FULLOWKA V. PINKERTON'S OF CANADA LTD. AND THE MATERIAL-CONTRIBUTION TEST FOR FACTUAL CAUSATION IN NEGLIGENCE

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On 18 February 2010 the Supreme Court of Canada released its judgment in *Fullowka v. Pinkerton's of Canada Ltd.*[1] In a unanimous decision, the Court canvassed issues including duty and standard of care, factual causation, and the vicarious liability of unions, focusing especially upon duty and standard of care. This case comment examines, in particular, the decision's treatment of factual causation in negligence. I argue that while the reasoning on factual causation is brief, its implicit logic helps reveal the Court's current intent regarding the substance of the material-contribution test for factual causation.

This comment is divided into four parts. In Part I, I describe the case history and facts. In Part II, I outline the material-contribution test for factual causation in negligence and review recent appellant level decisions on the topic. In Part III, I examine the Court's reasons on factual causation in *Fullowka* and their significance for this area of negligence law. Part IV serves as a brief conclusion.

I. FACTS AND CASE HISTORY

Fullowka arose out of events transpiring at the Giant Mine, located 5 km from Yellowknife. This gold mine was first operational in 1948 and was owned by various companies until Royal Oak Mines (Royal Oak) gained control in 1990.[2]

At 8:45 a.m. on 18 September 1992, a violent explosion killed nine miners on the 750-foot level of the mine. Mine workers had been on strike since May of that year.[3] The strike was bitter and led to severe tension in the broader community.[4] Those who perished included both replacement workers hired to continue production during the strike and union members who had returned to work during the strike.[5] A former mine employee, Roger Warren, was convicted of second degree murder in relation to the explosion.[6]

Warren, who had been fired weeks previously following his participation in the strike-related riot of 14 June 1992, accessed the mine through an isolated and unmonitored entrance in the early morning hours of 18 September 1992.[7] He used the ladder system to reach

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1 2010 SCC 5, [2010] 1 S.C.R. 132 [*Fullowka* (S.C.C.)].

2 Indian and Northern Affairs Canada, "History of Giant Mine," online: Indian and Northern Affairs Canada <http://www.ainc-inac.gc.ca/ai/scr/nt/cnt/gm/ab/his/index-eng.asp> ["Giant Mine"].

3 *Fullowka* (S.C.C.), *supra* note 1 at paras. 4-8.

4 For an overview of the strike's divisive effects on the broader community, see the trial judgment: *Fullowka v. Royal Oak Ventures*, 2004 NWTSC 66, [2005] 5 W.W.R. 420 at paras. 4-7 [*Fullowka* (N.W.T.S.C.)].

5 *Fullowka v. Royal Oak Ventures*, 2008 NWTCA 4, 433 A.R. 69 at para. 4 [*Fullowka* (C.A.)].

6 *Fullowka* (N.W.T.S.C.), *supra* note 4 at para. 171.

7 *Fullowka* (C.A.), *supra* note 5 at para. 19. Entrance was made at approximately 2:00 a.m. via an open window: *ibid.* at para. 168.

approximately the 750-foot level. After walking almost one mile underground, Warren used first a front-end loader and then a small electrical locomotive to transport explosives to the bomb site. The bomb detonated when a man car carrying the nine deceased workers triggered it. The bodies were later discovered by James O'Neil, a fellow mine worker.

The families of the deceased workers initiated a civil claim against several defendants, including Royal Oak, as well as a security company, Pinkerton's of Canada Ltd. (Pinkerton's), which Royal Oak had hired to secure the mine during the strike. Other defendants included the Government of the Northwest Territories (GNWT) and the striking workers' union. At the time of the explosion the striking workers were members of the Canadian Association of Smelter and Allied Workers (CASAW), and CASAW Local 4 specifically. In 1994, the CASAW amalgamated with the National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW). The CAW was thus the named union defendant in the suit.[8] Miner O'Neil, who developed post-traumatic stress disorder after witnessing the underground scene, sued the same defendants in a parallel action.

The 1300-paragraph trial judgment was scathing in many places.[9] Justice Lutz of the Northwest Territories Supreme Court ultimately awarded $10.7 million in damages to the surviving family member plaintiffs. The Court's reasons outlined the negligence and liability of Pinkerton's, Royal Oak, the CAW, the GNWT, and several other defendants (including Warren) in their personal capacities. In Lutz J.'s view, the defendants had breached their duties of care, causing foreseeable injuries:

> [A]s the strike unfolded, and as more and more anger and frustration was exhibited, with increased sabotage with near death implications, all known as each occurred, the only reasonable and objective conclusion a reasonable man could reach was that an act such as Warren's would result. The deaths of the miners was but another unlawful act, elevated from earlier unlawful acts involving progressive illegal activities including physical injuries inflicted on persons, death threats, explosions that could have resulted in deaths, property damage, sabotage and the like. Equally important was the perception on the mine site and around town that someone was going to die. In that context, what could be more foreseeable than that as the obvious anger and frustration among the strikers grew as time wore on, a Warren would appear. The "harm that occurred" was a reasonably foreseeable consequence of the cumulative acts of other Defendants, namely, those who I find negligent as delineated in the following sections.[10]

Royal Oak was held to have breached the standard of care on several fronts, including its failure to ensure the occupational health and safety of workers.[11] The conduct of Pinkerton's was also found to be negligent since the company had failed to take reasonable steps to secure the mine premises.[12] The GNWT was found to have been negligent in permitting the

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8 *Fullowka* (N.W.T.S.C.), *ibid.* at para. 199.

