

# CONFUSION IN MATERIAL CONTRIBUTION

David Mangan\*

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*Clements v Clements continued a problematic line of cases for the Supreme Court of Canada. The Court missed an opportunity to provide enhanced guidance on this topic. Even if it was marking a distinct line of thought from that of the English courts, the Canadian Supreme Court avoided useful distinctions found in the English jurisprudence (a body of jurisprudence which is more extensive than that of Canada). Still, Clements was not devoid of a bold pronouncement. On this occasion the Court endorsed corrective justice as the theory underpinning the law of negligence. While a number of prominent academics have advocated for corrective justice, its adoption by the Supreme Court absent more elaborate discussion (notably when there are pointed criticisms of the theory) only perpetuates further confusion in the area of exceptions to the traditional approach to causation.*

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*L'arrêt rendu dans l'affaire Clements c Clements s'est ajouté à un courant jurisprudentiel préoccupant émanant de la Cour suprême du Canada. Dans cette affaire, la Cour n'a pas profité de l'occasion pour fournir de meilleures directives en matière de causalité. Même si elle s'est démarquée des tribunaux anglais quant à la façon d'envisager le tout, la Cour suprême s'est malheureusement privée de réitérer certaines distinctions utiles proposées par la jurisprudence anglaise (d'ailleurs plus fournies que la jurisprudence canadienne). Pourtant, l'affaire Clements était un arrêt audacieux. À cette occasion, la Cour a en effet soutenu la théorie selon laquelle la justice réparatrice est le fondement du droit de la responsabilité basée sur la faute. Bien qu'un certain nombre d'universitaires réputés appuient ce principe de la justice réparatrice, son adoption par la Cour suprême, en l'absence de discussions plus approfondies (surtout que cette théorie fait l'objet de critiques spécifiques), ne fait qu'augmenter la confusion existante en matière d'exceptions à l'approche traditionnelle de la causalité.*

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\* University of Leicester, Faculty of Law; of the Ontario Bar. My thanks to Andrew Botterell, Lynda Collins, François du Bois, Andrew Huxley and the anonymous reviewers for their comments.

## 1. Introduction

The judgment of the Supreme Court of Canada in *Clements v Clements*<sup>1</sup> serves as a vehicle for the consideration of when an exception to the traditional causation analysis arises in Canadian jurisprudence. The United Kingdom has a body of cases on this point. Courts there have wrestled with this topic for decades and so the UK jurisprudence remains a useful resource. *Clements*, in contrast, lacked the more detailed analysis found in England.<sup>2</sup> The vagaries of the Supreme Court's analysis (in what is now a difficult line of decisions) gave no concrete shape to the material contribution test. Adding to the complexity of the area, the Canadian Supreme Court, for the first time, endorsed corrective justice as a foundational mode of thought for negligence law; that is, as "the theory ... that underlies the law of negligence"<sup>3</sup> and as the "anchor" of negligence.<sup>4</sup>

This article explores the strains within the Court's analysis in *Clements*. First, the challenges posed by the Court's rulings on this topic are assessed. Second, the Court's handling of the English jurisprudence is questioned. The argument here is not that the Supreme Court of Canada should have followed the UK Supreme Court. By comparison, however, the English analysis is a more engaged investigation of the complexities of the issue, perhaps a by-product of the different occasions on which that Court has faced this issue. The Canadian Supreme Court took pains to point out it has not employed an exception to the "but for" test. It is suggested that the UK analysis is of greater service to Canadian law than the Court in *Clements* acknowledged. Finally, the Canadian Court's endorsement of corrective justice is discussed. Corrective justice as a theory of tort law will not be tested. Instead, it is contended that an exception to the traditional analysis does not pose an ideal opportunity in which to proclaim the theory's prominence, especially considering how much criticism there has been of the Court's handling of exceptions to the traditional causation analysis leading up to *Clements*.<sup>5</sup>

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<sup>1</sup> 2012 SCC 32, 2 SCR 181 [*Clements*]. The majority and minority agreed on the interpretation of causation; see *ibid* at para 55.

<sup>2</sup> The point has been made elsewhere regarding the Court's decision in *Resurfice Corp v Hanke* 2007 SCC 7, 1 SCR 333 [*Resurfice*]; see Vaughan Black and David Cheifetz, "Through the Looking Glass, Darkly: *Resurfice Corp v Hanke*" (2007) 54 *Alta L Rev* 241 at 242.

<sup>3</sup> *Clements*, *supra* note 1 at para 21.

<sup>4</sup> *Ibid* at para 37.

<sup>5</sup> On corrective justice, see Lynda M Collins and Heather McLeod-Kilmurray, "Material Contribution to Justice? Toxic Causation after *Resurfice Corp v Hanke*" (2010) 48 *Osgoode Hall L J* 411 at 416. More generally concerning an exception to the traditional causation analysis, see Erik S Knutsen, "Clarifying Causation in Tort" (2010) 33 *Dalhousie L J* 153; Russell Brown, "Material Contribution's Expanding Hegemony:

## 2. The Supreme Court and Causation

The Court in *Clements* largely relied upon its previous decisions. In canvassing these rulings, problems emerge regarding what constitutes the material contribution test (as an exception to “but for” causation) and when it should be used.

*Snell v Farrell*<sup>6</sup> remains a foundational decision for Canadian law. Snell launched her claim against the doctor who conducted her cataract surgery. Bleeding developed as soon as anaesthetic had been administered. While experts would testify to the common practice of delaying surgery in such an instance, Farrell continued. Eventually it was determined that Snell was permanently blind in the affected eye. Complicating the causation issue, Snell also suffered from diabetes which could have played a role in blindness developing.<sup>7</sup> The issue centred on whether causation was inferred by the trial judge and, if not, could it have been inferred in this instance. Finding for Snell, Sopinka J, writing for a unanimous Court, ruled that causation should have been inferred based on the facts before the trial judge, using a “robust and pragmatic” approach to causation.

Sopinka J noted the difficulties with the “but for” analysis. He attributed these challenges to the “too rigid application” by the courts of the traditional analysis.<sup>8</sup> His concern was deprivation of relief for the “likely victim of the combined tortious conduct of a number of defendants.”<sup>9</sup> The plaintiff’s burden here was unchanged, but it was not immutable; where the “subject matter of the allegation lies particularly within the knowledge of one party, that party may be required to prove it.”<sup>10</sup> In a situation such as the one in *Snell*, this statement opens the

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Factual Causation After *Hanke v Resurfice Corp*” (2007) 54 Can Bus L J 432; Black and Cheifetz, *supra* note 2; Mitchell McInnes, “Causation in Tort Law: A Decade in the Supreme Court of Canada” (2000) 63 Sask L Rev 445 [McInnes, “A Decade”]; Mitchell McInnes, “Causation in Tort Law: Back to Basics at the Supreme Court of Canada” (1997) 35 Alta L Rev 1013. For different perspectives on how to engage with the topic, see Russell Brown, “The Possibility of ‘Inference Causation’: Inferring Cause-in-Fact and the Nature of Legal Certainty” (2010) 55 McGill L J 1; Vaughan Black, “Decision Causation: Pandora’s Tool-Box” in JW Neyers, Erika Chamberlain and Stephen GA Pitel, eds, *Emerging Issues in Tort Law* (Oxford: Hart Publishing, 2007)309.

<sup>6</sup> [1990] 2 SCR 311 [*Snell*].

<sup>7</sup> Knutsen has called this situation a “draw” because Snell adduced evidence that Farrell’s negligence may have been a cause of her blindness; see Knutsen *supra* note 5 at 175.

<sup>8</sup> *Snell*, *supra* note 6 at 320.

<sup>9</sup> *Ibid*.

<sup>10</sup> *Ibid*; this quotation comes close to *res ipsa loquitur* though its place is in question since *Fontaine v BC (Official Administrator)*, [1998] 1 SCR 424 at para 27.

traditional approach to causation to a more flexible application. The scenario could be addressed in one of two ways: where a defendant's breach of a duty of care has created the very risk of injury suffered and the plaintiff must establish a link between his injury and that risk<sup>11</sup> (a line attributed to Lord Wilberforce in *McGhee v National Coal Board*);<sup>12</sup> or by way of "an inference of causation" as there was "no practical difference between materially contributing to the risk of harm and materially contributing to the harm itself."<sup>13</sup> Sopinka J said that *McGhee* had been explained as "a robust and pragmatic" approach to causation<sup>14</sup> in selecting the second of the two aforementioned approaches to follow. Referenced from Lord Bridge's decision in *Wilsher v Essex Health Authority*,<sup>15</sup> the phrase was endorsed in *Snell*. Combining Lord Mansfield's statement regarding the weight accorded to evidence<sup>16</sup> with Lord Bridge's words in *Wilsher*, Sopinka J developed the rule for Canadian courts:

The legal or ultimate burden remains with the plaintiff, but in the absence of evidence to the contrary adduced by the defendant, an inference of causation may be drawn although positive or scientific proof of causation has not been adduced. If some evidence to the contrary is adduced by the defendant, the trial Judge is entitled to take account of Lord Mansfield's famous precept. This is, I believe, what Lord Bridge had in mind in *Wilsher* when he referred to "a robust and pragmatic approach to the ... facts."<sup>17</sup>

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<sup>11</sup> *Ibid* at para 22.

<sup>12</sup> [1972] 3 All ER 1008 (HL) [*McGhee*]. In Canada, Lynda Collins has advocated for this perspective; see Lynda M Collins, "Causation, Contribution and *Clements*: Revisiting the Material Contribution Test in Canadian Tort Law" (2011) 19 Torts L Rev 86.

<sup>13</sup> *Snell*, *supra* note 6 at 323.

<sup>14</sup> *Clements*, *supra* note 1 at para 20, citing *Snell*, *ibid* at 324.

<sup>15</sup> [1988] 1 All ER 871 (HL) [*Wilsher*], cited in *Snell*, *ibid* at 330. The notion of common sense can be traced to the famous work of Tony Honoré and HLA Hart, entitled *Causation in the Law*, 2nd ed (Oxford: OUP, 1985), where the authors unpacked the concept of causation. In explaining the work, Lord Hoffmann (extra-judicially) wrote, "They showed that when judges say that it is a matter of common sense, they usually mean that it accords with ordinary moral notions of when someone should be regarded as responsible for something which has happened. In explaining this use of the concept, they drew attention to the importance given to voluntary human acts and to unusual natural occurrences;" see Lord Hoffmann, "Causation" (2005) 121 L Quarterly Rev 592.

