to the delay in diagnosis and treating. Mr. Sacks started to develop symptoms on post-op day 2, at about 7:50 am, but Nurse R didn't tell the doctor. At 4:30 pm Dr. K was informed, but only ordered blood work and never sought out the results. The hospital failed to get the results back by 6:08 pm as required. Dr. R saw the patient at 8:00 pm, but took no action. Dr. R saw the patient at 9:00 am on post-op day 3, but waited for more tests. At 10:50 am infection was confirmed, but no therapy ordered. At 4:00 pm therapy commences, but too late to avoid catastrophic injury.

Assume that each party, Nurse R, Dr. K, the Hospital and Dr. R all contributed to the delay in diagnosis in breach of their respective duties.

Take the following scenario. Assume that had the lab results been received and acted upon by 6:08 pm, injury is avoided. Dr. K had ordered the bloodwork, and her failure to follow up within one hour was a breach of duty. The lab failed to process the results within an hour, in breach of its duty. Can the lab's failure to post the results be blamed for the outcome, when Dr. K had no intention to inform herself of those results? Can Dr. K. be blamed for the outcome because even if she checked back the lab would not have posted the results? Can it be said that either breach contributed? The counterfactual must address these sorts of circular arguments.

Assume that earlier, Nurse R breached her duty by not informing Dr. K of the patient's symptoms, causing delay. Can Nurse R be held liable, since Dr. K would still have neglected to check the lab results? Consider the situation where the jury answers yes to the re-framed question from the Court of Appeal – the combined delay of the defendants caused the injury. The questions that follow must tease out the role or involvement of each wrongdoing, successively, cumulatively, or redundantly.

In *Cheung v. Samra*[172], another medical malpractice jury case, the plaintiff proposed that the causation question to the jury include the words "caused or contributed". The defendant, I think quite appropriately, proposed that the jury be asked a "threshold" causation question, which was whether the injury occurred, in general terms, during the overall course of treatment. The trial judge rejected both the threshold question and the use of the word "contributed". With regard to the threshold question, the trial judge indicated that the issue would be covered in her charge. Certainly, the Court of Appeal in *Sacks* thought the threshold question would be appropriate. I submit that such a question is essential if the jury is to adequately comprehend the true nature of the counterfactual they must confront.

[171] See Stapleton 2008 page 436.
[172] *Cheung v. Samra* 2018 ONSC 3480.

The issue of proper jury questions on causation arose in *Uribe v. Tsandelis*.[173] In that case, the trial judge rejected the causation question proposed by the plaintiffs, which included the words "caused or contributed". In doing so, I submit that the trial judge misinterpreted the comments of the SCC in *Clements*. The judge accepted the defendant's submission, wrongly in my view, that using the word "contributed" would be to invoke a departure from the but-for test in favour of the *Clements* material contribution alternative. It is crucially important to fairly pose counterfactuals to juries that communicate the message that multiple factors may have to operate in concert to bring about an injury. The nature of "contribution", as a part of that analysis, is critical. The trial judge recognized the challenge of the language of "cause" only where multiple defendants are involved, but did not find it sufficiently compelling to allow the word "contribute" into the jury question. The judge undertook to explain to the jury in his charge that the doctor's breach may not be the *only cause* of the injury. This is precisely the message that the word "contribute" would send. This puts the judge's charge at odds with the causation question. Once again, if the role of contribution requires explication in the charge, it is that much more critical that the counterfactual be composed to adequately reflect how they must reason through the issue.

Donleavy v. Ultramar[174] is an important decision of the Ontario Court of Appeal. The approach to causation taken by the trial judge in this 2019 case affirms, once again, that the guiding principles for causation in the caselaw are deficient. In this case an oil tank was installed outside a home that was only permitted for installation inside the home. The oil company and contractors failed to recognize that the tank was not properly installed and should have tagged the tank and declined to fill it with oil. The tank rusted a number of years later, resulting in an oil spill. The homeowner was found contributorily negligent for failing to have the tank inspected. In finding the oil company and its contractors negligent, the trial judge relied on the material contribution alternative to the but-for test.