9 For example, the Court frames Basil Hargrove of the CAW thusly: "Hargrove, self-described as a person with a significant profile nationally and internationally, asked the Court to accept that, because of his exalted position, he, like Witte, was not fed details of the threats, vandalism and sabotage occurring during the strike and had no time for such minutiae" (*ibid.* at para. 888).

10 *Ibid.* at para. 664.

11 *Ibid.* at para. 744

12 *Ibid.* at paras. 763-64. Pinkerton's was demonstrably unaware of the existence of many mine entrances.

mine to continue operation in the face of the ongoing violence and unsafe mine conditions.[13] The union's conduct was also found to have been negligent, with the trial court holding that the local charter and national organization had failed to control union members, and indeed failed to condemn the strike-related violence.[14] All such defendents' respective negligence was held to have materially contributed to the plaintiffs' losses.[15] The plaintiffs' damages were not deemed to be excessively remote and Warren's act did not break the chain of causation.[16] In other words, Lutz J. found that the tests for both factual and legal causation had been met.

The trial decision was appealed to the Northwest Territories Court of Appeal. Royal Oak eventually settled with the plaintiffs and abandoned its appeal[17] but the other defendants maintained the appeal action. In May 2008, the Court of Appeal reversed the trial decision on several grounds. It held that, due to a lack of proximity, no general duty of care existed that would permit liability to be imposed upon the appellants in relation to Warren's act.[18] In addition to holding that there was no duty of care, the Court said that the trial judge had used the wrong test for factual causation by unjustifiably using the material-contribution test rather than the but-for test.[19] The Court further differed from the trial judge by concluding that the national union had a separate identity from the local chapter of the union, meaning that the CAW, as a national organization, was not directly liable for the local chapter's conduct.[20]

The surviving family members then appealed to the Supreme Court of Canada, which differed from the Court of Appeal on a number of fronts, but ultimately still denied the plaintiffs recovery. After outlining detailed reasons,[21] the Supreme Court found that both Pinkerton's and the GNWT *did* have a duty of care to the plaintiffs in connection with the explosion and the miners' deaths.[22] Unlike the trial judge, though, the Supreme Court held that there had not been a breach of the standard of care by either Pinkerton's or the GNWT.[23] Echoing the views of the Court of Appeal, the Supreme Court furthermore held that CAW National was a separate legal entity from the local union chapter, in effect insulating CAW National from potential liability for the actions of CASAW Local 4.[24]

The Supreme Court's decision presents fuel for commentary on various levels, including the Court's treatment of the duty of care and standard of care in negligence,[25] and in particular for how it found that seeking legal advice may protect a defendant from a finding

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13 *Ibid.* at para. 838.
14 *Ibid.* at para. 896.
15 On Pinkerton's, see *ibid.* at paras. 765-66; on the GNWT, see paras. 840-41; on the CAW, see paras. 899-901; on Royal Oak, see para. 747.
16 *Ibid.* at para. 664.
17 *Fullowka* (C.A.), *supra* note 5 at para. 29.
18 *Ibid.* at para. 100.
19 *Ibid.* at para. 205.
20 *Ibid.* at para. 143.
21 *Fullowka* (S.C.C.), *supra* note 1 at paras. 16-75.
22 On Pinkerton's, see *ibid.* at para. 30; on the GNWT, see para. 55.
23 On Pinkerton's, see *ibid.* at para. 79; on the GNWT, see para. 90.
24 *Ibid.* at paras. 121-22. Furthermore, CAW National was neither jointly nor vicariously liable for the union members' actions (at paras. 141-55).
25 Daniel Del Gobbo, "No Relief for Victims of the Giant Mine Disaster, Top Court Rules" *The Court* (23 February 2010), online: The Court <http://www.thecourt.ca/2010/02/23/no-relief-for-victims-of-the-giant-mine-disaster-top-court-rules/>.

of a breach of the standard of care.[26] Rather than examining duty and standard of care, however, this comment explores the Court's treatment of factual causation in negligence, and of the material-contribution test in particular.

II. THE MATERIAL-CONTRIBUTION TEST FOR FACTUAL CAUSATION IN NEGLIGENCE

If established as a finding of fact, factual causation links a defendant's negligent act to the loss or injury suffered by the plaintiff, thereby permitting tort compensation. The but-for test is regarded as the primary test for factual causation in Canadian law.[27] This test queries whether the plaintiff's injury would have occurred without the defendant's negligent conduct. The plaintiff has the burden of establishing factual causation on a balance of probabilities.[28]

Alternative approaches to the but-for test have arisen because, in some situations, the test simply does not function, either to be "fair"[29] or to establish causation, when there are multiple sufficient causes apparent on the facts.[30] The inadequacy of placing the full burden of establishing factual causation on the plaintiff in all circumstances has been evident in Canadian law since the Supreme Court's 1951 decision in *Cook v. Lewis*.[31] This case saw the onus of disproving causation (or more specifically of establishing either a lack of negligence or intent) shift to the defendant in situations where the plaintiff had established that the tort was caused by at least one member of a closed group of actors.[32]

The inadequacy of the but-for test was also addressed in the early 1970s by the U.K. House of Lords in *McGhee v. National Coal Board*.[33] The plaintiff, a former brick kiln employee, argued that his working conditions were to blame for his dermatitis. Expert witnesses supported the view that his working conditions had increased the risk of contracting this disease, but they were unable to conclude, as a fact, that without such working conditions the plaintiff would not have developed his illness. The perceived unfairness of placing the full burden of establishing factual causation according to the but-for test on the plaintiff in such circumstances led to the presentation of two alternative approaches in this judgment. Lord Reid reasoned that where a defendant materially increases the risk of a particular injury, and this injury is then experienced by the plaintiff, factual

