Common-Sense Causation: How a Robust and Pragmatic Application of the "But For" Test Can Solve the Circular Causation Problem in Cases of Multiple Contributing Tortfeasors

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I. INTRODUCTION

The "but for" test for causation is deceptively simple. It is easy to recite: the plaintiff must prove that the injury would not have happened but for the breach or breaches of the standard of care. Practitioners, law students, academics, and judges know all too well, however, that the application of this test fosters a range of emotions from mild apprehension to downright panic.

Eleven years ago, Chief Justice McLachlin observed that much judicial and academic ink had been spilled addressing the proper test for causation in negligence.[3] Indeed, academics,[4] judges,[5] and practitioners[6] have spent countless pages tracing the development of the law of causation in general and the "but for" test in particular. The Supreme Court attempted to curb this flow of ink

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[3] *Resurfice Corp. v. Hanke*, 2007 SCC 7 (S.C.C.) [*Resurfice*].

[4] See, e.g. Erik Knutsen, "Coping with Complex Causation Information in Personal Injury Cases" (2013) 41 Adv Q 149; Vaughan Black, "The Rise and Fall of Plaintiff-Friendly Causation" (2016), 53 Alta L Rev 1013 [Black].

[5] Russell Brown, "Cause-in-Fact at the Supreme Court of Canada: Developments in Tort Law in 2012-2013" (2014), 64 SCLR (2d) 327.

[6] See, e.g. Shantona Chaudhury, "Causation in the Law of Negligence" (2012) 40 Adv Q 257 [Chaudhury].

with its 2012 decision in *Clements v. Clements*[7] and with *Ediger v. Johnston*[8] the following year. In those decisions, the Supreme Court firmly established that the "but for" test is the proper test for causation in negligence. It held in *Clements* that except in truly rare, exceptional circumstances—which have not arisen in a single Canadian case to date—there is no need for resort to an alternative test for causation. For practical purposes, the "but for" test is the law of the land.

When reviewing the history of the "but for" test at the Supreme Court of Canada, at least three themes emerge. First, the test is intended to be "applied in a robust and common-sense fashion."[9] Second, the Supreme Court of Canada has analyzed causation only as it applies to a *single* defendant tortfeasor, providing little guidance to lower courts on how to apply this test in cases with multiple tortfeasors. Third, the Court has attempted to ensure that the test remains true to the purpose of the causation element in the law of negligence.

Although some have argued the "but for" test may not be workable in complex multiple tortfeasor cases, we suggest that it is—provided the courts follow the Supreme Court of Canada's directions and apply the test in a robust, pragmatic, and common-sense fashion. In our view, the "but for" test only appears unworkable or creates the potential for injustice when it is applied in an overly rigid, granular way that belies the robust and pragmatic approach the Supreme Court has repeatedly espoused.

To the extent the "but for" test appears unworkable, it has lapsed from its intended use as a helpful proxy or a convenient tool to detect whether there is a relationship between the tortious acts of a wrongdoer and the injuries of the victim sufficient to justify compensation, becoming instead an unduly restrictive, technical requirement that frustrates the underlying goals of negligence law when so rigidly applied.

This article proceeds as follows. Part II summarizes the current state of the law of causation in negligence, including the "robust and pragmatic approach". Part III discusses multiple-tortfeasor situations, both real and hypothetical, in which the "but for" test appears to break down, including the recent decision of the Ontario Court of Appeal in *Sacks v. Ross*.[10] Part IV considers the history and purpose of causation in negligence, and how the "but for" test fits into this context. In Part V, we bring these first principles to bear and propose a "robust and pragmatic" application of the "but for" test in a multiple-tortfeasor context that is consistent with the Supreme Court of Canada's jurisprudence and which avoids the apparent injustices that can result from an overly strict or granular approach.

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7 *Clements v. Clements*, 2012 SCC 32 (S.C.C.) [*Clements*].
8 *Ediger v. Johnston*, 2013 SCC 18 (S.C.C.) [*Ediger*].
9 *Clements* at para. 9.
10 *Sacks v. Ross*, 2017 ONCA 773 (C.A.).