<sup>16</sup> *Blatch v Archer* (1774) 98 ER 969 at 970: "It is certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted."

<sup>17</sup> *Snell*, *supra* note 6 at para 330; *Clements*, *supra* note 1 at para 11.

This has been the rule followed in Canada.<sup>18</sup> What was endorsed as the “common sense approach” was inference causation: an adverse inference which a defendant would run the risk of “in the absence of evidence to the contrary.”<sup>19</sup>

In *Snell*, Sopinka J considered the two major decisions the House of Lords had by then issued regarding exceptions to “but for” causation. He accepted the House of Lords’ assessment of *McGhee* (a landmark UK decision for discussion)<sup>20</sup> articulated by Lord Bridge in the later case of *Wilsher*, where his Lordship interpreted *McGhee* as having “laid down no new principle of law whatever. On the contrary, it affirmed the principle that the onus of proving causation lies on the pursuer or plaintiff.”<sup>21</sup> *Wilsher*, however, is not the end point and *Snell* is not the culminating assessment of English jurisprudence on the topic.<sup>22</sup> The House of Lords in *Fairchild v Glenhaven Funeral Services Ltd*<sup>23</sup> disagreed with Lord Bridge’s interpretation of *McGhee* as offering no new legal principle and ruled his opinion “should no longer be treated as authoritative.”<sup>24</sup> Consequently, *Fairchild* rehabilitated the decision in *McGhee*. A framework emerged from *Fairchild*: an exception to the “but for” analysis arises where there is one harmful agent (such as asbestos) and at least two sources of that same harm where the plaintiff has incurred an injury attributable to that single agent (such as multiple employers who exposed the plaintiff to asbestos).

The Supreme Court of Canada returned to the topic in *Athey v Leonati*.<sup>25</sup> The “but for” test was characterised as “unworkable in some

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<sup>18</sup> See e.g. *Clements*, *ibid* at para 9:

The “but for” causation test must be applied in a robust common sense fashion. There is no need for scientific evidence of the precise contribution the defendant’s negligence made to the injury. See *Wilsher v. Essex Area Health Authority*, [1988] A.C. 1074 (H.L.), at p. 1090, *per* Lord Bridge; *Snell v. Farrell*, [1990] 2 S.C.R. 311.

<sup>19</sup> *Snell*, *supra* note 6 at 328-29.

<sup>20</sup> The precedent set by *McGhee*, *supra* note 12, is that stated by Lord Wilberforce at 1012: “[W]here a person has, by breach of duty of care, created a risk, and injury occurs within the area of that risk, the loss should be borne by him unless he shows that it had some other cause.” This passage is cited as the rule from *McGhee* in English tort texts such as Simon Deakin, Angus Johnston and Basil Markesinis, *Markesinis and Deakin’s Tort Law*, 7th ed (Oxford: Oxford University Press, 2013) at 225.

<sup>21</sup> *Wilsher*, *supra* note 15 at 881, cited in *Snell*, *supra* note 6 at 324.

<sup>22</sup> The point is also stated in Gerald Fridman *et al*, *The Law of Torts in Canada* (Toronto: Carswell, 2010) at 412.

<sup>23</sup> [2002] 3 All ER 305 (HL) [*Fairchild*].

<sup>24</sup> *Ibid* at para 22.

<sup>25</sup> [1996] 3 SCR 458 [*Athey*].

circumstances”<sup>26</sup> and the “general but not conclusive test.”<sup>27</sup> Athey was involved in two car accidents, two months apart. Immediately after the first accident, he was taken to hospital and released. Soon afterwards, he began to suffer from pain and stiffness in his neck and back. Athey’s vehicle was hit head-on by a semitrailer truck in the second accident, though he walked away from it. He appeared to be well on his way to recovery through physiotherapy and chiropractic treatments. Following his doctor’s suggestion, Athey returned to his regular exercise routine. While at the gym, he experienced a pop in his back which resulted in great pain. By the next day, he was unable to move and he was subsequently diagnosed with disc herniation. Complicating the situation, he had been diagnosed with a pre-existing degenerative disc disease. Athey brought an action against the drivers in the two accidents claiming their negligence resulted in the herniation. The issue before the Court was “whether the loss should be apportioned between tortious and non-tortious causes where both were necessary to create the injury.”<sup>28</sup> To establish causation, the defendant’s conduct must be a cause of the plaintiff’s injury and the presence of non-tortious causes does not eliminate the defendant’s liability. In other words, the plaintiff need not establish that the defendant’s negligence was the sole cause of her injury.<sup>29</sup> The plaintiff in *Athey* successfully established causation by inference: “When a plaintiff has *two* accidents which both cause serious back injuries, and shortly thereafter suffers a disc herniation during a mild exercise which he frequently performed prior to the accidents, it seems reasonable to infer a causal connection.”<sup>30</sup> The Court found the defendants fully liable and therefore overruled the trial judge’s apportionment of twenty-five percent liability against the defendants.

In two subsequent cases, the court endeavoured to clarify its position on an exception to but for causation. In *Walker Estate v York Finch General Hospital*, the Court stated the material contribution test may be employed “[w]here there is more than one potential cause.”<sup>31</sup> Further elaboration came later in *Resurfice Corp v Hanke*.<sup>32</sup> Hanke had filled the

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<sup>26</sup> *Ibid* at para 15; this was also noted in *Walker Estate v York Finch General Hospital*, 2001 SCC 23, 1 SCR 647 at para 88 [*Walker Estate*]. Brown has argued that “unworkable” in *Athey* became “impossible” in *Resurfice*; see Brown, *supra* note 5 at 443.

<sup>27</sup> *Athey*, *supra* note 25 at para 14.

<sup>28</sup> *Ibid* at para 1.

<sup>29</sup> *Ibid* at para 17.

<sup>30</sup> *Ibid* at para 45 [emphasis in original].

<sup>31</sup> *Walker Estate*, *supra* note 26 at para 87, a point approved in *Clements*, *supra* note 1 at para 27: In “special circumstances,” the law may recognise “the ‘but for’ test for causation should be replaced by a material contribution approach.”

<sup>32</sup> *Supra* note 2; *Resurfice* was applied by the Court in *Fullowka v Pinkerton*, 2010 SCC 5, 1 SCR 132 at paras 93 and 95 where the Supreme Court ruled that the trial

gas tank of an ice-resurfacing machine he used for work with water instead of fuel. When he started it, he suffered severe burns. His ultimately unsuccessful claim at the Supreme Court of Canada centred on Resurfice improperly labelling the vehicle. In discussing the “special circumstances” in which an exception to the but for test may be applied, the Court wrote of two preconditions which Hanke had not met. The first was that “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.”<sup>33</sup> The second was that the plaintiff had been exposed to “an unreasonable risk of injury” as a result of the defendant’s breached duty of care and had suffered from that same injury. Meeting these two factors would result in the use of the material contribution analysis.<sup>34</sup> *Resurfice* is noteworthy for its acknowledgement of risk of injury as opposed to contribution to harm.<sup>35</sup>

*Clements*, however, does not clarify the discussion in *Resurfice*. Clements the defendant drove a motorcycle which was one hundred pounds overweight. His wife (the plaintiff) was seated at the rear part of the motorcycle. A nail had punctured one of the tires and only came loose when the defendant accelerated beyond the speed limit to 120 kilometres per hour in order to pass a car. As a result, the nail fell out, the bike began to wobble, the defendant lost control, and the plaintiff suffered severe brain trauma in the ensuing crash. Ms Clements sued her husband claiming that he was negligent in driving an overloaded bike too fast. The British Columbia Supreme Court found for the plaintiff and ruled that the material contribution test should be employed.<sup>36</sup> The Court of Appeal set aside the decision on the basis that the “but for” standard did apply and not the material contribution test.<sup>37</sup> The Supreme Court of Canada ruled that the “but for” test was to be applied and ordered the case be reheard, LeBel and Rothstein JJ dissenting on the issue of rehearing. While the conclusion was correct, the reasoning in *Clements* raised a number of questions that arguably render the decision of limited clarificatory value.

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judge had fallen into error by not applying the “but for” test and instead relying on an exception to it.

<sup>33</sup> *Resurfice*, *ibid* at para 25.

<sup>34</sup> *Ibid* at para 27.

<sup>35</sup> As will be seen, finding liability based on risk of harm (leading to the plaintiff suffering that harm) was the basis of the House of Lords’ decision in *McGhee*. Collins and McLeod-Kilmurray, *supra* note 5 at 439 drew attention to this point. These authors wrote in favour of the change in *Resurfice* as a “reasonable and practicable reform consistent with the just operation of tort law;” see *ibid* at 440.

<sup>36</sup> 2009 BCSC 112, BCJ No 166 (QL).

<sup>37</sup> 2010 BCCA 581, 298 BCAC 56.

The difficulty with the line of decisions from *Snell* to *Clements* stems from the changes which seem to accompany each Supreme Court decision. For example, the expansive language found in *Snell* called for a common sense causal inference;<sup>38</sup> a robust and pragmatic application of the traditional “but for” analysis is quite broad and seems to encompass wrongdoing at large. Upon finding the defendant breached a duty of care, the court may infer causation once the plaintiff adduced evidence and the defendant offered insufficient rebuttal evidence. As well, there is the wider spectrum established in *Athey* that plaintiffs must show the defendant’s negligence was *a* cause as opposed to *the* cause of injury. The question remains: How does the court treat a scenario such as that found in the House of Lords’ decision in *Wilsher*? There were five independent possibilities which could have caused the new-born child’s blindness, one of which was the hospital negligently providing an excessive amount of oxygen. *Wilsher* (as interpreted by the House in *Fairchild*) determined that if the plaintiff establishes only that the defendant’s negligence was one of many potential causes of the injury, the plaintiff has failed to satisfy the “but for” test and is not afforded access to the exceptional analysis. The plaintiff in *Wilsher* established the defendant was negligent, but failed to connect that negligence with the child’s retrolental fibroplasia. If excess oxygen is known to lead to blindness in new-born children, could an inference have been made that the negligent administration of oxygen was *a* cause? Perhaps insufficient evidence was adduced to ground liability. It is unclear what Canadian courts might have done in this situation. The Supreme Court’s guidance as to when the traditional causation analysis may be displaced by the material contribution test does not appear to have met its goal. *Clements* is an example. Excess speed and an overweight vehicle could each have caused the accident, but neither fact in itself mandates consideration of alternatives to “but for” analysis. Despite this, the case went to the Supreme Court. Another example is *Resurfice*. *Resurfice* was not a cause of the plaintiff’s mistake and yet the case also landed at the highest court on the issue of causation.

