

Causation: *Stare Non Decisis*

Prepared For: Legal Education Society of Alberta

Personal Injury and Insurance Update

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For Presentation In:

Edmonton – May 15, 2012

Calgary – May 24, 2012

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INTRODUCTION

1. The evolution of the causation test has consistently been fraught with misinterpretation and misapplication by litigants, lawyers and the courts. As observed by Chief Justice McLachlin in *Hanke v. Resurfice Corp.*, “much judicial and academic ink has been spilled over the proper test for causation in cases of negligence”.¹
2. Notwithstanding the courts repeated attempts to reaffirm and simplify general principles of causation, there is, unfortunately, still much debate over the application of the *but for* test and particularly the *material contribution* test.
3. In order to understand the present day confusion surrounding the test for causation, it is helpful to understand its development over three distinct periods:
 - The development of causation by the House of Lords from 1956 to 1988;
 - The trilogy of decisions from the Supreme Court of Canada from 1990 to 2007; and
 - The application of the Supreme Court of Canada decisions over the past few years.
4. Based on a review of three cases from each of the above defined periods, it is my belief that the causation test remains unsettled and provides little guidance to litigants, lawyers and judges. In our opinion, a return to the common sense, pragmatic approach advocated in *Snell v. Farrell*² is what is required for a better approach to determining causation.

DEFINING CAUSATION

5. Causation is one of the four essential elements which a plaintiff must prove in order to establish negligence. The well-known test for proving negligence is:
 - a. The defendant owed the plaintiff a duty of care;
 - b. The defendant failed to discharge its duty of care by breaching the standard of care expected of a reasonably prudent individual;

¹ *Hanke v. Resurfice Corp.*, [2007] CarswellAlta 130 (SCC) at paragraph 20

² *Snell v. Farrell*, [1990] CarswellINB 82 (SCC) at paragraph 27

- c. The plaintiff has suffered damages or injury; and
 - d. The damages or injury were factually and legally caused or materially contributed to by the breach of the standard of care.
6. Causation is an expression of the relationship that must be proven to exist between the tortious act of a defendant and the injury of a plaintiff.³ Generally, causation is established when it is determined that a foreseeable injury would not have occurred *but for* the sub-standard conduct of the plaintiff.
7. It is not sufficient for a plaintiff to prove that a defendant's acts or omissions were the factual cause of the plaintiff's injury. The plaintiff also bears the burden of proving, on a balance of probabilities, that the defendant's acts or omissions were the legal cause or the proximate cause of the injury. A defendant is not liable for all damages suffered by a plaintiff, but only those which are foreseeable to a reasonable person in the defendant's position.
- The chain of cause and effect can be found only to the point where the consequences of an act will be fairly accepted as attributable to the act in the context of social and economic conditions then prevailing and the reasonable expectation of members of societies and the conduct of each other.*⁴
8. Although the general principles of causation appear quite easy to interpret and apply⁵, in practice, causation has been the most difficult element of the negligence test to understand and prove.

HOUSE OF LORDS

9. The starting point for any consideration of the relevant law on causation are the three decisions of the House of Lords in *Bonnington Castings Ltd. v Wardlaw*;⁶ *McGhee v National Coal Board*;⁷ and *Wilsher v. Essex Area Health Authority*.⁸

³Snell, at paragraph 27

⁴*Abbot v. Kasa*, [1976] AJ 628 (SCAD) at paragraph 17

⁵See: Causation: Bridging the Gap Between Wrongful Acts and Injury, Alison Walsh, Kevin Feehan, QC and Jeannie McMordie, "The Barrister", Issue 103, March, 2012

⁶*Bonnington Castings Ltd. v. Wardlaw*, [1956] 1 All E.R. 615 (HL)

⁷*McGhee v. National Coal Board*, [1973] 3 All E.R. 1008 (HL)

⁸*Wilsher v. Essex Area Health Authority*, [1986] 3 All E.R. 801 (HL)