On appeal, the parties agreed that the material contribution test was the wrong test.[175] The appellants (supplier and inspector) asserted that the trial judge relied on the material contribution test, and they are undoubtedly referring to the *Clements* alternative test of causation. While the trial judge did use the words "materially contributed", it is clear that she was finding but-for causation. To assert that a factor was a material contribution is not to avoid finding the factor is a cause-in-fact of the loss.

The Court of Appeal stated that the trial judge misinterpreted the reasons in *Clements* because she was under the misapprehension that the but-for test applied to cases where there was only a single wrongdoer, whereas material contribution applied to cases of multiple wrongdoers.[176] Once again, with trial judges making this fundamental error in 2019, it is a compelling reason to re-examine the fundamentals of the but-for test.

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[173] *Uribe v. Tsandelis*, 2019 ONSC 6242.
[174] *Donleavy v. Ultramar Ltd*., 2019 ONCA 687
[175] See *Donleavy* para 59.
[176] See *Donleavy* para 61.

The Court of Appeal appropriately points out that the but-for test applies in cases of multiple events causing harm. It is interesting to note that the Court of Appeal refers to the defendants' breach of duty as a *necessary factor*,[177] whereas in *Sacks* applying the word "necessary" was thought by this same court to unduly complicate matters for the jury. The Court of Appeal goes on to say, citing *Clements*, that "material contribution" eliminates the need to prove factual causation in exceptional cases.[178] Once again, it is this notion that needs to be put to rest.

In reviewing the but-for test, the Court of Appeal recognizes that it applies to multiple tortfeasor cases, that a defendant will be liable for all the injuries caused by a breach of duty, "even if other non-tortious causes are present", and that a defendant needs to be "a" cause of "some" harm to be found liable.[179] The case of *Athey v. Leonati* and the work of Professor Knutsen are cited in support of this proposition. This emphasizes the importance of avoiding the "but-for" language in the counterfactual where multiple factors may be causal. It highlights the importance of not characterizing a specified tortfeasor's conduct as "the" cause. Finally, it demonstrates the importance of "contribution" in the cause-in-fact analysis.

The first branch of the test quoted from *Clements* for invoking an alternative to the but-for test is that the plaintiff has already proven that but-for the negligence of two or more tortfeasors, the loss would not have occurred. This is factual causation. Factual causation must always be proven. That the acts of two or more people, taken together, have satisfied the but-for test does not mean that the plaintiff has been forgiven from proving factual causation. The acts are a set of events or sequence of events necessary to cause the harm, the "global" approach rejected by the Court of Appeal, inappropriately, in my view, in *Sacks*.

The Court of Appeal cites the following from the work of Professor Knutsen:

> In nearly all instances [of an indivisible injury involving multiple tortfeasors], it will be possible for the plaintiff to apply the "but for" test in proving that the target tortfeasors' negligent conduct was a cause of some of the global total harm. If the question is about "how much" of that harm each target tortfeasor is responsible for, that is not a causation question but one of extent and damages, dealt with later in the negligence analysis. The fact that the injury is indivisible does not affect the workability of the causation test.[180]

Professor Knutsen is absolutely correct, but it leaves the issue of individuation outstanding. It is not sufficient, for the purposes of tort law, to stop at global harm. For this reason, we must ask the follow-up counterfactual questions that flow from an affirmative answer to the global harm question.

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[177] See *Donleavy* para 62.
[178] See *Donleavy* para 64.
[179] See *Donleavy* para 63,
[180] See *Donleavy* para 70.

The comments of Professor Knutsen should also be considered in the context of the case of *Barker*, where the House of Lords resiled from the notion of joint and several liability due to the exceptional nature of a departure from the ordinary requirements of proof of causation. It is impossible to reconcile the result in *Barker* relating to apportionment, with Professor Knutsen's observations about the timing of attribution of shares of fault. I think *Barker* got it wrong.