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26 Neil Wilson, "Using Legal Advice as a Shield from Liability: *Fullowka v. Pinkerton's of Canada Ltd.*" *The Court* (11 March 2010), online: The Court <http://www.thecourt.ca/2010/03/11/using-legal-advice-as-a-shield-from-liability-fullowka-v-pinkertons-of-canada-ltd/>. The Supreme Court held that, in seeking and following legal advice, the GNWT had met the applicable standard of care. Specifically, the acting Chief Mine Inspector (of the Mine Safety Division) had sought and received legal advice from the office of the acting Deputy Minister of Justice: *Fullowka* (S.C.C.), *supra* note 1 at paras. 86-90.

27 *Resurfice Corp. v. Hanke*, 2007 SCC 7, [2007] 1 S.C.R. 333 at para. 21 [*Resurfice*].

28 See e.g. *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para. 13 [*Athey*].

29 Referring to the need for an alternative approach to factual causation in some circumstances, the Supreme Court writes that "it would offend basic notions of fairness and justice to deny liability by applying a 'but for' approach": *Resurfice*, *supra* note 27 at para. 25.

30 For instance, if two people (perhaps named Bob and Bill) negligently and independently start different fires, and these fires conjoin and lead to damage, the but-for test will not function to establish causation as regards each individual fire starter. The but-for test will fail for both Bob and Bill's actions individually because the fire would have still happened even if one of them had not acted. The problem of multiple sufficient tortious causes relates to an innovative market share liability approach introduced in the U.S. through case law concerning the effects of diethylstilbestrol (DES): see e.g. *Sindell v. Abbott Laboratories*, 607 P.2d 924 (Cal. Sup. Ct. 1980) [*Sindell*].

31 [1951] S.C.R. 830 at 839 [*Cook*].

32 *Ibid.*

33 [1972] UKHL 7, [1973] 1 W.L.R. 1 [*McGhee*].

causation is established.[34] Lord Wilberforce reasoned that where the defendant materially increases the risk of a particular injury, and that injury is suffered by the plaintiff, the onus shifts to the defendant to disprove causation.[35]

The U.K. materially-increased risk approach to factual causation, dating from *McGhee*, has evolved over the decades to the so-called *Fairchild* exception, nuanced by the House of Lords in *Barker v. Corus UK Ltd.*[36] The Supreme Court of Canada elected not to affirm the materially-increased risk approach to factual causation within Canadian law in the 1992 decision of *Snell v. Farell*, choosing instead to conceptualize the but-for test as one that is sufficiently flexible to function fairly, even in cases of scientific uncertainty.[37]

In 1996, however, in *Athey*, the Supreme Court of Canada presented an alternative to the but-for test for factual causation, termed the material-contribution test, although little was said to describe the test other than how it was met in cases where the defendant's negligence was more than a *de minimis* cause of the plaintiff's injury, or that the defendant's conduct was a necessary condition for the plaintiff's loss.[38] In *Walker Estate v. York Finch General Hospital*, echoing *Athey*, the Supreme Court again discussed the material-contribution test, stating that a cause that met the material-contribution test was one that was more than a *de minimis* cause, and that such a cause was a sufficient rather than necessary condition for the plaintiff's loss.[39] In *Athey*, the material-contribution test was presented as an alternative to be turned to when the but-for test was "unworkable," without further describing this term.[40] In *Walker*, the material-contribution test was presented as being unworkable in cases of multiple causes,[41] albeit without distinguishing between scenarios of multiple insufficient causes (when the but-for test will work), and scenarios of multiple sufficient causes (when the but-for test will not work to identify, in isolation, the various potential causes).[42]

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34 *Ibid.* at 5. Lord Reid wrote that "[f]rom a broad and practical viewpoint I can see no substantial difference between saying that what the defender did materially increased the risk of injury to the pursuer and saying that what the defender did made a material contribution to his injury."

35 *Ibid.* at 6. Lord Wilberforce wrote:

> First, it is a sound principle that where a person has, by breach of a 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. Secondly, from the evidential point of view, one may ask, why should a man who is able to show that his employer should have taken certain precautions, because without them there is a risk, or an added risk, of injury or disease, and who in fact sustains exactly that injury or disease, have to assume the burden of proving more: namely, that it was the addition to the risk, caused by the breach of duty, which caused or materially contributed to the injury? In many cases, of which the present is typical, this is impossible to prove, just because honest medical opinion cannot segregate the causes of an illness between compound causes.

36 [2006] UKHL 20, [2006] 2 A.C. 572. See also *Fairchild v. Glenhaven Funeral Services Ltd.*, [2002] UKHL 22, [2003] 1 A.C. 32; *Wilsher v. Essex Area Health Authority*, [1987] UKHL 11, [1988] 1 A.C. 1074. See generally Jane Stapleton, "Lords a'Leaping Evidentiary Gaps" (2002) 10 Torts Law Journal 276.

37 [1990] 2 S.C.R. 311 at 328 [*Snell*]. In *Snell*, the Supreme Court of Canada encouraged judges to take a "robust and pragmatic approach" to the facts and opined that where there is limited scientific evidence of causation, judges may make a conclusive inference of factual causation (at 330).