The question of whether a defendant is materially contributing to harm or to risk of harm remains. According to *Resurfice*, the material contribution test<sup>39</sup> may be utilised where it is impossible for the plaintiff to establish – through no fault of his own (for example, where the impossibility was attributable to the limitations of science) – that the defendant caused his harm, and where the defendants exposed the plaintiff

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<sup>38</sup> As stated in *Clements*, *supra* note 1 at para 10: “Evidence connecting the breach of duty to the injury suffered may permit the judge, depending on the circumstances, to infer that the defendant’s negligence probably caused the loss.”

<sup>39</sup> Collins and McLeod-Kilmurray are correct to point out the missing object to this phrase in *Resurfice*; see Collins and McLeod-Kilmurray, *supra* note 5 at 439.

to a risk of incurring the same harm which he in fact developed. With *Clements*, there appears to be a stricter standard applied. It is not clear what will constitute “special circumstances;” the only clear point was the Court’s concern with how wide this opening may be.<sup>40</sup> The limitations of science were discounted as a trigger insofar as the Court contended that common sense should prevail if scientific certainty has not been the benchmark since *Snell*. Preceding decisions were interpreted as containing the following indicators:

Typically, there are a number of tortfeasors. All are at fault, and one or more has in fact caused the plaintiff’s injury. The plaintiff would not have been injured “but for” their negligence, viewed globally. However, because each can point the finger at the other, it is impossible for the plaintiff to show on a balance of probabilities that any one of them in fact caused her injury. This is the impossibility of which *Cook* and the multiple-employer mesothelioma cases speak.<sup>41</sup>

The Court offered the following rule as to when an exception to the traditional approach may arise:

Exceptionally, a plaintiff may succeed by showing that the defendant’s conduct materially contributed to the risk of the plaintiff’s injury, where (a) the plaintiff has established that her loss would not have occurred “but for” the negligence of two or more tortfeasors, each possibly in fact responsible for the loss; and (b) the plaintiff, through no fault of her own, is unable to show that any one of the possible tortfeasors in fact was the necessary or “but for” cause of her injury, because each can point to one another as the possible “but for” cause of the injury, defeating a finding of causation on a balance of probabilities against anyone.<sup>42</sup>

There has arguably been a tightening of when the exceptional analysis may arise. Consideration of a material contribution test arises when proof on a balance of probabilities – 51 per cent – is not possible, but there are clearly identifiable defendants. Proof may be established at less than 50 per cent (keeping in mind the establishment of a risk of harm and not proof of harm): the plaintiff may establish a 20 per cent increase in the risk of harm as a result of the defendant’s conduct, but this figure falls in between a balance of probabilities at the high end and materiality at the lower (where materiality is beyond *de minimis*). Material contribution to harm and material contribution to risk, however, are two different concepts. Material contribution to harm means the defendant(s) played a causative role in the plaintiff’s suffering. Material contribution to risk denotes some role in increasing the likelihood of harm arising.

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<sup>40</sup> *Clements*, *supra* note 1 at para 33ff.

<sup>41</sup> *Ibid* at para 39.

<sup>42</sup> *Ibid* at para 46.

### 3. *Interpreting the English Jurisprudence*

The Supreme Court of Canada canvassed the English case law as to when the material contribution approach may be available.<sup>43</sup> However, the Court contented itself with minimizing the value of the more recent English cases. The Court possessed a remarkable amount of confidence in the “but for” test despite it being a blunt tool<sup>44</sup> and “most helpful when help is least needed.”<sup>45</sup> The Court made clear in *Clements* that it has “never in fact applied a material contribution to risk test;”<sup>46</sup> such a special circumstance would only arise where there were “difficulties of proof [involving] multi-tortfeasor cases.”<sup>47</sup> It must be asked, however, whether Canadian law is any the better for guidance such as the suggestion that “a robust and common sense application of the ‘but for’ test”<sup>48</sup> should be used. *Clements* provided no clarification of this broad statement.

The aim here is not to exalt the English over the Canadian jurisprudence, for there are critiques of the former.<sup>49</sup> Many have criticised the state of the English jurisprudence and in particular the decision in *Fairchild*.<sup>50</sup> Most significant (and perhaps somewhat troublesome) are the comments of Lord Hoffmann (a member of the bench in the *Fairchild* case) who contended that *Fairchild* should have been decided differently:

In retrospect, I think the most satisfactory outcome [in *Fairchild*] would have been for their Lordships in their judicial capacity to have adhered to established principle, wrung their hands about the unfairness of the outcome in the particular case, and recommended to the Government that it pass appropriate legislation. Then judiciary and legislature would each have been functioning within its proper sphere: the judges

<sup>43</sup> *Clements*, *supra* note 1 at paras 29-32.

<sup>44</sup> A better perspective is found in *International Energy Group Ltd v Zurich Insurance Plc UK Branch* [2013] EWCA Civ 39 at para 52 [*Zurich*]: “English law does not have a monolithic doctrine of causation.” Leave to appeal this decision was granted by the UK Supreme Court on July 29 2013.

<sup>45</sup> Ernest J Weinrib, “A Step Forward in Factual Causation” (1975) 38 Mod L Rev 518 at 522. Weinrib later added at 530: “But it is noticeable that even here the purely factual approach breaks down on occasion, and it is necessary, whether explicitly or not, to supplement the mechanical formula with an infusion of policy.”

<sup>46</sup> *Clements*, *supra* note 1 at para 28.

<sup>47</sup> *Ibid.*

<sup>48</sup> *Ibid* at para 20. McInnes contended that this test has been “favourable” to Canadian plaintiffs; see McInnes, “A Decade,” *supra* note 5 at 449.

<sup>49</sup> See e.g. Jane Stapleton, “Lords a’leaping Evidentiary Gaps” (2002) 10 Torts L J 1 [Stapleton, “Lords a’leaping”]. See also the comments of Lord Mance in *Durham v BAI (Run Off) Ltd* [2012] UKSC 14 [*Trigger*], discussed below.

<sup>50</sup> See e.g. Sandy Steel, “Causation in English Tort Law: Still Wrong After All These Years” (2012) 31 UQLJ 243.

not creating confusion in the common law by trying to legislate for special cases and Parliament amending the common law where fairness and the public interest appeared to demand it.<sup>51</sup>

While these comments may ground an argument for wholesale dismissal of English law, it would be imprudent to adopt the position because the English decisions remain useful given the state of the Canadian law in the area. The next section discusses the value in the English cases for a Canadian audience.

### A) Terminology Leading to Difficulties

The Supreme Court of Canada endorsed the phrase material contribution.<sup>52</sup> In canvassing English law, however, it did not employ the distinctions made, particularly with regards to the concepts of material contribution to and material increase in the risk of harm. The terms' importance rests in their distinction amongst types of harm to an individual. Though the Court previously noted the distinction between divisible (material contribution) and indivisible injury (material increase),<sup>53</sup> it made no reference to the difference in *Clements*. The two terms used in England intermingle, but characterise different scenarios. Material contribution to harm is an overarching term and a material increase in the risk of harm may be seen as falling underneath the former. Elaboration may be found in Lord Rodger's comments in *Fairchild*:<sup>54</sup>

Following the approach in *McGhee* I accordingly hold that, by proving that the defendants individually materially increased the risk that the men would develop mesothelioma due to inhaling asbestos fibres, the claimants are taken in law to have proved that the defendants materially contributed to their illness.<sup>55</sup>

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<sup>51</sup> Lord Hoffmann, "*Fairchild* and After," in Andrew Burrows, David Johnston and Reinhard Zimmerman, eds, *Judge and Jurist: Essays in Memory of Lord Rodger of Earlsferry* (Oxford: OUP, 2013) 68.

<sup>52</sup> This has been a phrase utilised in previous cases by this Court; see e.g. *Resurfice*, *supra* note 2 at para 24. In *Clements*, *supra* note 1 at para 15, the Court noted that material contribution should be the phrase employed.

<sup>53</sup> *Athey*, *supra* note 25 at para 24.

<sup>54</sup> It is also found in literature on the topic; see e.g. Jane Stapleton, "The Fairchild Doctrine: Arguments on Breach and Materiality" (2012) 71 Cambridge L J 32 at 32: "The *Fairchild* doctrine allows a claimant to prove that the tortious exposure to asbestos due to the defendant made a material causal contribution to the victim's mesothelioma merely by showing that the exposure had materially increased the risk of the victim contracting that disease."

<sup>55</sup> *Fairchild*, *supra* note 23 at para 168.