I do think that the role of the material contribution to risk, described by the Court of Appeal in *Donleavy* arising out of *Clements*,[181] requires clarification. The court is quite appropriately describing the *Clements* formulation of this test as "not a test of causation". This is first and foremost what judges and lawyers need to appreciate. It relieves a plaintiff of the burden of proof of causation. Having said that, material contribution to risk, as described earlier in this paper, is a principle that applies to the application of a properly composed counterfactual that will lead to a finding of cause-in-fact in most cases. It is the inference that the trier of fact is entitled to draw from the entirety of the evidence.

Reference is made in *Donleavy* to the SCC case of *Blackwater v. Plint*, where McLachlin CJ says:

> Even though there may be several tortious and non-tortious causes of injury, so long as the defendant's act is <u>a cause</u> of the plaintiff's damage, the defendant is fully liable for that damage. [emphasis added][182]

We should consider this quote carefully on a number of levels. First, the defendant's conduct, as "a" cause, is based on the counterfactual. That is, without the defendant's act, the harm does not occur. This is entirely binary. Second, the defendant is fully liable precisely because, on the proper application of the cause-in-fact analysis, the harm is avoided in the absence of the defendant's act. Third, it follows that even if the defendant's act is one in a sequence of unbroken events, provided the act is one that is "necessary" to cause the harm, the plaintiff succeeds on causation. The defendant's act does not need to be "sufficient" to cause the plaintiff's harm to be a cause-in-fact. It merely needs to be part of a "sufficient set" of events. Which of the elements of the "sufficient set" of events that are causative of the harm may present the evidential gap that some have referred to, but this does not take away from the fact that cause-in-fact has been established under the principled application of the counterfactual that defines a useful but-for test. It is difficult, however, to reconcile the notion of indivisible liability here, which allows for non-tortious causes, with McLachlin CJC's requirement in *Clements* that all causes be tortious.

Despite recognizing that multiple factors, tortious and non-tortious, can cause an injury, the Court of Appeal is concerned that "using 'contribution' language to recognize that a defendant's negligence is 'a' cause" of the injury "is a potential source of confusion".[183] It is

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[181] See *Donleavy* para 65.
[182] See *Donleavy* para 78.
[183] See *Donleavy* para 72.

not. The court then goes on to properly define the aspect of the test we are concerned with, saying:

> Causation is made out under the "but for" test if the negligence of a defendant caused the whole of the plaintiff's injury, or contributed, in some not insubstantial or immaterial way, to the injury the plaintiff sustained.[184] [emphasis added]

This is crucial. The court is describing *material contribution* as an element of the but-for test in multiple tortfeasor scenarios. This is the central theme of this paper. This is the critical distinction that must be made from the *Clements* formulation of an alternative test. Inevitably, this should be taken to mean that the counterfactual that applies in these cases must be constructed in a manner that incorporates this concept in understandable, and usually layered, questions for a jury.

Doobay v. Fu[185] was an Ontario Superior Court decision in 2020 that considered the apparent conflict between the Court of Appeal decisions in *Surujdeo* (rejecting "contribution") and *Sacks* (incorporating "contribution"). Once again, in this medical malpractice case, the plaintiff submitted that the jury question on causation include the word "contributed", while the defendant preferred the rigid but-for language. The trial judge, appropriately, included the word "contributed" in the causation question.

The trial judge goes astray slightly when he relies on the case of *White v. St. Joseph's Hospital*[186] and the assertion in that case that the phrase "caused or contributed" originates in the *Negligence Act*. This is to confuse two very distinct subjects. The *Negligence Act* has nothing to do with cause-in-fact and is invoked only after caused-in-fact is found, in order to apportion liability. This is articulated in the important quote from Professor Knutsen, above. For causation purposes, "caused or contributed" has the meaning described in this paper and relates directly to determining whether a factor is a cause-in-fact of a phenomenon, no matter how liability might later be apportioned.

Care must also be taken in how necessity is addressed, a matter that was summarily avoided by the trial judge.[187] Recall that necessity is confounding only in multiple cause cases where the counterfactual jumps to the individuation of liability without addressing all the required elements of the counterfactual.