38 *Athey*, *supra* note 28 at para. 15. See generally Mitchell McInnes, "Causation in Tort Law: Back to Basics at the Supreme Court of Canada" (1997) 35 Alta. L. Rev. 1013. See also Dennis Klimchuk & Vaughan Black, "A Comment on *Athey v. Leonati*: Causation, Damages and Thin Skulls," Case Comment, (1997) 31 U.B.C. L. Rev. 163.

39 2001 SCC 23, [2001] 1 S.C.R. 647 at para. 88 [*Walker*]. The Court noted that "the question in cases of negligent donor screening should not be whether the CRCS's conduct was a necessary condition for the plaintiffs' injuries using the 'but-for' test, but whether that conduct was a sufficient condition."

40 *Athey*, *supra* note 28 at para. 15.

41 *Supra* note 39 at para. 87.

42 See *supra* note 30 and accompanying text.

There were two main problems with the material-contribution test as it stood after *Athey* and *Walker*. First, there was arguably insufficient descriptive guidance offered as to when it was applicable.[43] Second, the substance of the material-contribution test was not adequately distinguished from the default but-for test. While the Court described causes that would meet the material-contribution test as those that exceeded the *de minimis* threshold, it was unclear analytically how such causes differed from those that could be found using the but-for test, considering that the but-for test permitted judicial inferences, including those involving a robust and pragmatic approach to the facts.

In other words, as is evident in the Supreme Court's reasoning in *Athey*, factual causation according to both the but-for and material-contribution tests remained a query with a binary answer.[44] Either the careless conduct was found to be a cause of the plaintiff's loss, or it was not. Under both the but-for and the material-contribution tests, factual causation was not permitted to exist in shades of grey. This differed from the reasoning of the House of Lords in *McGhee*, which presented options that were marked alternatives to the "yes or no" approach to plaintiff proven causation seen in the but-for and *Athey* material-contribution tests. These alternative approaches to factual causation took the form of either a policy-driven presumption (per Lord Reid) or a policy-driven onus shift (per Lord Wilberforce). The Canadian alternative to the but-for test, unlike the U.K. alternative, did not overtly explain how the burden on the plaintiff was actually lighter under the material-contribution test than under the but-for test.

In 2007, in *Resurfice*, the Supreme Court of Canada sought to clarify the material-contribution test. The core of the Court's reasoning included the following:

> [T]he law has recognized exceptions to the basic "but for" test, and applied a "material contribution" test. Broadly speaking, the cases in which the "material contribution" test is properly applied involve two requirements.
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> First, it must be impossible for the plaintiff to prove that the defendant's negligence caused the plaintiff's injury using the "but for" test. The impossibility must be due to factors that are outside of the plaintiff's control; for example, current limits of scientific knowledge. Second, it must be clear that the defendant breached a duty of care owed to the plaintiff, thereby exposing the plaintiff to an unreasonable risk of injury, and the plaintiff must have suffered that form of injury. In other words, the plaintiff's injury must fall within the ambit of the risk created by the defendant's breach. *In those exceptional cases where these two requirements are satisfied, liability may be imposed*, even though the "but for" test is not satisfied, because it would offend basic notions of fairness and justice to deny liability by applying a "but for" approach.[45]

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[43] For instance, Vaughan Black and David Cheifetz commented in 2007 that "[t]wo important questions have reigned since the approval of the material-contribution test: when is that test available and what is its content? Neither *Athey* nor subsequent decisions adequately answer these two questions": "Through the Looking Glass, Darkly: *Resurfice Corp. v. Hanke*," Case Comment, (2007) 45 Alta. L. Rev. 241 at 245.

[44] *Athey*, *supra* note 28 at paras. 42-45. In this case, the trial judge's finding that the negligence was a 25 percent cause of the loss was corrected to a holding that the negligence materially contributed to the loss.

[45] *Resurfice*, *supra* note 27 at paras. 24-25 [emphasis added]. See generally Black & Cheifetz, *supra* note 43. See also Russell Brown, "Material Contribution's Expanding Hegemony: Factual Causation After *Hanke v. Resurfice Corp.*," Case Comment, (2007) 45 Can. Bus. L.J. 432.

While this reasoning appeared to nuance the application of the material-contribution test in Canadian law, it actually created significant ambiguity. This was because the reasoning did not specify whether the two requirements — impossibility and injury within the ambit of negligently created risk — now *were* the components of material-contribution test, or whether these two requirements were prerequisite questions to be answered in the affirmative before the "old" *Athey* and *Walker* material-contribution test could then be applied. In writing that "[i]n those exceptional cases *where these two requirements are satisfied, liability may be imposed,*"[46] the Court left open a possible interpretation which would find that the material-contribution test itself is satisfied when these two requirements are met.

In other words, *Resurfice* did not spell out which interpretation was most accurate between the following two options:

(1) The two requirements were actually the new material-contribution test.

(2) The two requirements were the threshold criteria, but did not remove the need for factual causation to be established via the material-contribution test as presented in *Athey* and *Walker*.

It thus would have been useful for the Supreme Court to specify whether the fulfillment of these two requirements created a presumption of factual causation, as compared with a second interpretation that would require them to be met prior to applying the material-contribution test.

Perhaps as a result of the Supreme Court not specifying how the two *Resurfice* criteria related to the earlier test from *Athey* and *Walker*, a divergence in appellate court views of the material-contribution test has arisen.