The English cases make a useful distinction based on actual harm and the risk of harm which clarifies the content of an exception to the “but for” analysis.<sup>56</sup>

The absence of such a distinction has contributed to a general confusion regarding when an exception to the traditional causation analysis may be employed. The decision in *Cook v Lewis*<sup>57</sup> illustrates this. The Supreme Court of Canada has correctly maintained that it has not employed a material contribution test in its history. The ruling in *Cook*, however, took the Court close to doing so.<sup>58</sup> The facts are well-known. There was one cause of the plaintiff’s harm, a pellet used by a bird hunter, and two potential sources of that pellet, the two hunters who both accidentally fired simultaneously at the plaintiff. While only one pellet was in question, it was impossible to determine which hunter in fact shot him. All that could be said was that either hunter could have fired the shot which injured Lewis. Analysis would move beyond traditional “but for” causation.<sup>59</sup> For the majority, Cartwright J wrote:

If under the circumstances of the case at bar the jury, having decided that the plaintiff was shot by either Cook or Akenhead, found themselves unable to decide which of the two shot him because in their opinion both shot negligently in the direction, both defendants should have been found liable. I think that the learned trial judge should have sent the jury back to consider the matter further with a direction to the above effect.<sup>60</sup>

The *Clements* court characterised the decision in *Cook* as one of reverse onus.<sup>61</sup> This is only part of the ruling. Lewis had to establish that the defendants had caused his injury. The difficulty in the causation analysis was then addressed by reversing the burden of proof; that is, each defendant could adduce evidence establishing that he had not caused the plaintiff’s injury. We cannot say that the defendants in *Cook* materially contributed to Cook’s injury because both hunters were not a cause of the harm, only one was the cause. In the absence of evidence to link one hunter with the wound, we can only say that each hunter increased the risk of this injury occurring through their individual conduct and the injury did occur. The hunters’ liability was premised on their materially increasing the risk

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<sup>56</sup> Therefore, to say there was no difference between material contribution to risk and material contribution to harm, as Sopinka J indicated in *Snell*, is not accurate.

<sup>57</sup> [1951] SCR 830 [*Cook*].

<sup>58</sup> The Court ordered the case be retried and so the matter was left open as to whether a material contribution test would be employed.

<sup>59</sup> The Supreme Court acknowledged this assessment of *Cook* in *Resurfice*, *supra* note 2 at para 27.

<sup>60</sup> *Cook*, *supra* note 57 at 842.

<sup>61</sup> *Clements*, *supra* note 1 at para 28.

of harm to the plaintiff. This is what we may take from Cartwright J's comments above.<sup>62</sup>

The scenario is similar to that found in *Fairchild* where there was one agent of harm (asbestos) and multiple sources of that agent. The idea at the time *Fairchild* was decided was that the plaintiff needed to inhale only one asbestos fibre in order to develop mesothelioma (though this has since been questioned). The House of Lords ruled in the plaintiffs' favour based on the concept of material increase in the risk of injury; the plaintiffs had established that each defendant had exposed them to asbestos and therefore created the opportunity for each plaintiff to develop the disease. It was beyond the plaintiffs' control to establish a causal connection other than creation of a risk. And so the House of Lords applied the material increase in risk approach instead of the traditional causation analysis.

Distinguishing between material contribution to harm and material increase in the risk of harm (as the UK courts have) assists in clarifying causation in exceptional circumstances. The value may be further demonstrated by reference to a sentence from *Clements*: “[E]ach defendant who has contributed to the risk of the injury that occurred can be faulted.”<sup>63</sup> There is larger scope for liability if it is said that a defendant contributed to the risk of harm which arose than if it is said that liability attaches to the defendant who created a risk of injury which occurred. Creation of the risk is more appropriate here. The defendant has put the plaintiff in a situation in which he has been exposed to a substance known to lead to a fatal disease (if we take exposure to asbestos as an example).

In the UK, material contribution to harm refers to divisible harm, where the severity of an injury grows in concert with exposure to a harmful agent (cumulative). A useful example in the UK is *Bonnington Castings v Wardlaw*.<sup>64</sup> The plaintiff contracted a lung condition by exposure to asbestos as a result of the defendant's tortious conduct as well as an innocent cause (inevitable exposure to dust). The claim succeeded because the tortious exposure to silica dust had materially contributed to (to an unknown degree) the pneumoconiosis which the claimant might well have developed in any event as the result of non-tortious exposure to the same type of dust. As the Court of Appeal highlighted in the much later case of

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<sup>62</sup> It is also detectable in the decision of Rand J in *Cook*, *supra* note 57 at 833, who relied on the defendants' culpability as the basis for placing the onus on each of Cook and Akenhead: “The onus attaches to culpability, and if both acts bear that taint, the onus or prima facie transmission of responsibility attaches to both, and the question of the sole responsibility of one is a matter between them.”

<sup>63</sup> *Clements*, *supra* note 1 at para 40.

<sup>64</sup> [1956] AC 613 (HL) [*Wardlaw*].

*Ministry of Defence v AB and ors*,<sup>65</sup> the tort did not increase the risk of harm but it increased the actual harm.<sup>66</sup> While proportionate liability was not argued in *Wardlaw*, it has been subsequently held that each defendant may be liable to the extent of that contribution.<sup>67</sup>

The material contribution to harm formulation has some challenges. Lord Clyde, in dissent at the Court of Session in *Wardlaw*, argued that there had been no causal link established.<sup>68</sup> Material contribution has also been the topic of some confusion. In the UK, Stephen Bailey sought to clarify the meaning of the exception,<sup>69</sup> arguing that *Wardlaw* was not reversing the burden of proof. Instead, material contribution was an application of the “but for” test:

The principle can be summarised in the proposition that where an injury (here, the onset of the pneumoconiosis) is caused by a combination of factors (the totality of the dust arising from different sources) each source, unless it is to be disregarded as de minimis, is a cause in fact of that injury.<sup>70</sup>

Here is where the Canadian material contribution test appears to be. This is not the extent of an exceptional analysis which may displace the “but for” test of causation in certain limited circumstances.

An understanding of material increase to the risk of harm has evolved at the English Supreme Court. It has been referred to as indivisible harm: where once the harmful agent causes injury further exposure does not intensify the harm. The topic will be taken up in chronological order of decisions. The starting point is the House of Lords decision in *McGhee*.

<sup>65</sup> [2010] EWCA Civ 1317 [*MOD*] at para 150.

<sup>66</sup> *Ibid* at para 134. In contrast, the Court identified cancer as an example of indivisible harm, at para 150: “Cancer is an indivisible condition; one either gets it or one does not. The condition is not worse because one has been exposed to a greater or smaller amount of the causative agent.”

<sup>67</sup> *Holtby v Brigham & Cowan (Hull) Ltd* [2000] ICR 1086 (CA) at para 20, where the Court considered the effect of prolonged exposure to asbestos leading to asbestosis. Apportionment was also accepted in *Allen v British Rail Engineering Ltd* [2001] EWCA Civ 242; and damages were reduced by 60% in *Thaine v London School of Economics* [2010] ICR 1422 (Employment Appeals Tribunal) based on the Tribunal’s finding that the defendant materially contributed to the plaintiff’s harm.

<sup>68</sup> *Wardlaw v Bonnington Castings Ltd* (1955) SC 320 at 388: “it seems to me to follow that the mere fact that a breach of duty could cause the injury does not amount to proof in law that it did, and leaves the onus of proof, initially on the pursuer, undischarged.”

<sup>69</sup> Stephen Bailey, “Causation in Negligence: What is Material Contribution?” (2010) 30 LS 167.

<sup>70</sup> *Ibid* at 176.

Expert evidence testified only to the material increase in the risk of the plaintiff developing dermatitis. The precedent-setting statement by the House of Lords was the following: “Where a person has, by breach of duty of care, created a risk, and injury occurs within the area of that risk, the loss should be borne by him unless he shows that it had some other cause.”<sup>71</sup> Assessment of this decision exposes some difficulties which have contributed to its incoherence.<sup>72</sup> The decision in *McGhee* is not satisfactorily distinguished from that in *Wardlaw*. Was this a cumulative or alternative cause?<sup>73</sup> Part of the trouble was also that the House of Lords opened up the normative element of causation to the less certain area of policy.<sup>74</sup> The decision may also run the duty and breach questions too closely to those of causation.<sup>75</sup> Still, the case, despite complications, prompted consideration of the rigidity of the “but for” test and development of flexibility in certain instances.<sup>76</sup>

The mesothelioma<sup>77</sup> line of cases illustrated the material increase of risk form of harm.<sup>78</sup> Canadian scholars<sup>79</sup> have referred to the House of Lords’ landmark decision in *Fairchild* where the plaintiff contracted mesothelioma from inhalation of asbestos fibres. It was believed at the

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<sup>71</sup> *McGhee*, *supra* note 12 at 1012.

<sup>72</sup> See e.g. Lord Reid’s view in *McGhee*, *ibid* at 1011, that material increase and material contribution are synonymous: “From a broad and practical point of view I can see no substantial difference between saying that what the defender did materially increased the risk of injury to the pursuer and saying that what the defender did made a material contribution to his injury.”

<sup>73</sup> Fleming made this point in John G Fleming, “Probabilistic Causation in Tort Law” (1989) 68 Can Bar Rev 661 at 669.

<sup>74</sup> Lord Brown called it a “problematic” and Lord Phillips a “puzzling” case; see *Sienkiewicz v Greif (UK) Ltd.* [2011] UKSC 10 [*Sienkiewicz*] at paras 177 and 92 respectively.

<sup>75</sup> Weinrib, *supra* note 45 at 523.

<sup>76</sup> Weinrib lauded the House of Lords for its decision (“But *McGhee* was in its modest way a useful decision, showing a welcome flexibility with respect to entrenched doctrine”); see *ibid* at 534.

<sup>77</sup> Little is yet known about how this form of cancer develops other than its genesis can be traced to inhalation of asbestos fibres. What is known about this “hideous disease” is that it is “usually undetectable until shortly before death,” and “it is impossible to know whether any particular inhalation of asbestos dust (at least any occurring more than ten or so years prior to diagnosability) played any or no part in such development.” Moreover, approximately 3000 lives are claimed by this disease per year in the UK; see *Trigger*, *supra* note 49 at paras 5-6.

<sup>78</sup> However, the possibility of mesothelioma being indivisible appears to be in question after the United Kingdom Supreme Court’s decision in *Sienkiewicz*, *supra* note 74 at para 102: “[C]ausation may involve a cumulative effect with later exposure contributing to causation initiated by earlier exposure.”

<sup>79</sup> See for example Fridman *et al*, *supra* note 22.

time that the disease resulted from inhalation of as little as one fibre. In the *Fairchild* facts, each of the defendants (two former employers and one occupier of land) had exposed the plaintiffs to asbestos. The House of Lords ruled that each defendant had materially increased the risk of the plaintiffs contracting the disease (beyond the *de minimis* threshold)<sup>80</sup> and so all defendants were liable jointly and severally (proportionate liability was not argued). The exception utilised in *Fairchild* extended to “any case where there has been an act or omission exposing a person to asbestos, which exposure *may* have caused the mesothelioma, but which cannot be shown as a matter of probability to have done so.”<sup>81</sup> A “gap” created by the insufficiency of certainty regarding whether the defendants caused the harm was addressed by permitting the plaintiff to establish that the defendants exposed him to the harmful substance, thereby materially increasing the risk of developing the disease to which the substance was attributable.

