

## **Causation: How to Cross the Rubicon** *Defence Perspective*

“Causation is an expression of the relationship that must be found to exist between the tortious act of the wrongdoer and the injury to the victim in order to justify compensation of the latter out of the pocket of the former.”<sup>1</sup>

As the Supreme Court of Canada stated in *Athey v. Leonati*<sup>2</sup>, “[c]ausation is established where the plaintiff proves to a civil standard on a balance of probabilities that the defendant caused or contributed to the injury.” While this sounds like a relatively straight-forward proposition, establishing causation has, unfortunately, proven to be anything but straight-forward in many cases.

While “[m]uch judicial and academic ink” has indeed “been spilled over the proper test for causation in cases of negligence”<sup>3</sup>, there has been, and likely will continue to be, a fair bit of confusion on the subject. This paper seeks to shed some light on the current state of the law with respect to the issue of causation.

### **1. Tort: from “but for” to “material contribution” and back again...**

#### *Athey v. Leonati*

Until recently, the leading case with respect to causation was the Supreme Court of Canada’s decision in *Athey v. Leonati*. While there are several important points to be drawn from this case, the case has often been misapplied. As defence counsel well know, plaintiffs’ counsel (and unfortunately, occasionally arbitrators and judges), will rely on *Athey* for the proposition that as long as the accident in question made some contribution to the plaintiff’s current condition, the defendant will be responsible for 100% of damages relating to the plaintiff’s injuries, regardless of pre-existing conditions or post-accident occurrences. A thorough reading of *Athey*, however, makes it clear that this is not the case.

The facts of the case are well known. The plaintiff, Jon Athey, had a history of minor back problems when he was involved in two separate motor vehicle accidents. Soon after the accidents, he experienced a disc herniation. At issue was the cause of the disc herniation.

The trial judge found that the herniation had been caused by a combination of the injuries sustained in the two accidents, and a pre-existing disposition to injury. She found that although the accidents contributed to the injury “to some degree”, they were “but a minor contributing factor.” She held that the role of the accidents in contributing

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<sup>1</sup> *Snell v. Farrell*, [1990] 2 S.C.R. 311 at para. 26.

<sup>2</sup> [1996] 3 S.C.R. 458 at para. 13.

<sup>3</sup> *Resurfice Corp. C, Hanke*, 2007 SCC 7

to the injury was “no more than 25%.” She then went on to assess damages, but to award only 25% of the global amount assessed.

The plaintiff appealed, claiming that he should have been awarded 100% of the damages assessed. The appeal was dismissed by the British Columbia Court of Appeal. The plaintiff then appealed to the Supreme Court of Canada. The appeal was allowed, and judgment was entered for the plaintiff for the full amount of the global damages assessed.

The judgment of the Court was delivered by Major J. He began his analysis by stating that it “has long been established that a defendant is liable for any injuries caused or contributed to by his or her negligence. If the defendant’s conduct is found to be a cause of the injury, the presence of other non-tortious contributing causes does not reduce the extent of the defendant’s liability.”<sup>4</sup> Major J. explained that it has never been necessary for a plaintiff to show that the tortious act would have been enough to cause the injury on its own, and that the existence of necessary pre-conditions for the injury to occur will not reduce the tort-feasor’s liability. If it was necessary to have had both certain pre-conditions and the defendant’s negligence for the injury to have occurred, then the defendant is fully liable for adding a necessary causative ingredient, without which the injury would not have occurred.

It is important to note, however, that the *particular injuries* in question still have to be caused or contributed to by the defendant’s negligence for the defendant to be liable for damages with respect to those same injuries. As explained by Major J., where injuries are distinct and divisible, (for example, where an injury to the plaintiff’s foot is caused by one tort-feasor, while an injury to her arm is caused by another tort-feasor), a defendant will only be liable for damages for the injury that she has caused.<sup>5</sup>

Similarly, a defendant will not have to pay damages attributable to an independent intervening condition or event, such as a disease or a non-tortious accident. A completely independent condition which would have resulted in the plaintiff being debilitated *regardless of the defendant’s negligence*, will necessitate damages being reduced. As Major J. stated, to understand the reason for this “one need only consider first principles.” Tort law seeks to place the plaintiff back in the position she would have been in had it not been for the defendant’s negligence. The defendant does not, however, have to place the plaintiff in a better position than she would have been in had it not been for the defendant’s negligence. Although the facts did not support a conclusion that Mr. Athey would have suffered the injury in question regardless of the defendant’s negligence, Major J. did note the following:

Had the trial judge concluded (which she did not) that there was some realistic chance that the disc herniation would have occurred at some

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<sup>4</sup> *Athey, supra* at para. 12.

<sup>5</sup> *Ibid*, at para. 24.

point in the future without the accident, then a reduction of the overall damage may have been considered. This is because the plaintiff is to be returned to his “original position”, which might have included a risk of spontaneous disc herniation in the future.<sup>6</sup>

Major J.’s reasoning differentiates between the application of the “thin skull” and “crumbling skull” doctrines. A pre-disposition to injury which has not, and on a balance of probabilities would not have, manifested itself in injury had it not been for the defendant’s negligence is an application of the “thin skull” doctrine. The defendant must take the plaintiff and all her pre-dispositions, as she finds her, and is responsible for 100% of the damages caused by her negligence. The ‘crumbling skull’ doctrine, on the other hand, recognizes that the plaintiff would have suffered injury even without the defendant’s negligence, and holds the defendant responsible for the additional damage caused by the defendant’s negligence, but not the inherent or pre-existing damage.<sup>7</sup>

- “*but for*” vs. “*material contribution*”

As should be clear from the above analysis, Major J. applied a “but for” test in *Athey*. As stated above, the inquiry was whether the defendant’s negligence was a necessary ingredient without which, or “but for” which the injury would not have occurred. In finding the crumbling skull doctrine inapplicable to the facts of the case, Major J. relied on the fact that the trial judge had “made no finding of any measurable risk that the disc herniation would have occurred *without the accident*”<sup>8</sup> [emphasis added].

However, as pointed out by Maxime Faille in his very useful paper “More Kicks at the Causation Can”, Major J.’s statement that “[c]ausation is established where the plaintiff proves to the civil standard on a balance of probabilities that the defendant caused *or contributed to the injury*” [emphasis added], has been taken by some observers to suggest that there are two tests - a “causation” test and a “contribution” test, and that either may be applied to establish legal causation. As stated by Faille, the problem seems to arise from the fact that Major J. uses “contribution” in two different ways in *Athey*:

...The first meaning of “contribution” as used in *Athey* is merely descriptive. It is this use of the term that is actually relied upon in deciding *Athey*. It is employed to underscore that, for liability to fasten, a negligent act need not be the sole or exclusive physical cause of the injury. As stated by Major J.:

**It is not now necessary, nor has it ever been, for the**

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<sup>6</sup> *Ibid*, at para. 48.

<sup>7</sup> *Ibid*, at para. 35.

<sup>8</sup> *Ibid*, at para. 36.

**plaintiff to establish that the defendant's negligence was the sole cause of the injury.** There will frequently be a myriad of other background events which were necessary preconditions to the injury occurring. To borrow an example from Professor Fleming (*The Law of Torts* (8<sup>th</sup> ed. 1992) at p. 193) a "fire ignited in a wastepaper basket is... caused not only by the dropping of a lighted match, but also by the presence of combustible material and oxygen, a failure of the cleaner to empty the basket and so forth." **As long as the defendant is part of the cause of an injury, the defendant is liable, even though his act alone was not enough to create the injury... This position is entrenched in our law and there is no reason to depart from it... [emphasis added]**

However, using the notion of "contribution in this sense in no way detracts from the applicability of the standard "but for" test for causation. This is so because although the negligent act may not be the sole cause of the injury (it never is), it must still be a necessary ingredient in bringing about the injury. In other words, causation is established if the injury would not have occurred **but for** the **contribution** of the negligent act.<sup>9</sup>

The second use of the word "contribution", on the other hand, *is* actually in reference to a separate and alternative test to the "but for" test, namely the "material contribution" test. In his discussion of the test to be applied in establishing causation, Major J. stated:

The general, but not conclusive, test for causation is the "but for" test, which requires the plaintiff to show that the injury would not have occurred but for the negligence of the defendant...

The "but for" test is unworkable in some circumstances, so the courts have recognized that causation is established where the defendant's negligence "materially contributed" to the occurrence of the injury... A contributing factor is material if it falls outside of the *de minimus* range...<sup>10</sup>

Although a separate "material contribution" test is referenced in *Athey*, the circumstances under which the test is to be applied are not spelled out. While the decision suggests that the "material contribution" test should be applied where the "but for" test is "unworkable", the Court does not explain exactly what is meant by "unworkable".

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<sup>9</sup>Maxime Faille, "More Kicks at the Causation Can" (2006) at 3-4.

<sup>10</sup>*Athey, supra*, at para. 14-15.