At the Alberta Court of Appeal, option one appears to have been favoured. Five cases post-*Resurfice* have addressed the material-contribution test.[47] The most comprehensive interpretation of the test is found in *Nattrass*, in which the Court regarded the meaning of "material-contribution" as proposed in *Resurfice* to be wholly different from the meaning of "material-contribution" as seen in *Athey*. The Court wrote:

> The term "material contribution" here is used to describe different legal rules.
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> *Athey* is the multiple causes precedent, and it confirms that the tort cause need not be the sole cause, so long as it "materially contributes". In *Athey*, the Supreme Court of Canada confirmed that in multiple cause cases the law does not apportion among causes. The Supreme Court of Canada placed a *de minimis* limit on the

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[46] *Resurfice*, *ibid.* at para. 25 [emphasis added].

[47] *Ball v. Imperial Oil Resources Ltd.*, 2010 ABCA 111, 477 A.R. 251 at para. 69 [*Ball*] (found that the evidence before the trial judge had in fact established factual causation according to the but-for test, despite the trial judge's seeming use of the material-contribution test); *Crooked Post Shorthorn v. Masterfeeds Inc.*, 2010 ABCA 106, 477 A.R. 280 at paras. 32-35 [*Crooked Post*] (affirmed trial finding that the *Resurfice* "ambit of risk" requirement was not met); *Nattrass v. Weber*, 2010 ABCA 64, 477 A.R. 292 at paras. 43-59 [*Nattrass*] (the requirement of impossibility was not met); *Carrier v. Wan*, 2008 ABCA 318, [2008] A.J. No. 1033 at paras. 6-7 (QL) [*Carrier*] (no reference to the *Resurfice* criteria); *Bowes v. Edmonton (City of)*, 2007 ABCA 347, 425 A.R. 123 at paras. 227-30 [*Bowes*] (*Resurfice* criteria are treated as sufficient in themselves to establish factual causation).

> implication of the tort cause by saying it must at least "materially contribute" to the loss to be part of the legal equation.
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> In *Resurfice* the Supreme Court of Canada confirmed that the "but for" test is the presumptive legal test, and confirmed an exception where it is impossible for the plaintiff to prove causation to the "but for" standard. Unfortunately that exceptional rule is also called "materially contributes", leading to potential confusion. In *Athey*, de minimis or "non-material contribution" is an exception to liability where several causes contribute to the damage. It could be described as a type of de minimis defence or limit on liability. In *Resurfice*, "material contribution" is an exceptional alternative standard of proof that can sometimes be used to prove causation.[48]

Other Alberta appeal cases appear to accord with this reasoning, viewing the material-contribution test as being fully satisfied when both criteria are met,[49] and not requiring that the negligent conduct also be more than a *de minimis* cause.[50]

The British Columbia Court of Appeal[51] has employed largely the same approach[52] and explicitly regards the *Resurfice* material-contribution test to be a different principle from the material-contribution test outlined in *Athey* and *Walker*.[53] It regards the *Resurfice* material-contribution test as fulfilled entirely when the two *Resurfice* criteria are met, since the test "is a policy-driven rule of law designed to permit plaintiffs to recover in such cases despite their failure to prove causation."[54]

In contrast to these courts, the Ontario Court of Appeal has not openly distinguished the *Resurfice* material-contribution test from the material-contribution test in *Athey* and *Walker*.[55] Instead, several cases have not regarded *Resurfice* as having fundamentally changed the law

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48 *Nattrass*, *ibid*. at paras. 45-47.

49 None of the Alberta Court of Appeal cases cited in *supra* note 47 refer to the *de minimis* requirement from *Athey* as needing fulfillment alongside the two *Resurfice* requirements.

50 For an example of the two *Resurfice* criteria as being sufficient to establish factual causation, see *Bowes*, supra note 47 at para. 230.

51 See e.g. *MacDonald (Litigation guardian of) v. Goertz*, 2009 BCCA 358, [2009] 12 W.W.R. 10 at para. 23 [*MacDonald*] (found that the trial judge had established factual causation according to the but-for test); *Bohun v. Segal*, 2008 BCCA 23, 289 D.L.R. (4th) 614 at para. 53 [*Bohun*] (the impossibility requirement does not equate to a failure to meet the but-for test); *Sam v. Wilson*, 2007 BCCA 622, [2008] 6 W.W.R. 91 at para. 111 [*Sam*] (but-for test applies); *Seatle (Guardian ad litem of) v. Purvis*, 2007 BCCA 349, 68 B.C.L.R. (4th) 288 at para. 70 [*Purvis*] (impossibility requirement not met); *B.S.A. Investors Ltd. v. Mosly*, 2007 BCCA 94, 283 D.L.R. (4th) 220 at para. 45 [*B.S.A. Investors*] (impossibility requirement not met); *Hutchings v. Dow*, 2007 BCCA 148, [2007] 5 W.W.R. 264 at para. 20 (found that the trial judge had established factual causation according to the but-for test); *Jackson v. Kelowna General Hospital*, 2007 BCCA 129, 277 D.L.R. (4th) 385 at para. 22 [*Jackson*] (lack of evidence to ground causation finding according to either test and impossibility requirement not met).

52 In fact, the British Columbia Court of Appeal approach predates that of the Alberta Court of Appeal in *Nattrass*, *supra* note 47. See *Sam*, *ibid.*

53 See e.g. *MacDonald*, *supra* note 51 at paras. 16-21.

54 *Ibid.* at para. 17. See also *Sam*, *supra* note 51 at para. 109.