The House of Lords came to the apportionment issue in *Barker v Corus*.<sup>82</sup> The imprecise state of science was viewed as the reason for the difficulty in determining causation on the “but for” standard.<sup>83</sup> The Court found that each defendant would be liable to the extent of harm each caused the plaintiff. Barker’s damages were reduced because he was self-employed for one of the periods during which he was exposed to asbestos.

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<sup>80</sup> What is beyond *de minimis* was considered in *Cox v Rolls Royce Industrial Power (India) Ltd* [2007] EWCA Civ 1189 at paras 9 and 21, where work for one week at a power station with “asbestos dust in the air everywhere” and without the availability of proper protection was conceded to be beyond the *de minimis* level.

<sup>81</sup> *Trigger*, *supra* note 49 at para 57.

<sup>82</sup> [2006] 3 All ER 785 (HL) [*Barker*]. The following passage from the leading judgment of Lord Hoffmann at para 43 is often cited:

In my opinion, the attribution of liability according to the relative degree of contribution to the chance of the disease being contracted would smooth the roughness of the justice which a rule of joint and several liability creates. The defendant was a wrongdoer, it is true, and should not be allowed to escape liability altogether, but he should not be liable for more than the damage which he caused and, since this is a case in which science can deal only in probabilities. The justification for the joint and several liability rule is that if you caused harm, there is no reason why your liability should be reduced because someone else *may* have caused the same harm. But when liability is exceptionally imposed you may have caused harm, the same considerations do not apply and fairness suggests that if more than one person may have been responsible, liability should be divided according to the probability that one or other cause the harm.

<sup>83</sup> *Ibid* at para 17:

[The] purpose of the *Fairchild* exception is to provide a cause of action against a defendant who has materially increased the risk that the claimant will suffer damage and may have caused that damage, but cannot be proved to have done so because it is impossible to show, on a balance of probability, that some other exposure to the same risk may not have caused it instead.

This was an important outcome since the possibility that he could have developed the disease through his own wrongdoing did not negate the claim. Following trade unions' opposition to the ruling in *Barker*,<sup>84</sup> Parliament quickly amended this decision with respect to mesothelioma by enacting the *Compensation Act 2006* where liability for this disease alone would be joint and several.<sup>85</sup> These parameters underlined the exceptional nature of this provision.<sup>86</sup>

The combination of *Fairchild* and *Barker*<sup>87</sup> lead to significant difficulties as it was unclear what rule the House of Lords had laid down. Lord Rodger's dissent in *Barker* drew attention to the problem.<sup>88</sup> Lord Mance's opinion in *Trigger*<sup>89</sup> (with whom all other members of the bench except Lord Phillips PSC agreed) picked up where Lord Rodger had dissented in *Barker*. At issue in *Trigger* was the interpretation of coverage regarding insurance contracts when employees developed mesothelioma: whether the coverage included the time after employment (and the conclusion of the insurance contract) when the employees developed the disease. Lord Mance identified the issue as the difference between an "occurrence (or manifestation) basis and an exposure (or causation)

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<sup>84</sup> Ken Oliphant, "England and Wales," in Helmut Koziol and Barbara Steininger, eds, *Tort and Insurance Law Yearbook* (Vienna: Springer, 2006) 153.

<sup>85</sup> *Compensation Act 2006* (UK), c 29, Section 3(1):

(a) a person ("the responsible person") has negligently or in breach of statutory duty caused or permitted another person ("the victim") to be exposed to asbestos,

(b) the victim has contracted mesothelioma as a result of exposure to asbestos,

(c) because of the nature of mesothelioma and the state of medical science, it is not possible to determine with certainty whether it was the exposure mentioned in paragraph (a) or another exposure which caused the victim to become ill, and

(d) the responsible person is liable in tort, by virtue of the exposure mentioned in paragraph (a), in connection with damage caused to the victim by the disease (whether by reason of having materially increased a risk or for any other reason).

<sup>86</sup> Sections 3(3) and 3(4) of the Act permit contribution amongst multiple defendants, but does not guide as to how that apportionment should be calculated.

<sup>87</sup> Though Lord Mance did not allude to it, the Supreme Court's ruling in *Sienkiewicz* should also be included, as was done by Lord Clarke; see *Trigger*, *supra* note 49 at para 77.

<sup>88</sup> *Barker*, *supra* note 82 at para 71.

<sup>89</sup> The case has come to be known as "the *Trigger* litigation" as the issue was whether insurance coverage for former employees who developed mesothelioma were covered only for the period during which they were employed or whether that extended to the time at which the disease was triggered (sometimes arising after leaving employment); see *Zurich*, *supra* note 44 at para 8. This is also an instructive decision with regards to the interpretation of insurance contracts. On this point, Lord Mance concluded in *Trigger*, *supra* note 49 at para 74: "The concept of a disease being 'caused' during the policy period must be interpreted sufficiently flexibly to embrace the role assigned to exposure by the rule in *Fairchild* and *Barker*."

basis.”<sup>90</sup> The action developed in *Fairchild* was not based simply on increasing the risk of mesothelioma through wrongful exposure to asbestos. Citing the House’s decision in *Rothwell v Chemical Insulating Co Ltd*,<sup>91</sup> Lord Mance underscored the requirement for the plaintiff to establish that the disease must have manifested (the harm having arisen). He also observed that causation was not satisfied simply because the plaintiff has been wrongfully exposed to asbestos; and that the risk of exposure was not the cause of action in *Fairchild*.<sup>92</sup> The curiosity here is that this became an issue. In *McGhee*, Lord Wilberforce was clear that an injury must have manifested.<sup>93</sup> The point is implicit (if not explicit) in the opinion of Lord Rodger in *Fairchild*<sup>94</sup> (later recalled by Lady Justice Smith in *Hull v Sanderson*<sup>95</sup>).

In *Trigger* the court endeavoured to clarify the difficulties of its earlier decisions:

The rule [in *Fairchild* and *Barker*] imposes liability for the mesothelioma upon persons who have exposed the victim to asbestos and so created a risk of mesothelioma. But it is not a rule which, even as between employers and employees, deems the latter to have suffered injury or disease at the time of any exposure.<sup>96</sup>

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<sup>90</sup> *Trigger*, *ibid* at para 3. These are called “long-tail diseases.” The two interpretations are outlined in Nicholas J McBride and Sandy Steel, “The ‘Trigger’ Litigation” (2012) 28 J Professional Negligence 285.

<sup>91</sup> [2008] AC 281 [*Rothwell*], cited in *Trigger*, *ibid* at paras 52 and 64. *Rothwell* was lauded for its clarity in relation to damages in Gemma Turton, “Defining Damage in the House of Lords” (2008) 71 Mod L Rev 1009.

<sup>92</sup> “... [N]o cause of action at all exists unless and until mesothelioma actually develops. Neither the exposure to asbestos nor the risk that this may one day lead to mesothelioma or some other disease is by itself an injury giving rise to any cause of action;” see *Trigger*, *supra* note 49 at para 64. Lord Mance specifically disagreed with Lord Phillips PSC who concluded in dissent that *Fairchild* created liability for the creation of the risk of incurring the disease; see *ibid* at paras 58 and 72 *per* Lord Mance, and para 124 *per* Lord Phillips. Lord Mance’s decision was relied upon by the English Court of Appeal in *Zurich*, *supra* note 44 at paras 28 and 48.

<sup>93</sup> *McGhee*, *supra* note 12 at para 6.

<sup>94</sup> *Fairchild*, *supra* note 23 at para 170.

<sup>95</sup> [2008] All ER (D) 39 (Nov) (CA) [*Hull*] at 52. That harm must in fact occur is a point detectable in Sopinka J’s decision in *Snell*, *supra* note 6 at para 27 (“... that the plaintiff simply prove that the defendant had created a risk of the injury which occurred or that the defendant has the burden of disproving causation”); the same point was noted more recently in *Clements*, *supra* note 1 at para 8, and *Ediger v Johnston*, 2013 SCC 18, 442 NR 105 at para 28 [*Ediger*].

<sup>96</sup> *Trigger*, *supra* note 49 at para 52.

Causation is satisfied on a “broad” view of the analysis.<sup>97</sup> The causal link was mirrored in the *Compensation Act 2006*: “[T]he rule in *Fairchild* and *Barker* must have been viewed by the drafters ... as establishing a causal link, between the exposure and the mesothelioma, sufficient for it to be said that the mesothelioma was ‘the result’ of each (and every) exposure.”<sup>98</sup> The broad view established in *Trigger* does not override the opportunity for any defendant to adduce evidence contradicting liability for the plaintiff’s injury. Absent such evidence, the court may arrive at an inference regarding causation.<sup>99</sup>

In determining when exceptional treatment of the causation issue may arise, an instructive decision of the English courts is *Hull*. Hull was hired for the unenviable position of turkey feather plucker during the Christmas period (due to an increase in work load). Although she was provided gloves by the defendant, she found them to be too big. As the gloves were not mandatory gear, she abandoned them and soon afterwards developed campylobacter bacteria.<sup>100</sup> The employer did not tell her about such a risk but instead considered precautions a matter of common sense when handling dead turkeys.<sup>101</sup> The issue was whether an exception to the “but for” test applied in this instance. Finding for the defendant, the Court of Appeal noted the exception did not apply because there was no evidence to suggest that there was a tortious source of the bacteria which could be attributed to the defendant. To find otherwise, “Ms Hull [would have had to] show that, on the facts of this case, there was some other exposure which could have been a potential cause of the injury and that it was scientifically impossible for her to show which exposure caused the injury.”<sup>102</sup>

For Canada, the absence of greater distinction regarding the nature of causation, harm and the depth of discussion on the topic has contributed to confusion. The Supreme Court of Canada conflated different forms of injury into one.<sup>103</sup> Harm arises in different ways. The danger with the ambiguous material contribution phrasing is that a plaintiff may be said to

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<sup>97</sup> *Ibid* at para 66.