II. CURRENT STATE OF THE LAW OF CAUSATION IN NEGLIGENCE

The "robust and pragmatic" approach to causation has its origins in the 1990 Supreme Court of Canada case of *Snell v. Farrell*.[11] According to Professor Vaughan Black, *Snell* was the Court's attempt to redress a perception that the "but for" test was too hard on plaintiffs. Professor Black posits that there was "a growing sense that sometimes the "but for" test led to false negatives. That is, it led to findings that there was no causation, and thus to a nonsuit, when fairness demanded the opposite."[12]

Snell was a medical malpractice case with one defendant, an ophthalmologist, who negligently performed cataract surgery despite noticing a small retrobulbar bleed. The plaintiff later suffered from optic nerve atrophy and lost her eyesight. None of the experts could express with certainty whether the atrophy was caused by a retrobulbar hemorrhage resulting from the doctor's negligence, or from the plaintiff's pre-existing glaucoma, a non-tortious cause.[13]

Today, *Snell* is cited primarily for the proposition that causation need not be determined with scientific precision.[14] Justice Sopinka, writing for the Court, stated that it was open to the trier of fact to draw an inference of causation even in the absence of positive or scientific proof of causation.[15] This approach does not require shifting the burden, which remains with the plaintiff. Rather, it reaffirms the trier of fact's ability to weigh the evidence and draw inferences, in what Justice Sopinka referred to as a "robust and pragmatic approach to the facts."[16] *Snell* established that the "but for" test for causation is adequate to prove causation in difficult medical malpractice cases provided it is not applied too rigidly.

Six years later, in *Athey v. Leonati*,[17] the Supreme Court applied the "but for" test in a situation of factual uncertainty. In *Athey*, the plaintiff herniated a disc in his back while exercising. He had a history of back injuries and two recent car accidents. The issue before the Court was whether the car accidents, for which breach of the standard of care was admitted, caused the disc herniation. The Court held that they did, and held the defendants liable in negligence.[18] In a decision that appears to affirm the *Snell* "but for" test, the Court also stated that the "but for" test was "unworkable in some circumstances", and as a result, "the

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[11] *Snell v. Farrell*, [1990] 2 S.C.R. 311 (S.C.C.) [*Snell*].
[12] Black, *supra*, at 1014.
[13] *Snell* at paras. 5-6.
[14] *Ibid.* at para. 29.
[15] *Ibid.* at para. 33.
[16] *Ibid.* at para. 33.
[17] *Athey v. Leonati*, [1996] 3 S.C.R. 458 (S.C.C.) [*Athey*].
[18] *Athey* at paras. 43 to 53.

courts have recognized that causation is established where the defendant's negligence 'materially contributed' to the occurrence of the injury."[19]

Interestingly, even though there had been two car accidents, the Court, on consent, treated them as one for the purposes of the causation analysis—thus addressing causation as if it were a single tortfeasor case.

Athey has been widely criticized, and has even been called "supremely unhelpful," because the Court provided no guidance on the circumstances in which the "but for" test would be "unworkable."[20] In the years that followed the decision, judges heard all manner of argument about what the Court meant in *Athey*. The Supreme Court ultimately granted leave in three cases that attempted to clarify the use of the "but for" test and "material contribution" test: the 2001 case of *Walker Estate v. York Finch General Hospital*,[21] the 2007 case of *Resurfice Corp. v. Hanke*,[22] and the 2010 case of *Fullowka v. Pinkerton's of Canada Ltd.*[23] None of them satisfactorily answered the question.

In 2012, the Supreme Court of Canada decided *Clements v. Clements*,[24] and a year later, decided *Ediger v. Johnston*.[25]

Clements made at least three important points. First, *Clements* affirmed that the "but for" test rests on a factual inquiry, made by the trier of fact. Chief Justice McLachlin stated for the Court:

> The plaintiff must show on a balance of probabilities that "but for" the defendant's negligent act, the injury would not have occurred. Inherent in the phrase "but for" is the requirement that the defendant's negligence was *necessary* to bring about the injury — in other words that the injury would not have occurred without the defendant's negligence. This is a factual inquiry. If the plaintiff does not establish this on a balance of probabilities, having regard to all the evidence, her action against the defendant fails.[26]

Second, the Chief Justice also affirmed the direction from *Snell* that the "but for" test "*must* be applied in a robust, common-sense fashion."[27]

Third, *Clements* firmly established that the "test for showing causation is the 'but for' test." A plaintiff may exceptionally be able to recover in negligence on the basis of a "material contribution to risk of injury" without showing factual causation, but only in "cases where it is *impossible* to determine which of a

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[19] *Ibid.* at para. 15.
[20] Black at 1018.
[21] *Walker Estate v. York Finch General Hospital*, 2001 SCC 23 (S.C.C.).
[22] *Resurfice Corp. v. Hanke*, 2007 SCC 7 (S.C.C.).
[23] *Fullowka v. Pinkerton's of Canada Ltd.*, 2010 SCC 5 (S.C.C.).
[24] *Clements v. Clements*, 2012 SCC 32 (S.C.C.) [*Clements*].
[25] *Ediger v. Johnston*, 2013 SCC 18 (S.C.C.) [*Ediger*].
[26] *Clements* at para. 8 [emphasis in original].
[27] *Ibid.* at para. 9 [emphasis added].

number of negligent acts by multiple actors in fact caused the injury, but it is established that one or more of them did in fact cause it."[28]

Taking these points together, the current law on causation is that, except for extreme cases where it is impossible to determine causation through the use of the "but for" test, lawyers and judges are to use the "but for" test in a robust and common-sense fashion.