55 See e.g. *Frazer v. Haukioja*, 2010 ONCA 249, 317 D.L.R. (4th) 688 at para. 42 [*Frazer*] (two *Resurfice* criteria not met but causation established via the but-for test); *Bafaro v. Dowd*, 2010 ONCA 188, 260 O.A.C. 70 at paras. 36-37 [*Bafaro*] (second *Resurfice* requirement for deviating from the but-for test was not met); *Fisher v. Atack*, 2008 ONCA 759, 242 O.A.C. 164 at para. 53 [*Fisher*] (material-contribution test is an exceptional approach applicable only where the *Resurfice* requirements are met); *Monks v. ING Insurance Co. of Canada*, 2008 ONCA 269, 90 O.R. (3d) 689 at paras. 91-92 [*Monks*] (upheld trial level application of the *Athey* material-contribution test without reference to the *Resurfice* criteria); *Moore v. Wienecke*, 2008 ONCA 162, 90 O.R. (3d) 463 at para. 27 (trial judgment consistent with but-for test); *Barker v. Montfort Hospital*, 2007 ONCA 282, 278 D.L.R. (4th) 215 at para. 53 [*Barker*] (impossibility requirement not met).

of causation from *Walker*[56] but, rather, as qualifying when the existing material-contribution test may be used.[57] In this way, Ontario favours an understanding of the *Resurfice* criteria similar to option two above. That is, that the two criteria are prerequisites to applying the material-contribution test.

III. FACTUAL CAUSATION AFTER *FULLOWKA V. PINKERTON'S OF CANADA LTD.*

While *Fullowka* did not explicitly clarify the Supreme Court of Canada's preference between these two contrasting readings of *Resurfice*, it arguably shows support for the second interpretation, which holds that the two criteria alone are not the exhaustive content of the material-contribution test. This is evident from how the Supreme Court regarded the trial court as having (erroneously) applied the material-contribution test.[58] Since the Court treated the trial judgment as being an application of the material-contribution test, the Court cannot simultaneously intend for the two *Resurfice* criteria to now wholly constitute the material-contribution test. In other words, the Court's treatment of the material-contribution test in *Fullowka* does not suggest that the *Resurfice* material-contribution test was meant to be distinct from the material-contribution test presented in *Athey* and *Walker*. In *Fullowka*, the Supreme Court writes in a manner that suggests that the *Resurfice* criteria are prerequisite questions to be answered before the full material-contribution test:

> As [*Resurfice*] made clear, the sorts of *special situations for which the material contribution test is reserved* generally have two characteristics. First, it is impossible for the plaintiff to prove that the defendant's negligence caused the injury under the "but for" test, and second, it is clear that the defendant breached a duty of care owed to the plaintiff and thereby exposed the plaintiff to an unreasonable risk of injury of the type which the plaintiff ultimately suffered. This case has neither of these characteristics.[59]

If the Supreme Court had instead wished for an option one reading to prevail, it might have held something different, along the lines of the following:

> The trial judge in this decision did not have the benefit of our judgment in *Hanke v. Resurfice*. Following that decision, a plaintiff is presumed to establish factual causation under the material-contribution test if the plaintiff establishes that it is impossible to use the but-for test, and that the loss experienced was within the

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56 For example, the Court in *Monks*, *ibid.* at para. 86, wrote: "I do not understand *Resurfice* to alter the basic causation principles that I have described." In a similar vein, in the earlier case of *Barker*, *ibid.* at para. 51 [citations omitted, emphasis added], the Court noted: "Subsequent to the hearing of this appeal, the Supreme Court of Canada released its decision in *Resurfice v. Hanke*. As set out by the Chief Justice in her reasons at para. 20, *this decision simply asserted "the general principles that emerge[d] from the cases." It did not alter the state of the law on causation*."

57 See e.g. *Fisher*, *supra* note 55 at para. 53 (the material-contribution test is available if *Resurfice* criteria are met).

58 Providing slight illumination, the Supreme Court of Canada cites *Athey* and *Resurfice* alongside one another on the issue of exceptions to the but-for test:

> I agree with the Court of Appeal that the trial judge applied the wrong legal test for causation. When he wrote his reasons in 2004, the trial judge did not have the advantage of this Court's judgment in *Resurfice Corp. v. Hanke*. That decision clarified the law of causation, holding that absent special circumstances, the plaintiff must establish on the balance of probabilities that the injury would not have occurred but-for the negligence of the defendant: *Hanke*, at paras. 21-22; *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para. 14.

Fullowka (S.C.C.), *supra* note 1 at paras. 93-94 [citation omitted].

59 *Ibid.* at para. 95 [citations omitted, emphasis added].

> ambit of the risk negligently created. The trial judge did not have the benefit from this new approach to the material-contribution test for factual causation.

The Supreme Court thus took an approach that shared the implicit assumptions of the Ontario cases concerning *Resurfice*.[60] Unlike the British Columbia or Alberta Courts of Appeal, the Supreme Court did not present the material-contribution test as a policy-driven presumption[61] that finds causation if impossibility and ambit of risk are established. Instead, these two *Resurfice* requirements must be met before the material-contribution test can apply. By this rationale, the material-contribution test remains a test that somehow lowers the threshold of proof from that required under the but-for test, but still requires the plaintiff to establish that the defendant's negligence was more than a *de minimis* cause of the plaintiff's loss, as was the approach in *Athey* and *Walker*.