## Material Contribution

Although there is nothing in *Athey* leading to the conclusion that in the normal course a “contribution” that is less than causative will give rise to liability, this seems to have been lost on many courts seeking to apply the case. As noted by Faille:

Since *Athey*, numerous cases have set aside the “but for” test in favour of the “material contribution” test for causation. Typically, this is done without explanation as to what the distinction is between the two tests and why material contribution is the appropriate test in the case at bar. Indeed, it appears that many courts regard the two tests as interchangeable alternatives – that one must meet either one of the two tests. On this view, causation is established if either (a) the negligence was a “but for” necessary cause to the injury; OR (b) the negligence “materially contributed” to the injury. In approaching the test in this way, the courts must assume that the use of the term “materially contributed” requires something less than proof that injury would not have occurred but for the “material contribution.” Otherwise... there would be no point in regarding “material contribution” as being a distinct test from the traditional “but for” test. Such an interpretation is, it is submitted, erroneous. If a plaintiff may in effect choose between the traditional “but for” test or a lower-threshold, more nebulous “material contribution” test, there is no need to retain the “but for” test at all.<sup>11</sup>

As stated above, confusion as to the proper application of the “material contribution” test may have been caused by the Court’s use of the word “contributed” in two different ways. It is submitted that a proper understanding of the use of the word in the statement that “[c]ausation is established where the plaintiff proves to the civil standard on a balance of probabilities that the defendant caused or contributed to the injury”, however, does not lead to the conclusion that there are two interchangeable tests for establishing legal causation. Rather,

The use of the phrase “or contributed” in contradistinction to “caused” as part of the causation test appears to have been intended to connote only the trite proposition that it is not and has never been necessary to demonstrate that the defendant’s conduct was the *only* cause of the injury. The distinction is not between the negligence either *causing or contributing* to an injury, but between the negligence being the *sole or primary* (and thus obviously necessary) cause of an injury and the negligence being a *contributing* (but still necessary) cause to the injury.<sup>12</sup>

It seems that many courts have forgotten that the “but for” test is the general test for

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<sup>11</sup> Faille, at 12.

<sup>12</sup> *Ibid*, at 10-11.

causation, and that the “material contribution” test is only to be applied where the “but for” test proves to be “unworkable.” The question then, becomes under what circumstances the “but for” test becomes “unworkable” so that the “material contribution” test should apply.

Faille points out that courts and academics have traditionally departed from the “but for” test in situations where the test “breaks down and leads to clear injustice.” As stated by Professor P. Osborne,

This has arisen, for example in situations of multiple sufficient causes. The classic example is that of two defendants negligently lighting fires, each one of which is sufficient, independently to cause the plaintiff’s loss. Application of the but for test sequentially to each of the defendants results in each defendant being exonerated because the loss would still have occurred if either one, but not both, had been careful. Clearly, in fairness, both defendants should be held responsible. To achieve this result the courts developed the material contribution or substantial connection test. Under this test the conduct of both defendants is regarded as a cause-in-fact because it materially contributed to the loss.<sup>13</sup>

In such cases, sometimes referred to as “duplicative causation” cases, both defendants actually cause the injury. The “but for” test simply breaks down because the injury would still have occurred without the negligence of one particular defendant due to the duplicative negligence of the other. This is not a situation in which a “contribution” that is less than causative will give rise to liability.

One case, however, in which the Supreme Court of Canada seems to have applied a relaxed standard of causation in applying what it referred to as a “material contribution” test is *Walker Estate v. York Finch General Hospital*.<sup>14</sup> The plaintiff in that case was infected with HIV through tainted blood and blood products.<sup>15</sup> The plaintiff brought an action against the Canadian Red Cross Society (CRCS) claiming, among other things, that the CRCS was negligent in its screening of blood donors during the time period in which the plaintiff was infected.

The trial judge in *Walker* found that although the CRCS had not met the proper standard of care, the plaintiff had not shown causation. The trial judge concluded that even if the CRCS had provided donors with pamphlets setting out warnings regarding HIV and AIDS, the person who donated the HIV infected blood would have donated blood

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<sup>13</sup>P. Osborne, *The Law of Torts* (Toronto: Irwin Law, 2002) at p. 53, quoted in Faille at p. 6.

<sup>14</sup>[2001] 1 S.C.R. 647

<sup>15</sup>The case dealt with three individuals who were infected with HIV. Causation was established with respect to two of the three individuals. The Supreme Court of Canada’s causation analysis related to the infection of Alma Walker. Ms. Walker died of AIDS during the course of the litigation, and her claim was continued by her estate. For ease of reference, however, I will refer to the plaintiff as if it were the infected individual, Alma Walker.

anyway. The plaintiff appealed to the Ontario Court of Appeal. The appeal was allowed, and the CRCS then appealed the matter to the Supreme Court of Canada.

The Supreme Court of Canada applied a “material contribution” test particular to “cases of negligent donor screening” and held that causation had been established. The Court stated:

The unique difficulties in proving causation make this area of negligence atypical. The general test for causation in cases where a single cause can be attributed to a harm is the “but-for” test. However, the but-for test is unworkable in some situations, particularly where multiple independent causes may bring about a single harm.

In cases of negligent donor screening, it may be difficult or impossible to prove hypothetically what the donor would have done had he or she been properly screened by the CRCS. The added element of donor conduct in these cases means that the but-for test could operate unfairly, highlighting the possibility of leaving legitimate plaintiffs uncompensated. Thus, the question in cases of negligent donor screening should not be whether the CRCS’s conduct was a necessary condition for the plaintiff’s injuries using the “but-for” test, but whether that conduct was a sufficient condition. The proper test for causation in cases of negligent donor screening is whether the defendant’s negligence “materially contributed” to the occurrence of the injury.<sup>16</sup>

The Court in *Walker Estate* may have been influenced by the fact that two other plaintiffs who had also been infected by HIV infected blood, but had received blood from a different donor than the plaintiff, Alma Walker, had proven causation. It seems unfair and illogical to deny one plaintiff compensation solely because she received blood from a different donor, especially under circumstances where that donor could not be held liable to the plaintiff, as he had no information as to the risks of the spread of HIV through tainted blood, and had not committed any tortious act himself. As the wording of the decision makes clear, (and as stated above), however, the test applied by the Supreme Court in Canada is particular to “cases of negligent donor screening.”

### *Resurface Corp. v. Hanke*

The Supreme Court of Canada’s latest pronouncement on the law of factual causation was delivered recently in the case of *Resurface Corp. v. Hanke*. The facts of the case are relatively simple. The plaintiff was in the process of using an ice resurfacing machine to maintain an ice rink when he was involved in a tragic accident. The plaintiff placed a water hose into the gasoline tank of the machine instead of the water tank.

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<sup>16</sup>*Walker Estate, supra* at para. 87-88.

When hot water overflowed the gasoline tank, vapourized gasoline was released into the air. The vapourized gasoline was ignited by an overhead heater, causing an explosion and fire, which resulted in the plaintiff suffering serious burns.

The plaintiff claimed that the water tank and gasoline tank were similar in appearance and placed too close to each other on the machine, making it easy to confuse the two. He alleged that the manufacturer or distributor of the ice resurfacing machine had been negligent in the design of the machine.

The trial judge rejected the plaintiff's claim, holding that it was not reasonably foreseeable that an operator of the ice resurfacing machine would mistake the gasoline tank for the water tank, and that the plaintiff had not shown that the defendants had caused the accident. The plaintiff appealed to the Alberta Court of Appeal, which allowed the appeal and ordered a new trial. With respect to causation, the Alberta Court of Appeal held that the trial judge had erred by failing to consider the "comparative blameworthiness" of the plaintiff and defendants, and in applying a "but for" test instead of a "material contribution" test.

The case was then appealed to the Supreme Court of Canada. The decision of the Court was delivered by the Chief Justice, who wrote that the Court of Appeal had "erred in applying the material contribution test in circumstances where its use was neither necessary nor justified", and restored the trial judgment. Given the importance of the Court's reasoning on the issue of causation, I will quote the Court's reasons at length. The Chief Justice stated:

The Court of Appeal erred in suggesting that, where there is more than one potential cause of an injury, the "material contribution" test must be used. To accept this conclusion is to do away with the "but for" test altogether, given that there is more than one potential cause in virtually all litigated cases of negligence. If the Court of Appeal's reasons in this regard are endorsed, the only conclusion that could be drawn is that the default test for cause-in-fact is now the material contribution test. This is inconsistent with this Court's judgments in *Snell v. Farrell*,... *Athey v. Leonati*,... *Walker Estate v. York Finch General Hospital*,... and *Blackwater v. Plint*... [citations omitted].

Much judicial and academic ink has been spilled over the proper test for causation in cases of negligence. It is neither necessary nor helpful to catalogue the various debates. It suffices at this juncture to simply assert the general principles that emerge from the cases.

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

This fundamental rule has never been displaced and remains the primary test for causation...

The “but for” test recognizes that compensation for negligent conduct should only be made “where a substantial connection between the injury and the defendant’s conduct” is present. It ensures that a defendant will not be held liable for the plaintiff’s injuries where they “may very well be due to factors unconnected to the defendant and not the fault of anyone”: *Snell v. Farrell*...

However, in special circumstances, the law has recognized exceptions to the basic “but for” test, and applied a “material contribution” test. Broadly speaking, the cases in which the “material contribution” test is properly applied involve two requirements.