<sup>98</sup> *Ibid* at para 68.

<sup>99</sup> The point is seen in Canada. See e.g. *Ediger*, *supra* note 95 at para 36: “The trier of fact may, upon weighing the evidence, draw an inference against a defendant who does not introduce sufficient evidence contrary to that which supports the plaintiff’s theory of causation.”

<sup>100</sup> This only arises when the bacteria is ingested, for example through touching one’s hands to the mouth without proper cleansing.

<sup>101</sup> *Hull*, *supra* note 95 at para 7.

<sup>102</sup> *Ibid* at para 52.

<sup>103</sup> Brown has also identified this difficulty in the Canadian analysis; see Brown, *supra* note 5 at 448.

satisfy this standard only by showing that the defendant was one of the potential causes of the harm in question. The exception is not to be interpreted so broadly. The House of Lords' ruling in *Wilsher* as stated in the later case of *Fairchild* is instructive: "The [exception] does not apply where the claimant has merely proved that his injury could have been caused by a number of different events, only one of which is the eventuation of the risk created by the defendant's wrongful act or omission."<sup>104</sup> *Snell* provided a wide spectrum for liability<sup>105</sup> or what Fleming has called a "benign 'interference.'"<sup>106</sup> This breadth appears now to be of potential concern to the Supreme Court and helps to explain its more guarded commentary in *Clements*. This point will be returned to in the final section of this article.

In exploring the above distinctions, the hope is that some clarity may be brought to the Canadian jurisprudence. To date the language employed in Canada has not made sufficient distinctions. As a result, the discussion remains confusing. Refining the nature of the harm (material contribution to harm or material increase in risk of harm) can assist in defining the approach taken by Canadian courts.

#### *B) When the "But For" Exception Applies*

Two difficulties in the Supreme Court's treatment of when the material contribution test arises will be discussed below.

##### *1) Minimum Number of Defendants*

In *Clements*, the Supreme Court ruled that a material contribution test can only arise when there are two or more tortfeasors.<sup>107</sup> The Supreme Court of Canada put aside the UK Supreme Court's decision of *Sienkiewicz v Greif (UK) Ltd.*<sup>108</sup> The principle drawn from *Sienkiewicz* was that there need be only one tortfeasor so long as there is another, though not necessarily tortious, source of harm. In *Sienkiewicz*, the claimant acted as administratrix of the estate of her mother, Costello. Costello had contracted mesothelioma through exposure to asbestos. The two sources of asbestos were the factory of her employer, Greif, and the air surrounding the plant where there were higher than normal levels of asbestos in the air; one

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<sup>104</sup> *Fairchild*, *supra* note 23 at para 169.

<sup>105</sup> Sopinka J remarked in *Snell*, *supra* note 6 at para 30: "Both the burden and the standard of proof are flexible concepts."

<sup>106</sup> Fleming, *supra* note 73 at 139.

<sup>107</sup> *Clements*, *supra* note 1 at para 46.

<sup>108</sup> *Supra* note 24.

tortious and one non-tortious source.<sup>109</sup> The UK Supreme Court ruled that Greif had materially increased the risk of Costello contracting mesothelioma through exposure to asbestos. The Supreme Court of Canada distinguished *Sienkiewicz* on the basis that the UK Court had declared itself “bound by precedent” though several members of the bench had “difficulty” with this result.<sup>110</sup> With regards to precedent, the basis for distinguishing *Sienkiewicz* is in question because “precedent” was not the reason for finding that a claim may succeed where there is one defendant. At least two sources of the harmful agent were needed, but only one needed to be tortious.

## 2) *Standard to be Met by the Plaintiff*

The Canadian Supreme Court in *Clements* criticised the standard for plaintiffs to meet in order to succeed in a negligence action, and yet the discussion did not advance any clearer understanding of the topic. Any plaintiff must establish that there was a duty of care owed and that the standard of care was breached;<sup>111</sup> this finding of fault is the necessary pre-condition to any court hearing an argument about causation.<sup>112</sup> An exception to the traditional causation analysis is employed when there is a limitation to the plaintiff’s ability to establish causation on the “but for” standard which is beyond his or her control. An exception has only arisen when the agent of harm has been established and the exact source of that harmful agent is in dispute.<sup>113</sup> The source, though, has been narrowed to identifiable defendants because each put the plaintiff in contact with that harmful agent. These criteria seemed to be more readily accepted by the Court in *Resurface*.

Identifying the distress of many corporate defendants with regards to liability grounded in any exception to a traditional causation analysis,<sup>114</sup>

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<sup>109</sup> A noteworthy fact is that the population is exposed to asbestos and may therefore develop mesothelioma; see Stapleton, “Lords a’leaping,” *supra* note 49 at 277.

<sup>110</sup> *Clements*, *supra* note 1 at para 42.

<sup>111</sup> As the Court implies in *ibid* at para 37.

<sup>112</sup> Knutsen noted the framework of negligence does not permit the type of circumvention some would suggest an exception to the “but for” analysis provides; see Knutsen, *supra* note 5.

<sup>113</sup> Hypothetically, there is room for multiple agents of harm provided they operate in substantially the same way; see *Fairchild*, *supra* note 23 at para 170 *per* Lord Rodger; Stapleton, “Lords a’leaping,” *supra* note 49 at 296. Though an instance of material contribution, the Court of Appeal in *Bailey v Ministry of Defence*, [2008] EWCA Civ 883 found that lack of care and pancreatitis operated in substantially the same way and resulted in a material contribution to the plaintiff’s harm.

<sup>114</sup> David Mangan, “Seeking a Normative Solution for an Exceptional Circumstance” (2011) 3 J PI L 144 at 149.

the defendant in *Sienkiewicz* argued that the court would equate factual exposure with the defendant's breach of a duty of care without a causal link between the two. There was legitimacy to this concern when considering the facts of *Sienkiewicz*. The evidence established that Greif increased the risk of Costello incurring mesothelioma by 18 per cent; yet Greif was held 100 per cent liable, in spite of the fact that it may not have actually caused the harm. In Canada, the decision in *Athey* may be brought into this discussion; a defendant must be a cause. *Sienkiewicz* extended the point to risk of the harm in question as a way to satisfy the causation analysis. The defendant may adduce evidence to exculpate itself. In the absence of such proof, as noted by Major J in *Athey*, the court can infer that the defendant materially contributed to the plaintiff's harm and so satisfy all aspects of the negligence claim.<sup>115</sup> The fact the Supreme Court of Canada put aside *Sienkiewicz* suggested a step back from *Resurface* where a material increase in risk of harm was discussed.

The probabilistic arguments put forward by the defendant in *Sienkiewicz* may find their way into Canadian facta, if they have not already.<sup>116</sup> Grounded in notions of fairness, these arguments challenged the basis for satisfying causation where the traditional analysis is not employed. The members of the UK bench were critical of the doubling standard<sup>117</sup> in relation to mesothelioma and yet they did not rule out the possible utility of probabilistic arguments.<sup>118</sup> Probabilistic analysis has been viewed as a useful tool for defendants when addressing the reversed burden.<sup>119</sup> What is meant by the doubling of the risk standard<sup>120</sup> may

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<sup>115</sup> Major J in *Athey*, *supra* note 25 at para 18 endorsed the "entrenched" position as stated by Lord Reid in *McGhee*, *supra* note 12 at 1010: "It has always been the law that a pursuer succeeds if he can shew that fault of the defender caused or materially contributed to his injury. There may have been two separate causes but it is enough if one of the causes arose from fault of the defender. The pursuer does not have to prove that this cause would of itself have been enough to cause him injury."

<sup>116</sup> This may be one of the "new considerations" alluded to by the Court with specific reference to toxic torts and statistical probabilities of inducing harm; see *Clements*, *supra* note 1 at para 44.

<sup>117</sup> In *Sienkiewicz*, *supra* note 74 at para 4, the defendant argued that the plaintiff had to establish that Greif was twice as likely to have exposed Costello to asbestos as compared with the level of asbestos generally in the atmosphere.

<sup>118</sup> Lord Phillips endorsed the use of epidemiological evidence in some circumstances; see *ibid* at para 91. Lady Hale wrote in *ibid* at para 170: "I do agree with Lord Rodger that doubling the risk is not an appropriate test of causation in cases to which the *Fairchild* exception does not apply."

<sup>119</sup> Deakin, Johnston and Markesinis, *supra* note 24 at 234.

<sup>120</sup> It was accepted in *Jones v Metal Box Ltd* unreported January 11, 2007 (EWHC) without any discussion of the point.

present its own queries. In *Novartis Grimsby Ltd v Cookson*,<sup>121</sup> this reasoning was utilised where the claimant contracted bladder cancer which could have arisen as a result of workplace asbestos exposure or his own smoking habit. The Court found that the tortious exposure accounted for 70 per cent of the risk of incurring the cancer and so liability was established. For the Court of Appeal, Lady Justice Smith wrote: “In terms of risk, if occupational exposure more than doubles the risk due to smoking, it must, as a matter of logic, be probable that the disease was caused by the former.”<sup>122</sup> Some plaintiffs may be able to meet this standard. The difficulty arises, however, when plaintiffs are unable to do so, especially if they are just shy of such a measurement.<sup>123</sup>

As already noted, the majority of the relevant cases from the UK courts involved workers. This is instructive – Lord Bingham limited the decision in *Fairchild* to this particular area<sup>124</sup> – but not determinative. The authors of *Markesinis and Deakin’s Tort Law*<sup>125</sup> suggested that the potential for employers to bear the cost may explain why the reversal of the burden has been permitted by the courts. Consider also the criteria which Stapleton identified in 2002.<sup>126</sup> The employment view may be a guide to understanding but it is not an exclusive rule because even here the law is not unequivocal, as one of the defendants in *Fairchild* was an occupier and was still found liable. Instead, the principle taken from the cases is one of vulnerability and here it recalls the acknowledged inequality in the employment relationship.<sup>127</sup> Liability was grounded in the fact the worker was placed in a susceptible position which resulted in an injury; only the employing entities had control over the work conditions and so they alone should bear the risk of any harm that came to these individuals during their period of engagement. For this reason, the courts

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<sup>121</sup> [2007] EWCA Civ 1261.