There are two downsides to the Supreme Court's treatment of the material-contribution test in *Fullowka.* First, the policy-exception (option one) approach, which was not adopted by the Supreme Court, was useful because it explicitly outlined how the material-contribution test was easier for plaintiffs to use successfully as compared with the but-for test. Conversely, with the current Supreme Court approach, the material-contribution test remains vague regarding precisely how a materially-contributing cause is different from a regular cause.[62] It does not explain exactly how a *de minimis* cause differs from a cause that is found using a robust and pragmatic approach to the facts. Quite helpfully, in my view, the option one approach presented a version of the material-contribution test that clearly differed in substance from the but-for test. However, under the option two approach, preferred by the Supreme Court, the substance of a materially-contributing cause remains as undefined today as it was following *Athey* and *Walker*.

The second downside to the *Fullowka* treatment of the material-contribution test is that it arguably leaves the impossibility requirement from *Resurfice* quite vague. In *Fullowka,* the Supreme Court hastily addresses the requirement of impossibility.[63] The description of impossibility from *Resurfice* itself presents *Cook* and *Walker* as instructive examples,[64] but does not contain contrasting examples of when the impossibility requirement is not met. Not unlike the Supreme Court in *Fullowka*, some post-*Resurfice* trial and appellate level judgments have established a failure to meet the impossibility requirement through quite brief

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60 See e.g. *Fisher*, *supra* note 55 at para. 53.

61 See *MacDonald*, *supra* note 51 at paras. 16-21.

62 The commonality between a but-for cause and a materially-contributing cause is highlighted by the following statement from the Manitoba Court of Queen's Bench in *Hisco v. Stitz*, 2008 MBQB 45, 224 Man. R. (2d) 252 at para. 93 [*Hisco*]: "In the end, however, it doesn't matter whether the but for test is applied or the easier test of material contribution. They both require that a connection be established between the wrongful conduct and the damage claimed." In the same paragraph, the Court notes that "[o]ne can quibble about the distinction between material contribution and substantial connection but the fact remains that there has to be some connection as a minimum starting point."

63 The Court writes that "[i]t was not impossible to prove causation to the "but for" standard. The appellants' submissions in effect demonstrate this: their primary position is that they did so and the trial judge found that they had": *Fullowka* (S.C.C.), *supra* note 1 at para. 95.

64 *Resurfice*, *supra* note 27 at paras. 27-28.

reasoning.[65] Conversely, some judgments have been more comprehensive regarding impossibility and courts have sought to elaborate upon the meaning of this term.[66] When the Supreme Court of Canada next addresses the material-contribution test for factual causation in negligence, perhaps the Court will build upon such elaborations and describe the impossibility requirement in greater detail;[67] such guidance would help to ensure, in the interests of fairness,[68] that this test is made available to plaintiffs in appropriate situations.[69]

One advantage of more concretely delineating the scope of the impossibility requirement is that trial level courts will be able to use the material-contribution test in suitable circumstances with more confidence that their use of this test will not then be successfully appealed.[70] The choice of whether or not to use the material-contribution test is a question of law, a decision that may be much more easily overturned than a finding of fact.[71] Guidance as to when the test applies will ensure that the material-contribution test is a viable alternative to the but-for test available to appropriate plaintiffs.

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65 See e.g. *Dickson v. Pinder*, 2010 ABQB 269, [2010] A.J. No. 445 at para. 266 (QL); *Forde v. Inland Health Authority*, 2010 BCSC 91, [2010] B.C.J. No. 115 at para. 187 (QL); *Empire Life Insurance v. Krystal Holdings* (2008), 53 B.L.R. (4th) 234 at para. 173 (Ont. Sup. Ct. J.); *Anderson v. British Columbia*, 2008 BCSC 41, 61 M.V.R. (5th) 240 at para. 38; *Tonizzo v. Moysa*, 2007 ABQB 245, [2007] A.J. No. 430 at para. 194 (QL); *Frazer*, *supra* note 55 at para. 42.

66 *Polovnikoff v. Banks*, 2009 BCSC 750, [2009] B.C.J. No. 1128 at para. 286 (QL); *Sicard v. Sendziak*, 2008 ABQB 690, [2009] W.W.R. 162 at para. 165; *Frazer v. Haukioja* (2008), 58 C.C.L.T. (3d) 259 at para. 222 (Ont. Sup. Ct. J.); *Isildar v. Rideau Diving Supply*, [2008] O.J. No. 2406 at para. 543 (Sup. Ct. J.) (QL); *Farrant v. Laktin*, 2008 BCSC 234, [2008] B.C.J. No. 320 at para. 94 (QL); *Ruffle v. Canada (A.G.)*, 2007 BCSC 1264, [2007] B.C.J. No. 2147 para. 43 (QL) [*Ruffle*]; *Lyon v. Ridge Meadows Hospital and Health Care Centre*, 2007 BCSC 1000, [2007] B.C.J. No. 1516 at paras. 28-29 (QL); *Marszalek Estate v. Bishop*, 2007 BCSC 324, 46 C.C.L.T. (3d) 168 at para. 179.

67 For one excellent classification of impossibility scenarios see Erik S. Knutsen, "Clarifying Causation in Tort" (2010) 33 Dal. L.J. 153. See especially Section IV: "When Is 'But For' Unworkable?: Circular and Dependency Causation."

68 *Resurfice*, *supra* note 27 at para. 25.