First, it must be impossible for the plaintiff to prove that the defendant’s negligence caused the plaintiff’s injury using the “but for” test. The impossibility must be due to factors that are outside of the plaintiff’s control; for example, current limits of scientific knowledge. Second, it must be clear that the defendant breached a duty of care owed to the plaintiff, thereby exposing the plaintiff to an unreasonable risk of injury, and the plaintiff must have suffered that form of injury. In other words, the plaintiff’s injury must fall within the ambit of the risk created by the defendant’s breach. In those exceptional cases where these two requirements are satisfied, liability may be imposed, even though the “but for” test is not satisfied, because it would offend the basic notions of fairness and justice to deny liability by applying the “but for” approach.<sup>17</sup>

#### - Implications

*Resurfice* has clarified two very important aspects of the law with relating to legal causation. They are as follows:

- It is now clear that the default test for establishing legal causation is the **“but for” test**, and that it is **to be applied in all but “special circumstances”**;
- Where the “material contribution” test is applied it must be impossible to prove legal causation using the “but for” test **“due to factors that are outside of the plaintiff’s control”**. The “material contribution” test is NOT an interchangeable alternative to the “but for” test to be applied simply because the plaintiff is unable to prove causation under the “but for” test.

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<sup>17</sup> *Resurfice*, *supra* at para. 19-25.

Hopefully the Court's ruling will have the effect of cutting down on or eliminating (one can hope) cases where the "material contribution" test is applied as an interchangeable alternative to the "but for" test where the plaintiff is unable to prove causation on the higher standard of the "but for" test. It bears repeating that "compensation for negligent conduct should only be made "where a substantial connection between the injury and the defendant's conduct" is present."

Although this seems to have clarified things somewhat, a question does arise as to whether *Resurfice* has done anything to change the law of legal causation. The cases of *Barker v. Montford Hospital*<sup>18</sup> and *Rizzi v. Mavros*<sup>19</sup> indicate that the Ontario Court of Appeal is of the opinion that it has not.

*Barker* was a case of alleged medical negligence. The plaintiff had attended at a hospital with a partial bowel obstruction and was initially treated conservatively. Eventually it became clear that the plaintiff would require surgery, but by the time the surgery was performed, a portion of her bowel had died and had to be removed. It was alleged that the surgery should have been performed earlier, and that if it had been, her bowel would have been saved. The trial judge applied the "material contribution" test in order to establish causation, and found in favour of the plaintiff.

A majority of the Court of Appeal, however, held that the plaintiff had not proved that her bowel would have been saved if the surgery had been performed earlier, (or put another way, that her bowel would not have been lost but for the negligence of her treating physician), and that causation was therefore not established. In considering the implications of *Resurfice*, the Court of Appeal stated:

As set out by the Chief Justice in her reasons at para. 20, this decision simply asserted "the general principles that emerge[d] from the cases." It did not alter the state of the law on causation. Rather it confirmed that "the basic test for determining causation remains the 'but for' test."<sup>20</sup>

Turning to *Rizzi*, that case dealt with a motion by the defendants in a personal injury action to extend the time in which to cross-appeal. The plaintiff in the case had injured her right leg while attempting to move metal sheets stored in a building owned by the defendants. The plaintiff subsequently developed fibromyalgia. Causation of the fibromyalgia was at issue, with the defendants arguing that the plaintiff's complaints were caused by a pre-existing condition.

Despite defence counsel's urging that the "but for" test was the proper test to be applied, the trial judge instructed the jury on the basis of "material contribution." The

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<sup>18</sup>2007 ONCA 282

<sup>19</sup>[2007] O.J. No. 1783

<sup>20</sup>*Barker*, *supra* at para. 51.

jury found in favour of the plaintiff on the basis that her fibromyalgia had been caused or materially contributed to by the accident in which she had injured her right leg. The plaintiff appealed the quantum of the jury award, as well as a finding that she had been 75% contributorily negligent. The plaintiff perfected her appeal in January 2007.

Following the release of *Resurfice* and *Barker*, counsel for the defendants sought and obtained instructions to cross-appeal on the basis that the trial judge had incorrectly instructed the jury on the applicability of the “material contribution” test. That decision necessitated the motion for an extension of the time in which to appeal.

In allowing the extension Gillese J.A. accepted the explanation for the delay in cross-appealing. She stated:

Although *Resurfice* did not change the law of causation, it did clarify the law. The history of *Resurfice* demonstrates that there was confusion in this area following *Athey v. Leonati* – the trial judge applied the “but for” test but the Alberta Court of Appeal applied the “material contribution” test. If there were no confusion about the law of causation, it seems to me that the two levels of court would not have differed on which test applied. This court’s decision in *Barker* reinforces my view.

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In my view, the cross-appeal has considerable merit. I do not accept the appellant’s contention that the trial judge correctly instructed the jury on the issue of causation. Instruction was given on the basis of “material contribution” and the jury findings were on that basis also. But, the necessary determination that special circumstances warranted the application of the “material contribution” test had not been made. Until such determination is made, it cannot be known which of the two causation tests ought to have been applied.<sup>21</sup>

Some commentators, however, disagree with the Ontario Court of Appeal’s view that *Resurfice* has not changed the law of legal causation. David Cheifetz, for example, writes:

Neither the meaning nor the scope of the material-contribution test were entirely clear prior to *Resurfice*. However, this much was clear. The material-contribution test was used to determine if conduct was a cause of injury and the standard of proof was probability...

*Resurfice* changed that. The but-for test still exists. The material-contribution test still exists. But, the *Resurfice* material-contribution test is not the *Athey* material-contribution test. The *Resurfice* material

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<sup>21</sup> *Rizzi, supra*, at para. 19 and 24.

contribution test is not used to determine whether the impugned conduct is actually a cause of the harm. It is used to determine only whether the impugned conduct materially increased the risk of the occurrence (materialization) of the harm which the injured person in fact suffered, *in circumstances where it has already been determined that the trier of fact will be unable to make a valid finding that the impugned conduct was actually a cause of the harm....* Where the *Resurface* material-contribution test is held to be applicable, and where it is satisfied, the result will be a conclusion of law that the impugned conduct is deemed to be a legal cause of the plaintiff's harm, notwithstanding the absence of sufficient evidence to allow a valid conclusion that the impugned conduct was actually a cause of the harm.

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...[M]any judges and lawyers have not yet realized that the *Resurface* material contribution test does *not* identify wrongful (negligent, faulty) conduct that can be validly held to be an actual cause (a scientific, historical cause) of the harm. Instead, it identifies wrongful conduct that will be *deemed* to satisfy the causation requirement *because it materially increased (whatever materially means) the risk of the occurrence of the harm that occurred*, even though there has not been (and cannot be) a valid finding that the conduct is an actual cause of the plaintiff's harm, so that the court may use the *deemed connection* as the basis for the imposition of liability, assuming all other applicable criteria are satisfied...<sup>22</sup>

The wording that Cheifetz seems to be relying on in support of his conclusion that the *Resurface* "material contribution" test is not the *Athey* "material contribution" test is the Chief Justice's statement that

...it must be clear that the defendant breached a duty of care owed to the plaintiff, thereby exposing the plaintiff to an unreasonable **risk** of injury, and the plaintiff must have suffered that form of injury. In other words, the plaintiff's injury must fall within the **ambit of the risk** created by the defendant's breach. [Emphasis added]<sup>23</sup>

Although this issue is still very much open for debate, if Cheifetz is correct that the "material contribution" test posited in *Resurface* establishes legal causation based on mere *risk* of injury, this could very well signal a change in the law of legal causation.

Prior to *Resurface* there was clear case law from the Supreme Court of Canada establishing that conduct that merely increases the *risk* of injury is insufficient to

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<sup>22</sup>David Cheifetz, "Scraping the Surface: *Resurface Corp. v. Hanke* 2007 SCC 7", (2007) at pp. 3-4 and 6.

<sup>23</sup>See page 9 for the full quotation in greater context.

establish legal causation in tort. In *Snell v. Farrell*, for example, the Court expressly rejected the notion that causation is established where “the plaintiff simply prove[s] that the defendant created a risk that injury which occurred would occur.”<sup>24</sup> An important point to keep in mind, however, is that regardless of whether or not the “material contribution” test set out in *Resurfice* establishes causation on the basis of the creation of risk rather than the actual occurrence of injury, the application of the “but for” test remains unchanged. There is no question that the Supreme Court of Canada’s statement in *Snell* that the mere creation of risk will not be sufficient to establish liability is still applicable in all but those rarest of cases that constitute “special circumstances.”

Keeping this in mind should help to address some of the concerns of those who believe that the *Resurfice* “material contribution” test establishes causation on the basis of the creation of risk. In particular, it should help to address the concern that *Resurfice* stands in contradiction to pre-*Resurfice* case law from the Ontario Court of Appeal, which explicitly rejected the notion that factual causation may be established by demonstrating an increased risk of injury. Cheifetz, for example, has stated:

The *Resurfice* material-contribution test deals with contribution to *increased risk*. The *Athey* test deals with *contribution to the injury*. There is a difference. It is a difference known to law. It is a difference known to Canadian law. It is a difference known to Ontario law. It is a difference specifically recognized in cases such as *Cottrelle*, where increased risk was specifically rejected as a basis for finding that factual causation existed.<sup>25</sup>

*Cottrelle v. Gerrard*<sup>26</sup>, *Ortega c. 1005640 Ontario Inc.*<sup>27</sup>, and *Aristorenas v. Comcare Health Services*<sup>28</sup> are identified by Cheifetz as cases which are inconsistent with the “material contribution” test set out in *Resurfice*.<sup>29</sup> It is important to remember, however, that the “but for” test was found to be applicable in all three of those cases. In *Cottrelle*, for example, the plaintiff, who suffered from diabetes, developed a sore on her foot. The sore became infected and gangrenous, necessitating the amputation of the plaintiff’s leg below the knee. The plaintiff’s treating physician was found to have been negligent in his treatment of the plaintiff, however, the evidence demonstrated that given the plaintiff’s pre-existing condition, it was more likely than not that even if the physician had lived up to the standard of care, the plaintiff would have lost her leg anyway. The “but for” test, therefore, was not met.<sup>30</sup>

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<sup>24</sup> *Snell v. Farrell*, [1990] 2 S.C.R. 311, at para. 26. See also *Lawson v. Laferriere* (1991), 78 D.L.R. (4<sup>th</sup>) 609 (S.C.C.), and *St-Jean v. Mercier*, [2002] 1 S.C.R. 491 at para. 13.