III. WHEN THE APPLICATION OF THE "BUT FOR" TEST FALLS APART: CIRCULAR CAUSATION AND THE PROBLEM OF MULTIPLE CONTRIBUTING TORTFEASORS

Even though the Court in *Clements* used the term "defendant" (singular) in its summary of the "but for" test, a robust and common-sense use of the "but for" test applies equally well to a multiple tortfeasor situation. Where the "but for" test appears to break down in a multiple tortfeasor situation, the problem lies not with the test itself, but with an overly strict, granular application of it.

Where there are multiple defendant tortfeasors, a problem with the "but for" test can arise if the test is applied to one defendant at a time, and each defendant can argue that he cannot be held liable for the plaintiff's injury because it still would have been caused by the other defendant(s) "but for" his own breach of the standard of care. This problem is sometimes referred to as causal superfluity or overdetermination,[29] but we will refer to it here as "circular causation".[30]

The idea of "circular causation" has also been discussed in the context of the exceptional circumstances giving rise to the "material contribution to risk" test, but in that context the circular causation problem arises in a slightly different way. As explained in *Clements* and commentary since, the "material contribution to risk" test can be applied where the factual cause of the plaintiff's injury is unknown; it is clear that *one* of multiple defendants caused the injury, but the plaintiff cannot prove *which one*.[31] As a result, the "but for"

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[28] *Ibid*. at para. 13 [emphasis added].

[29] See Vaughan Black, "The Rise and Fall of Plaintiff-Friendly Causation" (2016) 53:4 Alta L Rev 1013 at 1016; Jane Stapleton, "Unnecessary Causes" (2013) 129 L.Q.R. 39.

[30] See Erik Knutsen, "Clarifying Causation in Tort" (2010) 33 Dal. L.J. 153 at 163, 187, cited in *Sacks v. Ross*, *supra* at para. 111.

[31] This problem has arisen in two notable scenarios: (1) a plaintiff is shot while hunting with two defendants, who negligently fired their guns virtually simultaneously, and it cannot be established which defendant's gun fired the shot that struck the plaintiff: see *Cook v Lewis*, [1951] S.C.R. 830; and (2) a plaintiff becomes ill due to exposure to asbestos in the workplace, but had been exposed to asbestos at different times when working for different employers, and it is impossible to prove which employer's negligence in fact exposed the plaintiff to the asbestos that led to the disease: see *Fairchild v Glenhaven Funeral Services Ltd.*, [2002] UKHL 22.

test becomes circular and breaks down because each defendant can argue "you can't prove it was me, because it just as well could have been him".[31]

These exceptional circumstances giving rise to the "material contribution to risk" test, while similar in nature, are distinct from the problem of multiple contributing tortfeasors we address in this article, which arises even though the factual cause of the plaintiff's injury is known or can be determined.

Here, we are using the term "circular causation" to refer to a distinct situation where multiple defendants' breaches combine or compound to cause the plaintiff's injury. Put another way, each defendant's breach(es) comprised *part* of the cause-in-fact of the injury. The "but for" inquiry becomes circular in these circumstances because each defendant can argue, "you can't prove the injury would not have occurred but for my breach, because the injury still would have been caused by the other defendants".

1. Illustrative Hypotheticals

Academics have often turned to borderline philosophical hypotheticals to signal warnings that the "but for" test may become circular and break down when applied individually to multiple tortfeasors, each of whose negligence combines to cause the plaintiff's injury.[32]

One such hypothetical is the situation of three people negligently leaning on the plaintiff's car, which is parked on the edge of a cliff. The combined force of all three people leaning on the car pushes it over the edge. The force of any one person would not have been enough to push the car over the edge, but the force of any two of them would have been sufficient.

Litigation ensues, with the three "leaners" as defendants. On a strict, individualized application of the "but for" test, each of the three "leaners" could escape liability by arguing that her *individual* force was not necessary to push the car off the cliff, because —the force of the other two still would have destroyed the car, even "but for" her negligent actions.