<sup>122</sup> *Ibid* at para 74. It has been aptly noted that there should have been a 30% reduction in damages in this case because it fell outside of the parameters of the *Compensation Act 2006*; see Chris Miller, “Causation in Personal Injury After (and Before) *Sienkiewicz*” (2012) 32 LS 396 at 404. Though not accepted by the Supreme Court, Lady Justice Smith at the Court of Appeal in *Sienkiewicz v Greif (UK) Ltd* [2009] EWCA Civ 1169 at para 23 was prepared to accept this point: “In my view, it must now be taken that, saving the expression of a different view by the Supreme Court, in a case of multiple potential causes, a claimant can demonstrate causation in a case by showing that the tortious exposure has at least doubled the risk arising from the non-tortious cause or causes.”

<sup>123</sup> This difficulty may recall criticisms of medical loss of chance cases in the UK such as *Gregg v Scott* [2005] 2 AC 176 (HL).

<sup>124</sup> *Fairchild*, *supra* note 23 at para 40.

<sup>125</sup> Deakin, Johnston and Markesinis, *supra* note 24 at 225.

<sup>126</sup> Stapleton, “Lords a’leaping,” *supra* note 49 at 292.

<sup>127</sup> *Autoclenz v Belcher* [2011] UK SC 41 at para 35.

have taken a “protective approach.”<sup>128</sup> There are nonetheless boundaries, one noted in *Hull*. In validating a “common sense” argument (distinct from that of Sopinka J in *Snell*), the Court in *Hull* underlined that employees are partners in maintaining the health and safety standards of their employers’ workplaces.<sup>129</sup>

In the UK, science, or more specifically the absence of precision in science, has played a formative role in when the exception is applied. The Supreme Court of Canada has been correct not to limit the use of an exception to the traditional “but for” test exclusively to this area.<sup>130</sup> The *Clements* Court, however, elected to diminish this perspective: “If scientific evidence of causation is not required ... it is difficult to see how its absence can be raised as a basis for ousting the usual ‘but for’ test.”<sup>131</sup> Taking the English cases as an example, science is not looked to as the standard but as a tool to uncovering causation. It appears that the Court has fallen into this situation due to the phrasing of the test in *Resurfice*, particularly the phrase “impossible for the plaintiff to prove.”<sup>132</sup> Confusion stemmed from the plaintiff’s burden of proof<sup>133</sup> which was easily criticised if viewed as a means of assisting plaintiffs in satisfying their cases. It would have appeared as though the courts were arbitrarily bending the rules of causation to assist certain litigants. The more accurate focus is on the impossibility of establishing “but for” causation due to difficulties beyond the plaintiffs’ control where this is the only difficulty for the plaintiff in establishing its case.

A point obscured by the *Clements* Court is that the exception (for better or worse) has been developed to mitigate against a perceived injustice; the plaintiff who establishes before the court the agent of her harm and the sources (where the defendants are in no position to deny their role) is left just short of establishing causation because of factors beyond her control. The exception is not an attempt to bend the rules of negligence to suit a particularly sad set of facts. It recognises that the plaintiff has put her case as best as she could and that any shortcomings are due to the nature of the harm, not any lacking in her legal arguments. The exception’s

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<sup>128</sup> *Trigger*, *supra* note 49 at para 24.

<sup>129</sup> Relevant to this case was the personal hygiene of employees when the work involves food preparation; David Mangan, “But for the Exception” (2009) 20 King’s L J 347 at 351.

<sup>130</sup> *Snell*, *supra* note 6 at para 30.

<sup>131</sup> *Clements*, *supra* note 1 at para 38.

<sup>132</sup> Black and Cheifetz, *supra* note 5 at 249 pinpointed this phrase as problematic.

<sup>133</sup> The decision of the Alberta Court of Appeal in *Hanke v Resurfice Corp*, 2005 ABCA 383, 53 Alta LR (4th) 219 illustrated this; the Court suggested that any time there are multiple potential causes of injury the material contribution test must be used. The Supreme Court identified this error in its decision; see *Resurfice*, *supra* note 2 at para 19.

development has been grounded in fairness.<sup>134</sup> The exception is applied for the reason outlined by Lord Wilberforce in *McGhee*:

And if one asks which of the parties, the workman or the employers, should suffer from this inherent evidential difficulty, the answer as a matter of policy or justice should be that it is the creators of the risk who, *ex hypothesi* must be taken to have foreseen the possibility of damage, who should bear its consequences.<sup>135</sup>

Here again, the comments in *Clements* stand out all the more when compared to those made in *Resurfice*. In the latter decision, the Court accepted these arguments: “In those exceptional cases where these two requirements<sup>[136]</sup> are satisfied, liability may be imposed, even though the ‘but for’ test is not satisfied, because it would offend basic notions of fairness and justice to deny liability by applying a ‘but for’ approach.”<sup>137</sup> Fairness in particular has garnered pointed criticism as a form of retroactive decision-making when the requirement is that “liability is ‘fair’ in the circumstances” and that “a negligent defendant in breach of a duty of care to the plaintiff will always be liable for foreseeable damage.”<sup>138</sup> English jurisprudence assists. The ruling in *Wilsher* acts (for lack of a better phrase) as a control mechanism against the events noted by critics. Considerations of fairness do not inevitably lead to a relaxation of causation standards to the extent that plaintiffs are arbitrarily awarded damages. It should be noted that an exception to the “but for” analysis is only entered into because the courts have accepted the test is not beyond reproach.

#### 4. Adopting Corrective Justice as the “Goal” of Tort Law

Finally, the Supreme Court of Canada wrote in *Clements* of corrective justice in a manner which suggested the presence of the theory in tort law

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<sup>134</sup> Fleming noted the point in his often-cited article, but within the context of the potential for “under-deterrence” where defendants escape liability; see Fleming, *supra* note 73 at 662-63.

<sup>135</sup> *McGhee*, *supra* note 12 at 1012.

<sup>136</sup> It will be recalled that the requirements are that “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;” see *Resurfice*, *supra* note 2 at para 25.

<sup>137</sup> *Ibid.* The point is also made by others; see Andrew Botterell and Christopher Essert, “Normativity, Fairness, and the Problem of Factual Uncertainty” (2009) 47 *Osgoode Hall L J* 663.

<sup>138</sup> Brown, *supra* note 5 at 445.

was obvious.<sup>139</sup> The source identified was the widely known and often-cited book of Ernest Weinrib, *The Idea of Private Law*.<sup>140</sup> High status was accorded as the Court called corrective justice “the theory ... that underlies the law of negligence”<sup>141</sup> and the “anchor” of negligence.<sup>142</sup> The Court defined corrective justice as liability assigned “when the plaintiff and defendant are linked in a correlative relationship of doer and sufferer of the same harm.”<sup>143</sup> The emergence of corrective justice can be seen in how the *Clements* Court seized upon Sopinka J’s interpretation of *McGhee* in *Snell* as having the effect of “compensating plaintiffs where a substantial connection between the injury and the defendant’s conduct is absent.”<sup>144</sup> In *Clements* the Court recalled the need for a “substantial connection” and identified the absence of correlation with a deviation from “the theory of corrective justice that underlies the law of negligence.”<sup>145</sup> This paper does not pursue a critique of the theory but rather explores it within the causation context and is critical of the Court’s adoption of the theory without a more elaborate discussion of the intersection between corrective justice and an exception to the traditional causation analysis. It is worth noting that Weinrib’s influence continues to be significant to critical engagement of private law.<sup>146</sup> To be clear, the fit between corrective justice and an exception to but for causation is not questioned on a substantive basis. Engagement of this topic by advocates of corrective justice is anticipated.<sup>147</sup> An exception to the “but for” test has been a confusing area

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<sup>139</sup> Its endorsement of corrective justice has been uncritically referred to by other Canadian courts; see e.g. *Hogarth v Rocky Mountain Slate Inc.* 2013 ABCA 57, 75 Alta LR (5th) 295 at para 37.

<sup>140</sup> Ernest Weinrib, *The Idea of Private Law* (Oxford: OUP, 1995) [Weinrib, *The Idea*].

<sup>141</sup> *Clements*, *supra* note 1 at para 21.

<sup>142</sup> *Ibid* at para 37.

<sup>143</sup> *Ibid* at para 7.

<sup>144</sup> *Snell*, *supra* note 6 at para 27.

<sup>145</sup> *Clements*, *supra* note 1 at para 21. Though a substantial connection in *Clements* may refer to a balance of probabilities or a material contribution to harm, would it also include a material increase in risk of harm?

<sup>146</sup> Weinrib has more recently reinforced the importance of corrective justice; see Ernest Weinrib, *Corrective Justice* (Oxford: OUP, 2012) [Weinrib, *Corrective Justice*]. A review of this new text (which is largely a collection of previously published essays) is found in Sandy Steel, (2013) 33 Oxford J Legal Stud 607.

<sup>147</sup> Could there be an opening in the idea of freedom from loss? See Weinrib, *Corrective Justice* at 123:

In negligence law, wrongdoing consists in the creation of unreasonable risk. When the plaintiff’s loss is within the ambit of the very risk that renders the defendant’s conduct wrongful, the parties stand to each other as the active and passive poles of the same injustice. Because freedom from this kind of loss is both the content of the plaintiff’s right and the object of the defendant’s duty, the parties are normatively linked through the wrongfulness of the defendant’s risk-creation. Liability then

of Canadian law. The decision of the Supreme Court to proclaim corrective justice as the lens through which to view negligence law is questioned on this basis. Adding the theoretical layer does not readily render the law here more accessible.