<sup>25</sup> *Ibid*, at 36.

<sup>26</sup> (2003), 67 O.R. (3d) 737 (C.A.)

<sup>27</sup> 2004 CanLII 19221 (Ont. C.A.)

<sup>28</sup> (2006), 83 O.R. (3d) 282 (C.A.)

<sup>29</sup> Cheifetz, at pp. 35-40.

<sup>30</sup> *Cottrelle, supra* at para. 31.

Even if the *Resurfice* “material contribution” test differs from the *Athey* “material contribution” test, it is clear that in cases where the “but for” test is applicable, merely increasing the risk of injury to a plaintiff will not be sufficient to establish legal causation. The above-mentioned cases from the Ontario Court of Appeal, therefore, remain good law.<sup>31</sup>

Turning back to the question of whether *Resurfice* has changed the application of the “material contribution” test, as mentioned above, it is not at all clear that it has. To begin with, considering that the Chief Justice relies on and refers to *Snell* approvingly, it is quite unlikely that she intended to overrule *Snell*. Secondly, the Chief Justice states that the two requirements that she sets out for the application of the “material contribution” test are “helpful in defining situations in which an exception to the “but for” approach ought to be permitted.” She does not say that satisfying the two requirements of the test will be enough for liability to be imposed.

As explained above, the “material contribution” test is often applied in “duplicative causation” cases. Cases of this type meet the two requirements set out by the Chief Justice in *Resurfice*, but they also require more than the mere creation of risk for the imposition of liability. The tortious acts committed in duplicative causation cases do actually *cause* the injury in question. They just fail to meet the “but for” test because two harmful acts are committed simultaneously.

It may be that the broad language of the second requirement for the application of the “material contribution” test set out in *Resurfice* is meant to capture what can be referred to as “indeterminate responsible defendant” cases.<sup>32</sup> These are cases in which the injury in question was definitely caused by a tortious act, (that is there are no possible “innocent” or “natural” explanations for the injury), but where there were multiple tortious acts which could have caused the injury and it is impossible to establish which one was actually responsible for the outcome.

The House of Lords’ decision in *Fairchild v. Glenhaven Funeral Services Ltd.*<sup>33</sup> is a good example of such a case. *Fairchild* involved three appeals that were heard together. The plaintiffs in all three cases had contracted mesothelioma, a rare cancer associated with the inhalation of asbestos and dust fibres. The evidence was that the risk of contracting mesothelioma increases significantly with exposure to airborne asbestos, but once the disease is contracted, it is not aggravated by continued

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<sup>31</sup>One Ontario Court of Appeal case that does appear to have been affected by *Resurfice* is *Alderson v. Callaghan* (1998), 40 O.R. (3d) 136 (C.A.). In that case, the Ontario Court of Appeal found that the trial judge had misdirected the jury in failing to instruct them that if the plaintiff’s condition resulted from the cumulative effect of the injuries that she sustained in the motor vehicle accident in question, multiple beatings that she had sustained after the accident and her pre-existing psychological condition, she should be entitled to full compensation so long as the accident “materially contributed” to her injuries. *Resurfice* has made it clear that it is not appropriate to apply the “material contribution” test simply because there is more than one potential cause of an injury.

<sup>32</sup>Failla, at p. 19.

<sup>33</sup>[2002] 3 All E.R. 305 (H.L.)

exposure. The plaintiffs had worked in at least two distinct workplaces where they had been negligently exposed to excessive quantities of asbestos. The plaintiffs commenced actions against two of their employers, but it was obviously impossible to determine where each of the plaintiffs had been working when they had contracted the disease.

On appeal, the House of Lords decided that a “modified” test for causation was warranted by the facts, and that the plaintiffs were entitled to recover against both employers. It is clear that while both employers might have exposed their employees to a *risk* of contracting mesothelioma, only one of the employers could actually have caused an individual employee to contract the disease.

Although, as Maxime Faille has pointed out “material contribution” might not be the correct name for the test that is applied in this type of case, (since one of the negligent parties did not actually *contribute* to the injury itself), it seems that “material contribution” has become more of a standard label for the test to be applied in those special circumstances where it is clear that a relaxed standard of causation must be applied in order for a deserving plaintiff not to be denied recovery.<sup>34</sup>

As set out below, the Chief Justice’s reference to *Cook v. Lewis*<sup>35</sup> as the type of situation which would justify the application of the “material contribution” test lends support to the argument that the broad wording of the second requirement for the application of the “material contribution” test is meant to include “indeterminate responsible defendant” cases.

- “*special circumstances*”

The challenging part of applying *Resurfice* will be in determining what constitute “special circumstances” such that the “material contribution” test applies. The Supreme Court of Canada did set out a couple of examples in the case, which do provide some guidance.

The Court stated:

One situation requiring the exception to the “but for” test is the situation where it is impossible to say which of two tortious sources caused the injury, as where two shots are carelessly fired at the victim, but it is impossible to say which shot injured him: *Cook v. Lewis*...<sup>36</sup>

What is interesting about this example is that *Cook v. Lewis* has always been viewed as a case in which the “but for” test is applicable, but the application of a reverse onus

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<sup>34</sup>Faille, at p. 19.

<sup>35</sup>[1951] S.C.R. 830

<sup>36</sup>*Resurfice*, *supra* at para. 27.

requiring the defendants to disprove causation is justified. However, this case is obviously just an early example of what has been referred to as the category of “indeterminate responsible defendant” cases. Moreover, as is clear from Sopinka J.’s reasons in *Snell*, such a reversal of the onus has been recognized as a relaxation of the standard of proof of causation required by the normal application of the “but for” test, which was necessitated by the “special circumstances” of the case. Sopinka J. stated:

...Is the requirement that the plaintiff prove that the defendant’s tortious conduct caused or contributed to the plaintiff’s injury too onerous? Is some **lesser relationship** sufficient to justify compensation? I have examined the alternatives arising out of the McGhee case. They were that the plaintiff simply prove that the defendant created a risk that the injury which occurred would occur. Or, what amounts to the same thing, that the defendant has the burden of disproving causation.... In my opinion... properly applied, the principles relating to causation are adequate to the task.... **Reversing the burden of proof may be justified** where two defendants negligently fire in the direction of the plaintiff and then by their tortious conduct destroy the means of proof at his disposal. In such a case **it is clear that the injury was not caused by neutral conduct**. It is quite a different matter to compensate a plaintiff by reversing the burden of proof for an injury that may very well be due to factors unconnected to the defendant and not the fault of anyone.<sup>37</sup> [Emphasis added]

The second example of a “special circumstance” given by the Court in *Resurfice* is the situation in *Walker Estate*, which the Court set out as follows:

A second situation requiring an exception to the “but for” test may be where it is impossible to prove what a particular person in the causal chain would have done had the defendant not committed a negligent act or omission, thus breaking the “but for” chain of causation.<sup>38</sup>

Although these examples do provide some assistance, they do not make it entirely clear exactly what it is about these situations that make them “special.” The Court did add that the “material contribution” test is to be applied under circumstances in which “it would offend basic notions of fairness and justice to deny liability by applying a “but for” approach”, however, this is also of limited assistance, as what “would offend basic notions of fairness and justice” can be very subjective.

Although *Cottrelle* pre-dates *Resurfice*, the following passage from the case does seem to shed some light on the circumstances under which it would be appropriate to apply the “material contribution” test:

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<sup>37</sup> *Snell, supra* at para. 26.

<sup>38</sup> *Resurfice, supra*, at para. 28.

The “but for” test has been relaxed as “unworkable” in cases where, practically speaking, it is impossible to determine the precise cause of the injury. In *Athey*, for example, the Supreme Court affirmed the “material contribution” test as a qualification of the strict “but for” test only when used in cases similar to *Bonnington Castings Ltd. v. Wardlaw...* and *McGhee v. National Coal Board...* The more recent House of Lords decision in *Fairchild v. Glenhaven Funeral Services Ltd. and Others...* also reflects this same tendency to depart from the “but for” standard, but only where the precise cause of the injury is unknown. *Bonnington*, *McGhee*, and *Fairchild* all involved situations where the plaintiff was exposed to harmful substances from various sources, but could not prove precisely that the substance resulting from the defendant’s tortious conduct caused the loss. In *Fairchild*, the plaintiffs had been exposed to asbestos while working for various employers for various periods. The plaintiffs developed a fatal disease caused by asbestos, but could not establish which exposure or exposures to asbestos had actually caused the disease. The House of Lords allowed the plaintiffs’ appeals from lower court decisions dismissing their claims and held that they were entitled to recover. ***The salient feature of Fairchild was that the plaintiffs were definitely injured by the negligence of one of the defendants, and there was no other operative cause or explanation for the injury.*** As pointed out in Lewis N. Klar, *Tort Law*, 3<sup>rd</sup> ed. (Toronto: Thomson Carswell, 2003), at p. 400: “courts will strive to fashion a just solution in this type of case to allow a wronged plaintiff to recover. Courts will not allow a wronged plaintiff to fall between the cracks due to the formal requirements of proving cause.”<sup>39</sup> [Emphasis added, citations omitted].