As a further example, suppose a company learns that a chemical used in manufacturing its product could be toxic for those with certain respiratory conditions, and puts the question of whether it should nonetheless sell the product to a vote of the Board of Directors. Although the relevant rules required only a majority of votes to make the decision, the Board votes unanimously to market and sell the product, which subsequently harms a number of consumers.[33] Every individual Board member could attempt to escape liability by stating that the injury still would have occurred "but for" her vote, because

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[31] See Chaudhury, *supra*, at 264.

[32] The examples that follow are derived from Jane Stapleton, "Unnecessary Causes" (2013) 129 L.Q.R. 39 and Michael D. Green & William C. Powers Jr., *Restatement of Torts: Liability for Physical and Emotional Harm*, 3d ed. (St. Paul, MN: American Law Institute Publishers, 2010) at section 27.

even if she had opposed, the majority would still have voted in favour of selling the product. In other words, she could argue that her vote was not only insufficient, but unnecessary to cause the harm.

Finally, consider a scenario where five factories each negligently release oil into a bay, and there is a regulation prohibiting fishing in the bay if the concentration of oil reaches a certain level. When it is discovered that the concentration of oil far exceeds the threshold, a ban on fishing is triggered, resulting in serious economic injury to local commercial fishers. The oil discharged by each individual factory would not have been sufficient to reach the regulatory threshold, and the regulatory threshold would have been exceeded by the pollution from any three of the factories. Each factory could attempt to escape liability on the basis that the ban would have been triggered even "but for" its negligent pollution.

Each of these examples has been used to posit that the "but for" test may be unworkable in a case of multiple tortfeasors, and may allow a negligent defendant to escape liability. As explained below, however, if the "but for" test is applied in a robust and practical manner, rather than using an excessively strict approach, it need not allow a negligent defendant to escape liability in these situations.

2. *Sacks v. Ross*

The "circular causation" problem arising from multiple contributing tortfeasors does not arise only in hypotheticals posited by academics. A recent decision of the Ontario Court of Appeal provides a real-world example.

In 2017 the Court of Appeal decided *Sacks v. Ross*,[34] a medical malpractice case in which the plaintiffs alleged delayed diagnosis and treatment. The actual holding in *Sacks* is open to debate. It can be argued *Sacks* is a case about jury questions, not causation, or about defendants' alternative theory of causation winning the day. In our view, however, that *Sacks* is a real-world example of an overly rigid application of the "but for" test in a multiple tortfeasor situation, resulting in negligent defendants escaping liability.

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[33] Stapleton, *supra* at 43-44. Professor Stapleton adapted this illustration from the facts of a case heard by the German Federal Supreme Court: see 37 BGHSt 106, 6 July 1990.

[34] *Sacks v. Ross*, 2017 ONCA 773 (C.A.) [*Sacks*]. On June 28, 2018, the Supreme Court of Canada dismissed an application for leave to appeal the judgment of the Court of Appeal: see Jordan Sacks, et al. v. Theodore Ross, Aliyah Amirali Kanji, Anna Maureen Bendzsak, Jeffrey Singer, et al., 2018 CanLII 58471 (SCC). As noted above, in the interest of disclosure, Ms MacKenzie was co-counsel representing the appellants, Jordan Sacks et al, before the Court of Appeal for Ontario in this matter.

(a) Background: The facts of *Sacks*

Jordan Sacks was a 36-year-old father of three, who had Crohn's disease but was otherwise healthy. After a colonoscopy revealed a narrowing of his bowel, putting him at risk for future obstruction, he elected to have a routine surgery at Toronto's Sunnybrook Hospital to remove the narrowed portion of the bowel.[35]

The surgery took place on May 13, 2008. The first two days of recovery were uneventful.[36] In retrospect, the first sign of trouble was reported at 7:50 am on May 16. Throughout May 16 and 17, Mr. Sacks' pain increased and his condition deteriorated. Various nurses and doctors attended to him, but many of them did not make notes, did not read the notes of the rest of the treatment team, or did not communicate with other members of the treatment team. Tests were ordered but not reported or pursued.[37]

By the morning of May 17, the surgeon concluded that Mr. Sacks had a serious infection. He ordered a CT scan to identify the source before proceeding with treatment. The CT scan was performed at 3 pm. The surgeon did not order antibiotics until 4 pm because he wanted to identify the source of the infection.[38]

Mr. Sacks was taken to the operating room at 5:05 pm. By that time, he was in septic shock. The surgery revealed an anastomotic leak, which is where fecal matter leaks from the bowel into the belly. It occurs when the edges of the bowel are not properly attached following surgery. It is a rare but known complication.[39]