In *Cheesman v. Credit Valley Hospital*[188], another medical malpractice case, the trial judge rejected a threshold causation question before turning to the individual defendants' breaches.[189] In doing so, the trial judge found that the proposed threshold question made an

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[184] See *Donleavy* para 72.
[185] *Doobay. v. Fu* 2020 ONSC 1774.
[186] *White v. St. Joseph's Hospital* (Hamilton), 2019 ONCA 312, at para 25.
[187] See *Doobay* para 20.
[188] *Cheesman v. Credit Valley Hospital*, 2019 ONSC 4995.
[189] See *Cheesman* para 30.

assumption that the standard of care had been breached.[190] As the causation question would only follow an affirmative finding that the standard of care had been breached, I think there is good reason to challenge this reasoning. The trial judge's concern would be easily addressed by posing the standard of care questions first, followed by the threshold causation question.

The trial judge was also concerned with a threshold question combining the multiple tortfeasors "into a single amorphous care-giver".[191] It seems that, once again, the judge's primary focus was on the order of the questions, a problem that could be easily remedied. The trial judge has failed to consider the fact that any one breach of duty may, on its own, have been insufficient to cause the loss, but together with other breaches or factors was sufficient.

In the end, the trial judge did allow the words "caused or contributed" to be in the causation question to the jury. In this regard, the trial judge says "If, however, it is already well accepted that a defendant will be liable if he caused 'some' injury, then asking whether the defendant caused or contributed to the injury merely translates the 'but for' test into everyday language".[192] Indeed, without the addition of the word "contributed", or other clear language expressing the same sentiment, in multiple tortfeasor cases, or even in cases that combine innocent and guilty causes, the jury is not asked the proper counterfactual.

WHAT SHOULD THE CAUSAL QUESTIONS LOOK LIKE?

For Sopinka J, the but-for test had been applied "too rigidly",[193] leading to challenges in its application. That may be true, but, for me, the test has also been defined too narrowly. But-for has been used in a way that ignores its provenance in the counterfactual. The inquiry is about proof of cause-in-fact, but proof only insofar as the law is prepared to accept that a factor can be seen as a cause of the harm being considered. In each case we must think of the search for cause-in-fact as an investigation into the role of the wrongful act, or specified factor, in the creation of the harm.[194] In so doing, we must construct the counterfactual question to isolate the specified factor. This cannot always be achieved by creating an imaginary world where we simply remove the specified factor. This works only in the simplest cases.[195]

Let's use the facts and findings in the *Sacks* case to illustrate the proper causal questions. Recall that *Sacks* was a case where the plaintiff had developed a post-operative infection, with delay in both the diagnosis and treatment of that infection. For the purposes of this exercise, we will assume that the jury did not accept the defence argument that the tragic outcome was inevitable, but accepted that the delays caused the injuries.

[190] See *Cheesman* para 32.
[191] See *Cheesman* para 40.
[192] See *Cheesman* para 71.
[193] See *Snell*.
[194] This is Stapleton's argument discussed elsewhere in this paper.
[195] See Stapleton 2008 page 443.

In *Sacks*, the jury found that five defendants had breached the standards of care, but we will focus on four factors.[196] The factors at play in this illustration are as follows:

1. Say Nurse R noted symptoms of infection at 8:00 am, but delayed reporting those symptoms to doctors until 4:00 pm, delaying treatment by 8 hours;[197]
2. Dr. B was told by the nurse at say 4:00 pm about the symptoms, ordered blood work, but failed to properly hand off care to the next doctor to follow up for the blood work;
3. The Hospital failed to complete the bloodwork ordered by Dr. B within the time specified in their own policy and failed to tell the team that the results would be delayed;[198]
4. Dr. R saw the patient the next morning, at 9:00 am, and failed to start antibiotic therapy within 1 hour, starting antibiotics 6 hours after this visit.[199]

Take the conduct of Nurse R, item 1, and Dr. R, item 4. Assume that, had Nurse R reported the symptoms sooner, Dr. R would have seen the plaintiff 8 hours earlier and started antibiotic therapy 8 hours before he did, thereby avoiding injury. Assume that had Dr. R started antibiotic therapy within 1 hour of his 9:00 am visit with the patient, harm is avoided. Let's look at the counterfactual to be asked only of the breach of duty of Nurse R. If we ask the causal question "To prevent the plaintiff's injury, would the breach of duty of Nurse R have to be absent?", the answer is clearly "yes". Had Nurse R reported the symptoms in a timely way, treatment would have been provided in time to avoid injury. On the other hand, if we ask the question "Did the breach of duty of Nurse R make a difference to the outcome?", the answer is "no", because Dr. R could have still avoided the harm.[200]

In both questions, we have isolated the conduct of Nurse R. But the questions yield quite different answers. Would the affirmative answer to the first question lead one to conclude that Nurse R's breach of duty was a cause? If it would, how does the negative answer to the second question affect the causal outcome?