It should be noted that both the passage in *Snell* quoted above, and this passage in *Cottrelle* indicate that a relaxation of the requirements of the “but for” test will be appropriate where it is clear that the defendants have committed a tortious act, and that there is no neutral or non-tortious explanation for the injury. When this is coupled with the requirements for the application of the “material contribution” test set out by the Supreme Court of Canada in *Resurfice*, we begin to get a sense of just what might constitute “special circumstances.”

There is fear in some quarters that the Supreme Court of Canada’s decision in *Resurfice* has still not provided sufficient guidance as to the proper application of the “material contribution” test to ensure the avoidance of an overly broad, misapplication of the test. Russell Brown, for example, states:

...the Supreme Court of Canada has converted the doctrine of “material contribution” in causation into a generic and comprehensive alternative to the traditional but-for test, applicable to all cases where the plaintiff cannot

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<sup>39</sup>*Cottrelle, supra* at para. 30.

demonstrate probable cause [on a but-for basis].

...Suffice to say that the Supreme Court of Canada has perpetuated the uncertainty which it introduced a decade ago in *Athey v. Leonati* about (1) the circumstances in which the finder of fact is entitled (or ought) to apply the “material contribution” test in lieu of the but-for test, and (2) what makes a contribution “material”. In fact, in *Hanke* the Court adds a third element of uncertainty: (3) assuming the contribution is “material”, need it go to actual harm or to risk of harm?<sup>40</sup>

We will have to wait and see what courts actually do in the wake of the *Resurfice* decision. In the meantime, however, defence counsel would be well advised to do what they can to make sure that the following principles set out by the case law are heeded:

- The “but for” test is to be applied in all but “special circumstances”;
- Before the “material contribution” test may be applied the following two requirements must be met:
  - It must be impossible for the plaintiff to prove that the defendant’s negligence caused the plaintiff’s injury using the “but for” test, and that impossibility must be due to factors outside of the plaintiff’s control; and
  - It must be clear that the defendant breached a duty of care owed to the plaintiff, thereby exposing the plaintiff to an unreasonable risk of injury, and the plaintiff must have suffered that form of injury.
- In order for the “material contribution” test to be applied, the situation must be one in which it would “offend basic notions of fairness and justice to deny liability by applying a “but for” approach;
- A salient feature of cases in which the “material contribution” test will be appropriate is that there is no neutral or non-tortious explanation for the injury.

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<sup>40</sup>Russell Brown quoted in Cheifetz at p. 5.

## 2. Accident Benefits - Directly or Indirectly

Just as the test that is to be applied in order to establish causation in tort has been the topic of much commentary, the issue of establishing causation in the area of accident benefits has also seen its fair share of “judicial and academic ink” spilled.

The degree of connection between the injury suffered and the accident or incident that would qualify a claimant for accident benefits has gone through changes over the years as legislation and the contractual language setting out entitlement has changed. As the case law has developed, a spectrum in the degree of connection or directness of causation required for entitlement has emerged. On one end of the spectrum is direct causation, while at the other end of the spectrum is the more relaxed requirement that an injury “arise out of” the use or operation of an automobile. An understanding of how this spectrum has emerged will assist in understanding the current state of the law.

### Amos – “arises out of”

The logical place to begin a review of this area of the law is with *Amos v. Insurance Corp. of British Columbia*.<sup>41</sup> The plaintiff in that case was shot when six men surrounded his van at an intersection and attempted to gain entry into the vehicle. Although the plaintiff managed to escape, a bullet that had been fired by the assailants lodged in his spine, causing serious and permanent impairment. The plaintiff sought accident benefits from his automobile insurer, but his claim was denied. The plaintiff commenced an action for a declaration that he was entitled to the benefits claimed. The Supreme Court of British Columbia dismissed his action and the Court of Appeal upheld that judgment. The plaintiff then appealed to the Supreme Court of Canada.

The case turned on the interpretation of the statutory provision providing for entitlement to accident benefits. That provision stated that benefits would be paid to an insured “**in respect of death or injury caused by an accident that arises out of the ownership, use or operation of a vehicle.**” Based on previous case law interpreting the wording of the provision, the Court held that the following two-part test should be employed in its interpretation:

1. Did the accident result from the ordinary and well-known activities to which automobiles are put?
2. Is there some nexus or causal relationship (not necessarily direct or proximate causal relationship) between the appellant’s injuries and the ownership, use or operation of his vehicle, or is the connection between the injuries and the ownership, use or operation of the vehicle merely

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<sup>41</sup>[1995] 3 S.C.R. 405

incidental or fortuitous?<sup>42</sup>

The first question comprised what was referred to as the “purpose” test in earlier jurisprudence, while the second question comprised the “causation” test.

In applying the two-part test, Major J. for the Court found that since the plaintiff had been driving his van down a street when the injury occurred, the accident clearly resulted “from the ordinary and well-known activities to which automobiles are put”. The first part of the two-part test was therefore satisfied.

With respect to the second part of the test, Major J. wrote the following:

The question is whether the requisite nexus or causal link exists between the shooting and the appellant’s ownership, use or operation of the van. With respect to causation, it is clear that a direct or proximate causal connection is not required between the injuries suffered and the ownership, use or operation of a vehicle. The phrase “arising out of” is broader than “caused by”, and must be interpreted in a more liberal manner. A formulation of the causation principle is found in *Kangas v. Aetna Casualty & Surety Co.*, 235 N.W. 2d 42 (1975), where the Michigan Court of Appeals stated at p. 50:

...we conclude that while the automobile need not be the proximate cause of the injury, there must still be a causal connection between the injury sustained and the ownership, maintenance or use of the automobile and which causal connection is more than incidental, fortuitous or but for. The injury must be foreseeably identifiable with the normal use, maintenance and ownership of the vehicle.

That court recognized that the words “arising out of” have been viewed as words of much broader significance than “caused by”, and have been said to mean “originating from”, “having its origin in”, “growing out of” or “flowing from”, or in short, “incident to” or “having connection with” the use of the automobile.<sup>43</sup>

Major J. went on to quote from the following passage from the High Court of Australia’s decision in *Dickinson v. Motor Vehicle Insurance Trust*, approvingly:

Whether or not the appellant’s injuries were actually caused by the use of the motor car, it is sufficient to say that they arose out of such use. The

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<sup>42</sup> *Ibid*, at para. 17.

<sup>43</sup> *Ibid*, at para. 21.

test posited by the words “arising out of” is wider than that posited by the words “caused by” and the former, although it involves some causal or consequential relationship between the use of the vehicle and the injuries, does not require the direct or proximate relationship which would be necessary to conclude that the injuries were caused by the use of the vehicle....<sup>44</sup>

Major J. concluded that the nexus or connection between the injuries and the vehicle in the case at hand was sufficient to establish the plaintiff’s entitlement to accident benefits. He noted that the plaintiff’s vehicle “was not merely the situs of the shooting” and that the shooting “appear[ed] to have been the direct result of the assailants’ failed attempt to gain entry to the... van.” He distinguished the situation from what he called a “true random shooting” not related to the use or operation of the vehicle, and noted that there was no “intervening act, independent of the ownership, use or operation of the vehicle, which broke the chain of causation.”<sup>45</sup>

#### “Directly or indirectly”

*Amos* was a British Columbia case considering the specific wording of the applicable accident benefits legislation in that province at that time. The wider implications of the case, however, become obvious when the case is applied to the comparable wording “directly or indirectly”, which has been found in a number of places in Ontario automobile insurance legislation over the years.

The applicability of the *Amos* two-part test to the wording “directly or indirectly” was set out by Lederman J. in the Ontario Superior Court of Justice in the case of *Saharkhiz v. Underwriters, Members of Lloyd’s, London England*<sup>46</sup>. *Saharkhiz* was a case in which a taxi driver was seriously injured when he was assaulted by two passengers in a dispute over a fare. The taxi-driver applied for, but was denied accident benefits by his automobile insurer.

The issue in *Saharkhiz* was whether the injuries suffered by the plaintiff occurred during an “accident” within the meaning of that term as set out in s. 1 of Ontario’s Statutory Accident Benefits Schedule – Accidents after December 31, 1993 and before November 1, 1996, O. Reg. 776/93. That section read:

“accident” means an incident in which, **directly or indirectly**, the use or operation of an automobile causes an impairment or causes damage to any prescription eyewear, denture, hearing aid, prosthesis or other medical or dental device... [emphasis added]

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<sup>44</sup>[1987] 61 A.L.J.R. 553 at 555, quoted in *Amos, supra* at para. 23.

<sup>45</sup>*Amos, supra* at para. 25-28.

<sup>46</sup>(1999), 46 O.R. (3d) 154 (S.C.J.), aff’d at (2000), 49 O.R. (3d) 255 (C.A.)