Briefly looking at the intersection between corrective justice (according to Weinrib) and an exception to the traditional causation analysis reveals a question as to how well these two concepts may work together. The premise of the theory seems firmly grounded in a bipartite understanding of law. The material contribution test is not necessarily bipartite as there are at least two causal sources of harm and the question is whether the defendant(s)' actions caused the injury. Proportionate liability may be the answer here. The notion of material contribution as expressed in *Athey* spoke to a correlative between conduct and injury, but did not require the conduct to be the sole reason for the injury. If we look at material increase in risk of harm, a difficulty may arise. Corrective justice will not countenance an exception to the "but for" standard where the allegation is only about a risk of harm. Weinrib in fact identified risk of harm as outside of corrective justice:

The argument construes the plaintiff's exposure to risk as the loss that corrective justice corrects. To be sure, exposure to risk, to the extent that it depreciates the value of the body considered as a capital asset, might be considered a factual loss, a change for the worse in the plaintiff's condition. But such loss is an inadequate basis for liability. Corrective justice requires not factual but normative loss consisting in wrongful infringement of the plaintiff's right.<sup>148</sup>

Underlining the point, Weinrib summarised this section of his text as follows:

Accordingly, traditional tort law reflects corrective justice in refusing to treat risk as an independent kind of harm. Risk is always the risk *of something*. In corrective justice, that *something* encompasses the right that defines the plaintiff's claim. Risk refers to the possibility of a normative loss. It is not itself the normative loss.<sup>149</sup>

A bipartite relationship is not as readily found in this area and yet corrective justice is premised on this construct.<sup>150</sup> The essence of the

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obligates the defendant to eliminate the loss wrongfully imposed on the plaintiff, and thus to restore (to the extent that monetary damages can) the freedom from loss which was the plaintiff's original entitlement.

<sup>148</sup> *Ibid* at 157.

<sup>149</sup> *Ibid* at 158 [emphasis in original].

<sup>150</sup> It is hard to contend that with an exception to "but for" the "law ... rectifies [the] injustice by reversing its active and passive roles, so that the doer of injustice

exception is that the plaintiff will not be held to the “but for” analysis for causation, but will rather satisfy the different evidential standard of demonstrating a material contribution to or a material increase in the risk of harm because it was not possible to identify from which source the harm emanated. It would be sufficient to demonstrate that the defendant’s tortious conduct contributed to the injury in some manner beyond the *de minimis* threshold.

The endorsement of corrective justice also stood out for how little the court engaged with the topic in so doing. For example, there are a number of proponents of the theory<sup>151</sup> and while one of the main figures is Weinrib, Coleman is another leading voice.<sup>152</sup> Differences are found between the authors.<sup>153</sup> As well, there are many critics of the theory. The judiciary in the UK has identified considerations other than corrective justice.<sup>154</sup> In his review of Weinrib’s 1995 monograph, Peter Cane noted the author’s “incomplete account of the structure of private law.”<sup>155</sup> He contended that corrective justice does not exhaust the theories or premises behind private law decisions of the judiciary, and “it follows that part of the function of the judge is to make judgments about distribution as well as correction.”<sup>156</sup> Cane also questioned Weinrib’s assertion that the litigation process enacts corrective justice and that courts are agents of the

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becomes the sufferer of the law’s remedy” as stated in *ibid* at 17, because it is not clear, when an exception to the “but for” analysis is applied based on creation of risk, that a defendant is the “doer.”

<sup>151</sup> For example, Allan Beever, *Rediscovering the Law of Negligence* (Oxford: Hart, 2009); Robert Stevens, *Torts and Rights* (Oxford: OUP, 2009).

<sup>152</sup> One example of his work on the topic being *The Practice of Principle* (Oxford: OUP, 2001). To these authors we may add a number of others such as Richard Epstein whose work in the area includes “Causation and Corrective Justice: A Reply to Two Critics” (1979) 8 J Legal Stud 477.

<sup>153</sup> Some of these have been explored in William Lucy, *Philosophy of Private Law* (Oxford: OUP, 2006), as well as in John Gardner “What is Tort Law For? Part I” (2011) 30 Law and Philosophy 1 at 5.

<sup>154</sup> “The truth is that tort law is a mosaic in which the principles of corrective justice and distributive justice are interwoven. And in situations of uncertainty and difficulty a choice sometimes has to be made between the two approaches;” see *McFarlane v Tayside Health Board*, [2000] 2 AC 59 at 82.

<sup>155</sup> Peter Cane, “Corrective Justice and Correlativity in Private Law” (1996) 16 Oxford J Legal Stud 471 at 487. This continues to be a critique of the theory as found in, for example, Gardner, *supra* note 153.

<sup>156</sup> Cane, *ibid* at 480. This may be countered by Weinrib, *Corrective Justice*, *supra* note 146 at 18:

A factor that applies to only one of the parties – for example, the defendant’s having a deep pocket or being in a position to distribute losses broadly – is an inappropriate justification for liability because it is inconsistent with the correlative nature of the liability. Accordingly corrective justice not only rectifies injustice in transactions;

theory.<sup>157</sup> Like Cane, William Lucy also subscribed to a mixed account of the field as opposed to the exclusive focus on corrective justice.<sup>158</sup> Of further importance to the present discussion is the fit between Weinrib's corrective justice and the practice of law.<sup>159</sup>

Prior to *Clements*, an explicit adoption of corrective justice has not been made by the Supreme Court; certainly not to the extent that would suggest it may be passingly referred to as it was in *Clements*. LeBel J has on occasion been a notable proponent of corrective justice underlying tort law. In *Whiten v Pilot Insurance Co* (in a dissenting opinion), he accepted that tort “fulfils diverse functions” but that its “core function” has been corrective.<sup>160</sup> Later he added: the “underlying organizing structure remains grounded in the principle of corrective justice.”<sup>161</sup> A full engagement of the merits and demerits of corrective justice being beyond the scope of this paper, the critique for the present is that reliance on a theory as a singular explanation of tort law without providing some level of discussion regarding its substance, let alone the criticisms levied against the theory, leaves Canadian law on causation in an unfocused state: the vagaries of the material contribution test are to be viewed through the lens of corrective justice.

With *Clements*, the Supreme Court may have been endeavouring to subscribe to corrective justice for a more strategic reason. It may be that the Court was indicating to the Canadian Bar that it is sceptical of exceptions to the “but for” analysis. This would be a strong line to take but it may be borne out of witnessing the challenges faced by the English courts. Another possibility may have been the focus. The Court was seeking to make a critical statement about compensation and loss distribution as a goal of tort law,<sup>162</sup> thereby endorsing corrective justice as a means of

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by structuring the justificatory considerations relevant to transactions, it is also regulative of the notion of injustice that is applicable to them.

<sup>157</sup> A point Weinrib reiterated in his latest work in *ibid* at 3.

<sup>158</sup> Lucy, *supra* note 153.

<sup>159</sup> Stephen Smith raised this critique in his review of *The Idea of Private Law* at (1996) 112 Law Q Rev 363.

<sup>160</sup> 2002 SCC 18, 1 SCR 595 at para 146 [*Whiten*]. He cited as authority for this statement Alan M Linden, *Canadian Tort Law*, 6th ed (Toronto: Butterworths, 1997) at 4-7.

<sup>161</sup> *Whiten*, *ibid* at para 152.

<sup>162</sup> This was the explicit critique of the Alberta Court of Appeal in *Fiala v MacDonald* 2001 ABCA 169, 94 Alta LR (3d) 201 at para 31 [*Fiala*]: “If compensating the injured is the overriding goal of tort law, the legal process becomes rife with fictions leading to the application of legal principles in a results-oriented manner, thereby compromising tort law as a system of corrective justice.” Jonathan Morgan has contributed a lively critique on this point in “Tort, Insurance and Incoherence” (2004) 67

curbing a “compensation culture.”<sup>163</sup> The *Clements* Court’s focus may have been to point out the significant difficulties with exceptions to the “but for” analysis. It may have been assumed that English courts had fallen into the exception’s inherent trap of uncertainty. English courts, though, have written with great concern on this very point.<sup>164</sup> Beyond the special case of mesothelioma, the courts in England contended an exception to the “but for” test also poses difficulties. In *Sinkiewicz*, the Court noted, “Save only for mesothelioma cases, claimants should henceforth expect little flexibility from the courts in their approach to causation.”<sup>165</sup> According to one of the judges of the Court of Appeal who ruled in *Sienkiewicz* (writing extra-judicially), the exception has been relied upon too easily: “If possible, judges should find facts and draw inferences that will enable them to decide the case on a “but for” basis before running for the cover of the *Fairchild* exception.”<sup>166</sup> And so, it is submitted that the *Clements* court was aiming to make this very point: the first recourse when causation problems arise should not be exceptions to the “but for” test, but rather to delve into the matter to determine whether “common sense inferences from fact may suffice.”<sup>167</sup> Unfortunately, this simple point is obstructed by unclear guidance.

### 5. Conclusion

In sum, *Clements* adds nothing to the common law discussion of the “but for” exception. It demonstrated a lack of appreciation for the nuances of the issue. Furthermore, the absence of discussion regarding the adoption of corrective justice as the “goal” of tort law only contributed to the on-going confusion in an already opaque area.

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Mod L Rev 384. As well, the material contribution test may be applied in ways which may be novel and therefore of concern such as *Walsh v Mobil Oil Canada (Exxmobil Canada Ltd.)*, 2012 ABQB 527, 71 Alta LR (5th) 343, where employment law and causation were discussed in relation to loss of income. A similar application in the employment context was found in the UK in *Dickins v O2 Ltd.* [2008] EWCA Civ 1144.

<sup>163</sup> In Canada this critique has been levied by Lewis Klar in “The Role of Fault and Policy in Negligence Law” (1996) 35 Alta L Rev 24, and it was endorsed by the Alberta Court of Appeal in *Fiala*, *ibid* at para 31.

<sup>164</sup> They have also been criticised for the extent to which they have sought to limit the *Fairchild* exception’s impact; see Marc Stauch, “‘Material Contribution’ as a Response to Causal Uncertainty: Time for a Rethink” (2009) 68 Cambridge L J 27.

<sup>165</sup> *Sienkiewicz*, *supra* note 74 at para 187.

<sup>166</sup> Lady Justice Smith, “Causation - the search for principle” (2009) J Personal Injury L 101 at 108. Though not mentioned and perhaps not known to the author, there is a distinct echo of Sopinka J in *Snell* here.

<sup>167</sup> *Clement*, *supra* note 1 at para 38.