If we could ask the threshold question as a general one: "Has the plaintiff proven, on a balance of probabilities, that the injury was caused by a delay in diagnosis and treatment?", then we are able to focus the causal inquiry on the part played by the individual breaches of duty in causing the delay. In *Sacks*, it would also have been abundantly clear whether the jury was accepting the defence theory of unavoidable outcome, with the added benefit of knowing that the causal question could be easily understood.

The first causal question posed captures the context and the involvement of the conduct of Nurse R. Professor Stapleton argues that the choice of causal question must capture all the ways in which the specified factor "might be involved" in the creation of a particular

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[196] See *Sacks* para 155.
[197] See *Sacks* para 157.
[198] See *Sacks* para 164.
[199] See *Sacks* para 170.
[200] See Stapleton 2008 page 438.

outcome.[201] For her, “necessity is one form of involvement, while duplicative necessity is another form of involvement”.[202]

Let’s assume that to avoid harm the plaintiff needed to be treated within 10 hours of the onset of symptoms. Assume that Nurse R caused 5 hours of delay and Dr. R caused an additional 6 hours of delay, all in breach of their duties to the plaintiff. It can be plainly seen that the combined delay of both wrongdoers is required to explain the harm. When considering the role of Nurse R in causing the harm, the causal question must not be framed to express Nurse R’s breach as “the” cause. Her conduct, on its own, was not sufficient to cause the harm, though it was necessary.

Assume there was only 1 hour to treat the plaintiff, where Nurse R was required to inform Dr. R of the symptoms, but Dr. R negligently failed to return to the hospital within the hour. Here Nurse R’s breach was sufficient to cause the harm, but not necessary. In this scenario, both are causative. The counterfactual imagines a world where a subset of factors is considered, except the breach of duty by Dr. R, to determine if the breach of duty by Nurse R was necessary for the sufficiency of the subset of factors. The subset of factors is the hypothetical world that removes Dr. R’s conduct.[203] One must not frame the counterfactual as whether Nurse R’s conduct was the but-for cause of harm. Thus, the question posed to the jury in *Sacks* would be incapable of a proper finding of cause-in-fact. The jury question in *Sacks* was “…have the Plaintiffs proven, on a balance of probabilities, that but-for the breach of standard of care, the injuries of Jordan Sacks would not have occurred?”. That is the wrong question because it fails to address the counterfactual that can determine the actual role of the conduct in question in causing the harm in question. It is applying the wrong filter. The better question is: “To prevent the plaintiff’s injury, would the breach of duty of Nurse R need to be absent?”.

Using the version of the *Sacks* case outlined here, it can readily be seen that as we add items 2 and 3, the breaches by Dr. B and by the Hospital, we can see how the counterfactual becomes more challenging to formulate. Each of Dr. B and the Hospital may add duplicative causation to the fact scenario.

In cases of simple necessity, the counterfactual alters the specified factor and asks whether the injury would have occurred, comparing the real world with an imagined one (say, had the defendant driven at the speed limit he would have stopped in time and the crash would have been avoided). With duplicative necessity, the counterfactual considers a world where the duplicative factors have been excluded, leaving a subset of factors sufficient to cause the harm that includes the specified factor. The question that follows asks whether further excluding the specified factor avoids the harm. If this is answered affirmatively, then the specified factor is necessary and a cause of the harm (say, the three people pushing on Paul’s

[201] See Stapleton 2008 page 441.
[202] Ibid.
[203] See Stapleton 2008 page 471.