In his analysis of the case, Lederman J. came to the conclusion that the meaning of the wording “directly or indirectly” was similar enough to the meaning “arising out of” for the two-part test set out in *Amos* to apply. Lederman J. stated:

The clause that was the subject matter in *Amos, supra*, contained the phrase “arises out of”. It differs from s. 1 of Ontario’s SABS, which contains the words, “directly or indirectly... the use or operation of an automobile causes...”. In analyzing the purpose and causation requirements of the *Amos* test as they apply to the fact situation in the case at bar, one must pay special attention to the meaning and appropriate scope of the phrase “directly or indirectly”. The word “indirectly” clearly imports into s. 1 of Ontario’s SABS, as it then existed, a relaxed causation requirement comparable to the one suggested by Major J. in *Amos, supra*... Ultimately, whether one phrase is broader or slightly more restrictive than the other, the difference is minimal. Certainly, the phrase in Ontario’s SABS is comparable or close in meaning to the liberal definition pronounced by Major J.<sup>47</sup>

Applying the *Amos* test to the facts of the case, Lederman J. found that the two-part test had been met, and that the plaintiff was entitled to receive accident benefits. Although the driver and the passengers were not in the vehicle at the moment when the assault took place, it was the ordinary and well-known use of a taxi in providing transportation for a fee, and the ensuing dispute over the fare that resulted in the injuries to the driver. Lederman J. explained:

Because passengers are expected to pay a fare and that commercial arrangement is inextricably linked to the ordinary and well-known purpose of using and operating a taxi-cab, as opposed to a regular automobile, one can readily conclude that the nature of the conflict between the plaintiff and the two passengers is inseparable from the use and operation of the taxi-cab.<sup>48</sup>

Significantly, Lederman J. also found that there was “an unbroken line of causation”. A line “beginning with the ride in the taxi-cab and ending with the assault.”<sup>49</sup>

### “Directly”

The definition of “accident” in Ontario’s SABS under consideration in *Saharkhiz* changed with the introduction of the SABS – Accidents on or after November 1, 1996,

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<sup>47</sup> *Ibid*, at para. 14.

<sup>48</sup> *Ibid*, at para. 15.

<sup>49</sup> *Ibid*, at para. 18.

O. Reg. 404/96. Lederman J. noted the change in *Saharkhiz*, stating:

In passing, it should be noted that the successor and current definition of “accident” significantly narrows the causation link. The present provision now reads:

“accident” means an incident in which the use or operation of an automobile directly causes an impairment or directly causes damage to any prescription eyewear, denture, hearing aid, prosthesis or other medical or dental device;<sup>50</sup>

The implications of this change were considered by the Ontario Court of Appeal in *Chisholm v. Liberty Mutual Group*.<sup>51</sup> *Chisholm* was a case in which the plaintiff was rendered paraplegic when an unknown assailant fired gunshots at his car. The question of the plaintiff’s entitlement to statutory accident benefits turned on whether the “use or operation of an automobile directly cause[d]” his injuries.

Laskin J.A. explained that due to the elimination of the word “indirectly” in the definition of accident in the SABS, the causation portion of the *Amos* test was no longer applicable. Laskin J.A. stated that

...the stringent causation requirement – “directly causes” – in the definition of accident under the 1996 Schedule means that the *Amos* test, or at least the causation part of the test, can no longer be used to interpret the definition. Indeed, Major J.’s reasons in *Amos* say as much. In setting out the causation part of the test, Major J. explicitly stated at para. 17 that the required nexus or causal relationship between a plaintiff’s injuries and the ownership, use or operation of his or her car was “not necessarily a direct or proximate causal relationship.”<sup>52</sup>

Laskin J.A. also rejected the plaintiff’s argument that the use or operation of his car had directly caused his injuries because he would not have been wounded “but for” the fact that he had been confined in his car. In Laskin J.A.’s words:

The “but for” test of causation serves as an exclusionary test. Its purpose is to eliminate from consideration factually irrelevant causes. It screens out factors that made no difference to the outcome. If the but for test is not met then the injury would have occurred regardless of the act or omissions in question. If the but for test is met then the act or omission is a factual cause of the injury. However, the but for test does not conclusively establish legal causation, the cause that attracts legal liability.

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<sup>50</sup> *Ibid*, at para. 8.

<sup>51</sup> (2002), 60 O.R. (3d) 776 (C.A.)

<sup>52</sup> *Ibid*, at para. 20.

Here, in the broad sense, one could say that the use or operation of the car Chisholm was driving was a factual cause of his injuries. As he argued, but for driving his car he would not have been shot. Legal entitlement to accident benefits, however, requires not just that the use or operation of a car be a cause of the injuries but that it be a direct cause.<sup>53</sup>

Lastly, Laskin J.A. found that the shooting constituted an intervening act, which broke the chain of causation between the plaintiff's use or operation of his car and the injury that he sustained. Laskin stated that

...even accepting that the use of Chisholm's car was a cause of his impairment, a later intervening act occurred. He was shot. An intervening act may not absolve an insurer of liability for no-fault benefits if it can be fairly considered a normal incident of the risk created by the use or operation of the car – if it is “part of the ordinary course of things”.... Gun shots from an unknown assailant can hardly be considered an intervening act in the “ordinary course of things”. The gun shots were the direct cause of his impairment, not the use of his car.<sup>54</sup>

The degree of causal connection required for entitlement to accident benefits under the SABS –1996 definition of “accident” was further considered by the Ontario Court of Appeal in *Greenhaagh v. ING Halifax Insurance Co.*<sup>55</sup> In that case, the plaintiff's vehicle had become stuck on a rock on a country road while driving in the winter. She and her passenger were unable to dislodge the vehicle or to call for help using the plaintiff's cell phone, as the battery was dead. The plaintiff and her passenger decided to walk back to the main road, but became lost and ended up walking for 9 or 10 hours. Along the way, they fell through ice into a river, and the plaintiff lost her boots. As a result of her exposure to the extreme cold, the plaintiff suffered severe frostbite which necessitated the amputation of her fingers and of her legs below the knees. The plaintiff submitted a claim for accident benefits, but it was denied by her automobile insurer.

At issue was whether the plaintiff had suffered an impairment as a result of an “accident” as defined in section 2(1) of the SABS – Accidents on or after November 1,1996, which as stated above, provides as follows; that is, whether her impairment had been **directly** caused by the use or operation of an automobile.

Labrosse J.A. for the court stated that “the language of the provision itself sets out the test”, which was comprised of the following two questions:

1. Did the incident arise out of the use or operation of the automobile?

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<sup>53</sup> *Ibid*, at para. 25-26.

<sup>54</sup> *Ibid*, at para. 29.

<sup>55</sup> (2004), 72 O.R. (3d) 338 (C.A.)

2. Did such use or operation of an automobile **directly** cause the impairment? [emphasis added]<sup>56</sup>

While the first question can be equated with the “purpose” test set out in *Amos*, the second question, or applicable “causation” test is obviously different. Labrosse J.A. stated the following concerning the second question:

The second question concerns direct causation and flows from the language of the governing provision. Unlike the predecessors, this legislation requires a direct causal link of causation. What will amount to direct causation will depend much on the circumstances. However, some of the following considerations may provide useful guidance in ascertaining whether or not it has been established in a given case:

- (a) the “but for” test can act as a useful screen;
- (b) in some cases, the presence of intervening causes may serve to break the link of causation where the intervening events cannot be said to be part of the ordinary course of the use or operation of the automobile; and
- (c) in other cases it may be useful to ask if the use or operation of the automobile was the dominant feature of the incident; if not, it may be that the link between the use or operation and the impairment is too remote to be called “direct”.<sup>57</sup>

Based on these considerations, Labrosse J.A. came to the conclusion that the plaintiff’s injuries had not been directly caused by the use or operation of her automobile, and accordingly, that she was not entitled to receive accident benefits.

It could be argued that the use of the plaintiff’s car was a factual cause of her injuries, as she would not have been wandering around outside in the cold “but for” the fact that her car got stuck on a rock. However, there were a number of intervening occurrences which could not be considered “a normal incident of the risk created by the use or operation of the car”. These included the fact that she became disoriented and walked a long distance over a long period of time, the fact that she fell into a river, and the fact that she lost her boots. In addition, the “dominant feature” of the accident was not the use and operation of the automobile, but the plaintiff’s exposure to the elements. As such, the link between the use and operation of the automobile and the plaintiff’s

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<sup>56</sup> *Ibid*, at para. 10.

<sup>57</sup> *Ibid*, at para. 12.

injuries was simply “too remote to be called “direct””.<sup>58</sup>

“As a result of”

The apparently tight causation requirement mandated by the word “directly” in the definition of “accident” in the SABS seems to have been relaxed somewhat in several cases that have focused on the wording setting out entitlement to benefits, which states that various types of benefits are to be paid to an insured person “who sustains an injury **as a result of** an accident”, rather than the word “directly” in the definition of “accident.”

*Correia v. TTC Insurance Company Limited*<sup>59</sup> is one such case. The claimant in the case was injured while disembarking from a TTC vehicle. The injuries that she suffered in that accident had largely resolved and were no longer debilitating when she attended for a Functional Abilities Evaluation as a pre-condition to returning to her pre-accident employment. During the course of the FAE, the claimant suffered new and different injuries, which she attributed to being required to use an improper lifting technique. At issue was whether the claimant was entitled to receive benefits in respect of the injuries that she had received during the FAE. At arbitration the arbitrator decided that the claimant was indeed entitled to benefits relating to the later injuries. The insurer appealed that decision.

In her appeal decision, the Director’s Delegate reviewed the applicable legislation, including the definition of “accident” in s. 2(1) of the SABS-1996 and the eligibility criteria for several benefits. As she summarized:

The criteria for eligibility for IRBs is set out in Part II, section 4.1 as follows:

The insurer shall pay an insured person who sustains an impairment as a result of an accident an income replacement benefit if the insured person meets any of the following qualifications...