69 As a side note, it appears that the impossibility requirement is more often than not found by courts to *not* be met in the cases before them. Indeed, the material-contribution test has arguably not been widely applied post-*Resurfice*. Appellate level cases that have found the impossibility requirement to have not been met include the following: *Nattrass*, *supra* note 47; *Bohun*, *supra* note 51; *Purvis*, *supra* note 51; *B.S.A. Investors*, *supra* note 51; *Jackson*, *supra* note 51; *Frazer*, *supra* note 55; *Barker*, *supra* note 55; *Fullowka* (C.A.), *supra* note 7. At the appellate level it appears that, as of May 2010, only one case has found the impossibility requirement to be met, although this claim failed on other grounds: see *Bowes*, *supra* note 47. As of May 2010, only nine trial level cases post-*Resurfice* appear identifiable in which the material-contribution test was found to be applicable, and where this finding was not successfully appealed: *Clements (Litigation guardian of) v. Clements*, 2009 BCSC 112, [2009] B.C.J. No. 166 at para. 67 (QL); *Randhawa v. Hwang*, 2008 BCSC 435, 64 M.V.R. (5th) 205 at para. 23; *Hisco*, *supra* note 62 at para. 93 (*Resurfice* requirements met but not more than a *de minimis* cause); *Preston v. Chow*, 2007 MBQB 318, [2008] 3 W.W.R. 47 at para. 175; *Zazelenchuk v. Kumleben*, 2007 ABQB 650, 430 A.R. 294 at para. 149; *Mainland Sawmills Ltd. v. U.S.W., Local 1-3567*, 2007 BCSC 1433, 52 C.C.L.T. (3d) 161 at para. 186; *Ruffle*, *supra* note 66 at para. 43; *Nash v. MacDougall*, 2007 BCSC 563, [2007] B.C.J. No. 838 at para. 68 (QL) (*Blackwater* rather than *Resurfice* criteria applied); *Greenall v. MacDougall*, 2007 BCSC 339, [2007] B.C.J. No. 486 at para. 39 (QL) (*Blackwater* rather than *Resurfice* criteria applied).

70 Reversals of trial level applications of the material-contribution test post-*Resurfice* include the following: *Nattrass*, *ibid.*; *Bohun*, *ibid.*; *B.S.A. Investors*, *ibid.*; *Frazer*, *ibid.* (material-contribution test is not to be applied after but-for test analysis); *Fullowka* (C.A.), *supra* note 7.

71 For a reversal of a finding of fact, a palpable and overriding error must be found: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 at para. 4.

IV. CONCLUSION

The Supreme Court's treatment of the material-contribution test in *Fullowka* suggests that the *Resurfice* criteria are not the exclusive content of the material-contribution test, but rather that the test as it was described in *Athey* and *Walker* must still be applied after these two criteria are met. *Fullowka* also underscores that the test to establish factual causation, in all but rare circumstances, is the but-for test.

Although the reasoning on factual causation is brief in *Fullowka* it does have significant ramifications for the law of factual causation in negligence. Importantly, in following the approach of Ontario rather than the Alberta or British Columbia Courts of Appeal, the decision suggests that trial courts should use caution in their reference to the words "material" or "contributing."[72] Unless trial courts undergo a thorough analysis of the two prerequisite *Resurfice* criteria they should avoid giving the impression of applying any test other than the but-for test for factual causation. Courts that do so place their judgments at risk of appeal on the basis of the wrong choice of factual causation test.

Another result of *Fullowka* is that the law remains under-clarified with respect to when the material-contribution test is to be applied, including when use of the but-for test is impossible. Without increased guidance with respect to the impossibility requirement, and the *Resurfice* material-contribution test generally, there is a risk of a lack of judicial use of this otherwise laudable legal concept, the need for which has been evident for many years. Until further reasoning on the impossibility requirement is rendered by the Supreme Court, trial judges can refer to the illustrative examples from *Resurfice*,[73] as was as the Alberta Court of Appeal's approach in *Bowes*, which appears to be the only appellate level decision post-*Resurfice* to hold that the impossibility requirement had been met, although the plaintiffs' claims failed for limitations reasons.[74]

As a factual postscript, the labour dispute at Giant Mine continued until December 1993.[75] Gold was produced at the mine until 1999, when Royal Oak went into receivership.[76] Following this, Indian and Northern Affairs Canada assumed ownership of the mine and, in 2005, the mine was officially abandoned.[77] An estimated 237,000 tonnes of arsenic trioxide dust, produced over 50 years of operation as a by-product of gold, remains in the mine and requires containment.[78] Post 2005, the mine site is co-managed by Indian and Northern Affairs Canada and the GNWT.[79]

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72 The approach of the British Columbia and Alberta Courts of Appeal, not favoured by the Supreme Court of Canada in *Fullowka*, would arguably have been more forgiving of references to "contributing" or "material," permitting such references to be perceived manifestations of the but-for test, or even an *Athey* material-contribution test for causation, rather than the *Resurfice* policy-driven exception: see e.g. *MacDonald*, *supra* note 51 at paras. 15-20.

73 *Resurfice*, *supra* note 27 at paras. 27-28.

74 *Bowes*, *supra* note 47 at paras. 178, 231-35.

75 *Royal Oak Mines v. Canada (Labour Relations Board)*, [1996] 1 S.C.R. 369 at para. 19.

76 Indian and Northern Affairs Canada, *Historical Timeline: Giant Mine Remediation Project*, online: Indian and Northern Affairs Canada <http://www.ainc-inac.gc.ca/ai/scr/nt/pdf/timeline_eng.pdf> [*Historical Timeline*]. The Giant Mine assets were sold to Miramar Giant Mine Ltd. in 1999.

77 *Ibid.*

78 "Giant Mine," *supra* note 2.

79 *Historical Timeline*, *supra* note 76 at 2.