car, where only two are needed to cause the harm). The specified factor is "involved" in the creation of harm in the form of duplicative necessity.[204]

As for the notion of contribution, Stapleton maintains that both necessity and duplicative necessity are merely forms of contribution.[205]

Therefore, in overdetermination cases, the counterfactual removes the tortious conduct as well as the excess factors to determine the role of the tortious conduct in causing harm. The proper counterfactual will hypothetically remove all the factors that are considered "excess" to the specified factor, and then ask whether the specified factor is "necessary" to causing the harm.[206] Take the example of the three people, A, B and C, pushing on Paul's car. The counterfactual removes one of the forces, say A, leaving the force from B and C, one of which is the specified factor. The question is then posed: "In this hypothetical world (where A does not exist), if B had not wrongfully pushed on Paul's car would the harm have been avoided?". The answer is "yes", but B is excess to what was needed to cause the loss. It makes sense that B is "necessary" because it is known that the loss was caused by some combination of A, B and C.

Therefore, Stapleton maintains that the choice of causal question must be such that it can identify factors that contribute as a cause, even where the factor may not be either necessary (at least on its own) or sufficient to bring about the harm.[207] This allows the involvement of a factor to be determined by filtering out factors that permit a properly focussed legal inquiry.[208]

There are, therefore, three ways in which cause-in-fact can be determined. First, the simple relationship between an event and an outcome. This is the narrow, or traditional, application of the but-for test, where the counterfactual removes the specified factor and asks whether the harm would have been avoided. This is the "the cause" scenario. Second, in overdetermination cases, the counterfactual excludes the factors that are excess, creating a subset of factors where the specified factor is then assumed not to have occurred, asking whether it was necessary for that sufficient subset of factors to cause the harm. This is the "a cause" scenario. Third, there are the *McGhee* and *Snell* scenarios, where the factor has "contributed" to the harm in a material way. This may be illustrated by the "straw that breaks the horse's back". Cause-in-fact is determined by inference, after weighing all the factors at play, even where, as in *McGhee* and *Athey*, there are innocent factors. This is the "inferred cause" scenario, but with elements of the two other scenarios.

CAUSATION – PROBABILITIES AND LOSS OF CHANCE OR REDUCED CHANCE

The whole notion of material contribution as an element of the cause-in-fact inquiry incorporates probabilities as a prominent part of the analysis. There may be no better means

[204] Ibid, pages 441-442.
[205] See Stapleton 2008 page 443.
[206] Ibid.
[207] Ibid.
[208] Ibid.

to establish proof that an injury is caused by a certain factor than the likelihood based on probabilities. Indeed, the weighing of the evidence and the drawing of inferences, a la *Snell*, can be seen as founded on one's sense of probabilities.

Wright says that reduced chance, increased risk, and alternative causation all raise questions about the connection that exists between various types of probability statements and the actual-causation requirement.[209]

Proof of causation at law always resorts to probabilities. Most notably, for tort law, causation is about confidence.

The loss of chance cases or the reduced chance cases are in a sense the opposite of the increased risk cases. In the increased risk cases, the harm associated with the risk has actually occurred. In the reduced chance case, the harm is some anticipated future phenomenon that may or may not occur.

Probabilities and loss of chance present additional complications for the law of causation. Any consideration of these issues must avoid confusing the balance of probabilities test with the nature of causation.[210] Employing material contribution in the manner promoted in this paper, as part of the application of the but-for test, means that a cause need not contribute to the outcome based on a greater than 50% threshold, but rather in a material, or not *de minimis*, way. The "least straw breaks the horse's back" (although I always thought the expression involved a camel).

The example used by Lord Salmon in *McGhee* is a good illustration of the concept. Suppose the plaintiff in *McGhee* was exposed to a 52% risk of disease as a result of his working conditions associated with innocent brick dust. Assume that the failure to provide shower facilities resulted in additional exposure to guilty brick dust such that the risk of disease was now 90%. Were the burden of proof test -- a balance of probabilities -- applied, the plaintiff would fail in his claim, notwithstanding an increase of 38% for risk of disease. If, on the other hand, the innocent brick dust only posed a 48% risk of disease, and the breach of duty in failing to provide showers increase the risk of disease from guilty dust to 52%, the balance of probabilities test for this increase risk of only 4% would attract liability. This is not how the law of causation works. In the former example, material risk would be proven and causation made out. It is more likely than not that the guilty brick dust, in the former scenario, caused injury to the plaintiff. The extent of injury is a matter of damages, not a matter of cause.