Provisions containing similar language, providing for the payment to an insured person “who sustains an impairment as a result of an accident,” govern eligibility for other benefits. For example, section 14(1) provides that:

The insurer shall pay an insured person who sustains an impairment as a result of an accident a medical benefit.

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<sup>58</sup> *Ibid*, at para. 37, 44-49.

<sup>59</sup> FSCO Appeal P00-00061, July 16, 2001

All told, the phrase “as a result of” appears some 70 times in *SABS-1996*. “Results in” or “resulting from” is occasionally used. “Cause” is found in section 34(2), dealing with the content of medical certificates and “directly causes” is found only in the definition of accident.

The Director’s Delegate agreed with the arbitrator that the claimant was entitled to receive accident benefits in relation to the injuries that she had sustained during the FAE. She set out the following reasoning in support of her conclusion:

“Accident” is defined in terms of an incident or event involving an impairment. Certainly consequences may result from or flow from such an event, giving rise to entitlement of benefits. I find it most plausible that the move to direct cause was intended to reinforce the involvement of the automobile in relation to an injury in the context of an original accident. In any event, I conclude, as did the arbitrator, that the position of the TTC that injuries sustained in the course of a rehabilitation assessment are not covered because they are not “directly caused” by the use or operation of the automobile is too narrow a reading of the language of section 4.1. ...[A]s pointed out other cases,... the word “result” [is] suggestive of a more tensile quality than “cause”...

New injuries clearly may be related to an impairment sustained in the accident. The arbitrator gave examples of cases in which someone fell down the stairs due to dizziness related to, or a knee weakened from, the effects of an accident and sustained new injuries. Those new injuries can be viewed as a direct consequence of the accident and a result of it. Likewise, if someone undergoes surgery for accident-related problems and, through no one’s fault, suffers new impairment in the course of the operation, such consequences are directly traceable to the accident.<sup>60</sup>

Although this decision does put forth a much more relaxed causal link requirement for the establishment of entitlement to accident benefits than the definition of accident would suggest, it is important to note that the arbitrator “did not conclude that anything done at the clinic represented an intervening cause” and that the evidence did not lead to the conclusion that the conduct amounted to “mis-treatment.”<sup>61</sup> The importance of the fact that there was no intervening cause is also highlighted in the following passage from the Saskatchewan case of *Sklar v. Saskatchewan Government Insurance Office*<sup>62</sup>, as quoted approvingly by the Director’s Delegate:

Let us now consider for one moment the words “as a result of.” A result is something that follows as an actual consequence. If one has a chain of

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<sup>60</sup> *Ibid*, at 12-13.

<sup>61</sup> *Ibid*, at 15.

<sup>62</sup> (1965), 54 D.L.R. 455 (Sask. Q.B.)

causation starting with the accident, each cause the result of a preceding cause leading up to the death, then the death can be said to result solely from the primary cause. Unless the chain of causation is broken by a *novus actus interveniens*, an act which is independent of the chain of causation, or which is not also the result of a previous cause, forming part of the chain, then the death is a *sequela* of the accident.<sup>63</sup>

A more recent case which was determined on the basis of the “as a result of” wording is the appeal decision of the Director’s Delegate in *Belair Insurance Co. v. McMichael*.<sup>64</sup> The claimant in *McMichael* was involved in a motor vehicle accident, which caused him to suffer a number of physical injuries. Approximately four months after the accident, the claimant attempted to return to his pre-accident employment, but was terminated after half a day because he was unable to work. Following this failure to return to work, the claimant began using crack cocaine, to which he became addicted. The addiction became so severe that it interfered with the claimant’s functioning to the extent that he was considered catastrophically impaired as defined under the SABS – 1996. The relevant issue was whether the claimant’s addiction to crack cocaine, and accordingly, the claimant’s catastrophic impairment had been caused by the motor vehicle accident. At arbitration, the arbitrator concluded that the claimant’s addiction was “a direct consequence of the injuries sustained in the car accident.” The insurer disagreed and appealed the decision.

The issue was described by the arbitrator as follows:

A key factual issue in this case is the causal relationship, if any, between the car accident and Mr. McMichael’s difficulties, in particular his addiction to crack cocaine. Mr. McMichael states that, as a result of the accident, he has become a crack cocaine addict. It is this addiction, primarily, that forms the basis of his position that he is catastrophically impaired and therefore entitled to attendant care and equally, that he is unable to work. Belair states, on the contrary, that Mr. McMichael was a cocaine abuser before the car accident and therefore his addiction to crack cocaine did not arise from the accident. In that case, states Belair, there is no entitlement to either benefit.<sup>65</sup>

The factual finding of the arbitrator underpinning the legal analysis was that although the claimant had *used* cocaine from time to time prior to the accident, he had not suffered from cocaine *abuse* or *dependency* before the accident. As noted by the Director’s Delegate, the main basis for the “use but not abuse” finding was evidence about Mr. McMichael’s ability to function at work, at home with his family, and in

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<sup>63</sup> *Ibid*, at 474, as quoted in *Correia* at 12.

<sup>64</sup> FSCO Appeal P05-00006, March 14, 2006. (Application for Judicial Review dismissed at [2007] O.J. No. 1972. Although the Notice of Application for Judicial Review sought broader relief, the insurer proceeded only on the issue of past attendant care for a specific time period).

<sup>65</sup> *Ibid*, at 12.

sporting and social activities before the accident”.<sup>66</sup>

The Director’s Delegate upheld the arbitrator’s decision, finding that the claimant’s catastrophic impairment was indeed a result of the motor vehicle accident. In arriving at this decision, the Director’s Delegate characterized the pertinent legal considerations as follows:

In summary, Belair submits that the definition of “accident” in s. 2(1) of the *SABS-1996* – “‘accident’ means an incident in which the use or operation of an automobile directly causes an impairment...” – requires Mr. McMichael to prove that his cocaine abuse was *directly caused by* the accident, a test Belair submits he has failed to satisfy. I need not address the *Chisholm/Greenhalgh* analysis because I agree with the arbitrator that it does not apply in this case:

the issue here is not whether there was an accident, in the sense of whether there were impairments caused by the use or operation of an automobile, but rather with tracing the chain of causation from impairments suffered in an accident to other causally linked *sequelae*.<sup>67</sup>

The Director’s Delegate agreed with the arbitrator that the correct legal analysis to be applied was the analysis that the Director’s Delegate had applied in *Correia, supra*. The Director’s Delegate concluded her analysis with respect to causation as follows:

In short, the arbitrator’s analysis is consistent with a number of decisions that deal not with whether an incident was an “accident” but with “the unfolding consequences of an injury sustained in the accident.” I agree with the arbitrator that this case falls to be decided under the same principles. He concluded:

whether its genesis was an effect of the mild traumatic brain injury that Mr. McMichael suffered, a vain and misguided attempt to self-medicate, or some combination of these two, the addiction is a direct consequence of the injuries sustained in the car accident.

This was a strong finding, and one that was well-supported on the evidence and consistent with previous decisions. I am not persuaded that the arbitrator erred.<sup>68</sup>

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<sup>66</sup> *Ibid*, at 14.

<sup>67</sup> *Ibid*, at 15-16.

<sup>68</sup> *Ibid*, at 18-19.

While this line of reasoning, which makes a distinction between the requirement of “direct” causation in the definition of “accident” in the SABS, and the “as a result of” language setting out entitlement to accident benefits, has mainly been applied in arbitrations and appeal decisions of the Financial Services Commission of Ontario, Lalonde J. of the Ontario Superior Court of Justice did reference this jurisprudence in *Monks v. ING Insurance Co. of Canada*,<sup>69</sup> (although the reasoning did not figure prominently in the overall decision).

The plaintiff in *Monks* had had two surgeries after suffering injuries in a motor vehicle accident. Lalonde J. relied on this jurisprudence to conclude that any impairment relating to complications that the plaintiff might have suffered following the surgeries had arisen “as a result of” the accident, and that the plaintiff was entitled to accident benefits in that regard.<sup>70</sup> Lalonde J. did also note, however, that there was “absolutely no evidence that the surgery was anything other than properly performed” and that there was “no evidence of any intervening act.”<sup>71</sup> It is also important to note that *Monks* is currently under appeal to the Ontario Court of Appeal. It will be important to see whether the Court of Appeal makes any pronouncements on this line of reasoning.

#### Reconciling “directly” caused by with “as a result of”

For a proper understanding of the current state of the law, some thought should be given to how to reconcile requirement of “direct” causation in the definition of “accident” in the SABS with the language setting out entitlement to accident benefits where an impairment is suffered “as a result of” an accident in the meantime. As explained above, in *Amos* the Supreme Court of Canada recognized that the words “arising out of” have a meaning which is comparable to ““originating from”, “having its origin in”, growing out of” or “flowing from””.<sup>72</sup> It is submitted that the words “as a result of” are obviously within the same category. As such, the reasoning which was applied in *Amos* and in subsequent cases which considered the meaning of the words “directly or indirectly” should be applicable to an analysis involving the words “as a result of”.

As set out in *Amos*, even where the causal connection which is required for the imposition of legal liability is not “direct or proximate”, there must still be a causal connection which is “more than incidental, fortuitous or but for”.<sup>73</sup> In addition, there must be an “unbroken line of causation.”<sup>74</sup> Accordingly, an insured would be entitled to receive benefits in relation to new impairments suffered during the course of routine and

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<sup>69</sup>[2005] O.J. No. 2526 (S.C.J.)