Once cause is proven, liability will follow. The principles to be applied to the assessment of damages are beyond the scope of this paper. Having said that, some discussion about the interplay between causation and damages is warranted in this context. Where there had been a material contribution to harm based on a negligence exposure to risk, there has been an

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[209] See Wright page 1821.
[210] See *McGhee* per Lord Salmon.

infringement of the plaintiff's interests, but the extent of that harm cannot be the subject of the causal analysis.

When addressing loss of chance, one is often referring to an opportunity for a more favourable outcome that has either been reduced or eliminated. It becomes difficult, however, to distinguish between a lost chance and the avoidance of risk.[211]

Apportionment of liability has to do with the degree to which a wrongdoer, found to have contributed to the loss, will share in the burden of loss.

Probabilities and the counterfactual figure prominently in the assessment of damages, but this, too, is beyond the scope of this paper. Damage, as element of a tort claim, is distinct from cause-in-fact.

CONCLUSIONS

Clarity in the law of causation can only be achieved if it is accepted that determining cause-in-fact relies entirely, and without exception, on the counterfactual. Only the counterfactual can lead to a principled finding of cause-in-fact. Though factual scenarios may exist where even the counterfactual is shown wanting – cases of true impossibility – those cases are sufficiently rare that they should not impair our ability to articulate the test that is equal to the task in the vast majority of cases.

I argue, therefore, that the treatment of "material contribution" in the Supreme Court of Canada in *Clements* be scrapped. Insofar as determining cause-in-fact is concerned, there are no tests, beyond the counterfactual, that can achieve that objective. For the purposes of cases involving "impossibility" of proof – and these cases must be seen to go beyond the confines articulated in *Clements* – the only answer articulated in the cases is to forgive the plaintiff from proving cause-in-fact. If the burden of proof is not immutable, then shifting the burden of proof may well be the answer to these exceptional cases. It must be appreciated, however, that the inadequacy of proof is vastly more likely to be the result of the failure to call all the causal evidence there was to call, than impossibility.

Parties should no longer assert, and courts should no longer accept, that there is a test for cause-in-fact other than the counterfactual. It should be understood that "material contribution" has a meaning and a role within the counterfactual analysis that, properly implemented, will lead to a cause-in-fact conclusion. Thus, it is not an alternative at all.

The "but-for" language has led parties and courts astray, by disregarding its foundation in the counterfactual. The conventional thinking about the traditional but-for test will still serve us well in the simpler factual scenarios. Having said that, we must be prepared to adapt the counterfactual to the more complex factual scenarios so that reasonable conclusions can be

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[211] See Weinrib, E. Causal Uncertainty, Oxford Journal of Legal Studies, Vol. 36, No. 1 (2016) page 159.

made about causation that do not defy common sense. While I would prefer avoiding the words “but-for”, that test has often been called a “necessary condition” test. If we can adapt that test and speak of necessity in the sense promoted by both Professors Wright and Stapleton, then we might still call the test by the same name, but ensure that we articulate what it means in this broader context.

Having said that, using but-for as a fall-back to describe causation in tort law has led to some complacency and confusion. I urge lawyers and judges to incorporate plain and understandable language into the counterfactual questions that can focus the proper analysis and lead to sensible conclusions. This means rejecting the words “but-for” and “contribution” in the formulation of a counterfactual question.

Scrapping the *Clements*-formulation of an alternative test will bring clarity to the law of causation, but causation will remain a complex and challenging concept in tort law, even so. In the multi-tortfeasor/multi-factor cases, the counterfactual may prove challenging to construct. It may have to be done in stages or layers. The counterfactual must allow the trier of fact to understand the nature of causation, as it applies to the case, and how the role of a factor in the creation of the outcome can be teased out.