<sup>70</sup>*Ibid.*, at para. 539.

<sup>71</sup>*Ibid.*, at para. 549.

<sup>72</sup>*Amos*, *supra* at para. 21.

<sup>73</sup>*Ibid.*

<sup>74</sup>*Amos*, *supra* at para. 25-28 and *Saharkhiz* at para. 18.

expected treatment for an injury suffered in the accident, but would not be entitled to receive benefits in relation to injuries suffered during negligent treatment, where that independent negligence would properly be considered a new intervening act.

In summary, although the interaction of the definition of “accident” set out in s. 2(1) of the SABS-1996 and the language setting out entitlement to various benefits with respect to impairment suffered “as a result of” an accident is admittedly confusing, a review of the case law, however, brings out the following principles:

- The definition of “accident” set out in s. 2(1) of the SABS-1996 requires a much more stringent causal link than the previous wording which only required a “direct or indirect” link between the use or operation of an automobile and the impairment or damage caused;
- The following considerations provide guidance in ascertaining whether an “accident” within the meaning of the definition set out at s. 2(1) of the SABS-1996 has occurred:
  - (a) the “but for” test can act as a useful screen;
  - (b) in some cases, the presence of intervening causes may serve to break the link of causation where the intervening events cannot be said to be part of the ordinary course of the use or operation of the automobile; and
  - (c) in other cases it may be useful to ask if the use or operation of the automobile was the dominant feature of the incident; if not, it may be that the link between the use or operation and the impairment is too remote to be called “direct”;
- Once it has been established that an accident has occurred, that is, that there has been an incident which the use or operation of an automobile has directly caused an impairment or damage, an insured will be entitled to receive benefits with respect to further impairments which have a nexus or causal link to the original injury sustained in the accident. The causal link between the further impairment and the original injury must be
  - (a) “more than incidental, fortuitous or but for”; and
  - (b) unbroken by an intervening act. That is, there must be an unbroken line of causation.

### 3. “Directly” vs. “Indirectly” Revisited: *Vytlingam* and *Herbison*

The issue of the correct interpretation of the words “directly or indirectly” has recently returned to the judicial spotlight with the cases of *Vytlingam (Litigation Guardian of) v. Farmer*<sup>75</sup>, and *Herbison v. Lumbermens Mutual Casualty Company*<sup>76</sup>.

The *Vytlingam* case arose out of a serious criminal act that occurred one evening in Fayetteville, North Carolina. The perpetrators of the act had decided that it would be fun to drop boulders on to oncoming vehicles from an interstate overpass. The plaintiff in the case was seriously injured when his vehicle was struck by one of those boulders.

The perpetrators of the act causing the plaintiff’s injuries had very limited insurance coverage, and the issue in the case was whether the plaintiff’s own insurer was liable to compensate the plaintiff for his loss pursuant to the OPCF 44R Family Protection Coverage endorsement.<sup>77</sup> That endorsement provides:

...the insurer shall indemnify an eligible claimant for the amount that he or she is legally entitled to recover from an inadequately insured motorist as compensatory damages in respect of bodily injury to or death of an insured person **arising directly or indirectly from the use or operation of an automobile. [Emphasis added]**

The question was whether the injuries sustained by the plaintiff arose “directly or indirectly from the use or operation of an automobile.” On a motion for summary judgment, the motions judge found that the use or operation of the perpetrators’ vehicle was central to the plan to drop boulders from the highway overpass, and that both branches of the *Amos* test had been met. The motions judge concluded that the plaintiff’s injuries had arisen “directly or indirectly from the use or operation of an automobile.” The decision was appealed to the Ontario Court of Appeal. The majority of that court agreed with the analysis of the motions judge and denied the appeal.

The majority of the Court of Appeal agreed with the motions judge that the “purpose” test set out in *Amos* had been met because the perpetrators had used their vehicle to transport themselves and the boulders, and the transportation of people and goods is an ordinary and well-known activity to which automobiles are put.<sup>78</sup> As was made clear in a forceful dissent by Juriansz J.A., however, that activity had already come to an end when the boulders were thrown off the overpass. Moreover, Juriansz J.A. reasoned that it is *the activity that gives rise to injury* that must comprise an “ordinary and well-

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<sup>75</sup>(2005), 76 O.R. (3d) 1 (C.A.)

<sup>76</sup>(2005), 76 O.R. (3d) 81 (C.A.)

<sup>77</sup>The named insured was actually the plaintiff’s mother, Chandra Vytlingam. However, the plaintiff, Michael Vytlingam was also an “insured person” and “eligible claimant” under the policy. For ease of reference, the policy of insurance in question will be treated as if it were the plaintiff, Michael Vytlingam’s.

<sup>78</sup>*Vytlingam, supra* at para. 31-33, 38 and 41.

known activity to which automobiles are put.” The activity which gave rise to the injury was throwing boulders off the overpass. This is clearly not an activity to which automobiles are ordinarily put.<sup>79</sup>

Turning to the causation test, the majority of the Court of Appeal upheld the motions judge’s reasoning that there was a sufficient connection between the plaintiff’s injuries and the use or operation of the automobile for the causation test to be met. In arriving at this conclusion, the motions judge had noted that “but for” the use of their vehicle, the perpetrators would not have been able to transport the boulders to the overpass and the plaintiff’s injuries would not have occurred. Juriansz J.A., however, pointed out that the causation test in *Amos* requires that a plaintiff demonstrate that the causal connection between the injury and the use or operation of the vehicle be “more than incidental, fortuitous or but for.”<sup>80</sup> Juriansz J.A. also considered the act of throwing the boulders off the overpass to be an intervening, independent act, interrupting the chain of causation between the use of the automobile and the plaintiff’s injuries.<sup>81</sup>

The *Herbison* case, on the other hand, dealt with the interpretation of section 239(1) of the *Insurance Act*. That section reads:

239(1) Subject to section 240, every contract evidenced by an owner’s policy insures... against liability imposed by law upon the insured named in the contract or other person for loss or damage,

(a) arising from the ownership or directly or indirectly from the use or operation of any such automobile...

The plaintiff in *Herbison* was seriously injured when he was accidentally shot in the leg in a hunting accident. The hunter who shot the plaintiff had been on his way to the hunting grounds in a pick-up truck when he spotted something in the distance, which he believed to be a deer. He stopped the truck, took out and loaded his rifle and took a shot. Unfortunately what the hunter had taken to be a deer was actually the plaintiff. At issue was whether the hunter’s policy of automobile insurance should respond to the tort claim against him.

As set out above, in order for the policy to respond, the damages sustained by the plaintiff would have to have arisen directly or indirectly from the use or operation of the hunter’s automobile. The majority of the Ontario Court of Appeal came to the conclusion that the policy should respond.

In applying the *Amos* purpose test, the majority of the Court of Appeal concluded that the hunter had used his truck to transport him to the hunting grounds, and that there

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<sup>79</sup> *Ibid*, at para. 62.

<sup>80</sup> *Ibid*, at para. 71-75.

<sup>81</sup> *Ibid*, at para. 80.

was no doubt that this was an “ordinary and well-known” activity to which vehicles are put.<sup>82</sup> In her dissent, however, Cronk J.A., noted that although the truck had originally been used to transport the hunter, “the truck was not being used for this purpose at the time of the shooting.”<sup>83</sup> In addition, like Juriansz J.A., Cronk J.A. reasoned that it is *the activity that gives rise to injury* that must comprise an “ordinary and well-known activity to which automobiles are put.” Cronk J.A. agreed with the trial judge’s conclusion that the activity which gave rise to the injury was “the negligent handling of a hunting rifle – something totally unrelated to the use of the truck.”<sup>84</sup>

With respect to the causation test, the majority of the Court of Appeal held that the test will be met “where the use and operation of a motor vehicle in some *manner contributes or adds to the injury*.” The majority of the court found that the truck played a crucial role throughout the sequence of events because without the truck the hunter (who had certain disabilities) would not have been able to make it to the hunting grounds, and because the truck’s headlights had illuminated the hunter’s target.<sup>85</sup> Cronk J.A., on the other hand found that the hunter’s shooting of the plaintiff “was an act independent of the ownership, use or operation” of the hunter’s truck. She held, therefore, that there was “no nexus or causal connection, direct or indirect, between [the] injuries and the ownership, use or operation of the pick-up truck.”<sup>86</sup>

As recognized by Juriansz J.A. in his dissent in *Vytlingam*, “[w]e live in a car culture.”<sup>87</sup> People use cars to transport things and to get to places where they engage in all manner of activities. If the decisions of the Ontario Court of Appeal stand, the implications are obvious. These cases are of great importance to the legal community, however, given that both of these cases have been appealed to the Supreme Court of Canada and that the decision of the Court is still pending<sup>88</sup>, any analysis of the reasons of the Ontario Court of Appeal would become moot upon the release of the reasons of the Supreme Court of Canada. We await the decision of the Court with interest.

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<sup>82</sup> *Herbison, supra* at para. 113.

<sup>83</sup> *Ibid*, at para. 51.

<sup>84</sup> *Ibid*, at para. 44-45, 54.

<sup>85</sup> *Ibid*, at para. 114-116.

<sup>86</sup> *Ibid*, at para. 62.

<sup>87</sup> *Vytlingam, supra* at para. 73.

<sup>88</sup> The cases were argued together before the Supreme Court of Canada in December, 2006.