Mr. Sacks was unstable after the surgery. His kidneys eventually failed, and he required multiple surgeries over the course of several months. He was in a medically induced coma for three months. Some of his tissue became necrotic and eventually he had both of his legs amputated below the knee as well as all ten of his finger tips.[40]

At trial, the plaintiffs argued that the defendant healthcare providers' delay in diagnosing and treating Mr. Sacks' anastomotic leak caused his injuries. Put another way, but for the delay, Mr. Sacks would not have suffered his injuries. The defendants raised an alternative theory of causation, arguing that Mr. Sacks contracted a rare, unrecognized aggressive secondary infection, making his injuries unavoidable and not the result of anyone's breach of the standard of care.[41]

The jury found that five of the seven defendants (three doctors, a nurse, and the hospital) breached the standard of care, including by failing to properly

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[35] *Sacks* at para. 12.
[36] *Ibid.* at para. 15.
[37] *Ibid.* at paras. 16 to 27.
[38] *Ibid.* at paras. 29 and 30.
[39] *Ibid.* at paras. 13 and 31.
[40] *Ibid.* at paras. 31 to 34.
[41] *Ibid.* at paras. 35-36.

document their assessments of Mr. Sacks in his chart, by failing to communicate appropriately with the healthcare team, their failure to follow the hospital's turnaround time policy for bloodwork, by failing to follow up on bloodwork, and by failing to begin antibiotics upon recognizing the severe infection.[42]

In respect of causation, the jury was asked in respect of *each individual* defendant who was found to have breached the standard of care: "have the Plaintiffs proven, on a balance of probabilities, that but for the breach of the standard of care, the injuries of Jordan Sacks would not have occurred?"[43] The jury answered no to each causation question, and Mr. Sacks' case was accordingly dismissed.

(b) The Ontario Court of Appeal's proposed solution to the circular causation problem in *Sacks*

The appellants submitted that it was an error of law for "the jury [to be] asked to determine whether the conduct of each defendant—on his or her own—was necessary to bring about Jordan's injuries".[44] They argued that this was a case of "circular causation" because multiple defendants' collective negligence created more delay than was actually necessary to cause Mr. Sacks' injuries; on the facts, "no *individual* defendant's conduct could be said to have been necessary to cause the harm."[45]

Writing for the Court, Justice Lauwers agreed that the circular causation problem could create an unjust outcome in cases like the one before him, stating:

> Generally speaking, with respect to delayed diagnosis medical negligence cases involving multiple tortfeasors, it ought not to be possible for any one of the negligent tortfeasors to sidestep liability on the basis that there was sufficient cumulative delay resulting from the negligent acts or omissions of other defendants so that it could not be proven under *Clements* that the defendant's particular contribution was "necessary" — that the injury would still have been incurred but for the negligent act or omission.[46]

As a result, the Ontario Court of Appeal found that the causation questions posed to the jury at trial were improper.[47] Despite this finding, however, the Court dismissed the appeal, concluding that no change in approach to causation "would have or could have resulted in a different verdict in this case."[48]

The Court of Appeal nevertheless engaged in extensive discussion about the applicability of the "but for" test in a multiple tortfeasor situation.[49] Its decision

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42 *Ibid*. at paras. 159-168.
43 *Ibid*. at para. 74.
44 *Ibid*. at para. 110.
45 *Ibid*. at para. 111.
46 *Ibid*. at para. 116.
47 *Ibid*. at paras. 8, 122.
48 *Ibid*. at para. 132.

highlights the issues that courts, including appellate courts, experience when the "but for" test is applied on a granular level, rather than, as the Supreme Court of Canada has instructed, with a robust common-sense approach.

Unfortunately, these reasons complicate, rather than clarify, the law on how causation should be determined in complex multi-tortfeasor cases.

(i) A curious expression of the causal reasoning process

After stating the basic principles of causation and adverting to the complexity of applying the "but for" test to anything other than a "simple case involving a single defendant who did something in breach of the standard of care that physically hurt the [plaintiff]",[50] Justice Lauwers held:

> Regardless of whether the defendant's breach of the standard of care is an act or an omission, the trier of fact's cognitive process in determining causation has three basic steps. The first is to determine what likely happened in actuality. The second is to consider what would likely have happened had the defendant not breached the standard of care. The third step is to allocate fault among the negligent defendants.[51]

This three-step "causal reasoning process," which was not argued by either party before the Court of Appeal, formed the foundation of the Court's analysis of the proper understanding of the law of causation in negligence cases, and weaved throughout its reasons.[52]

With the first two of the proposed steps, the Court sought to break down and explain what a trier of fact must think about when applying the "but for" test. It is no doubt helpful to reflect upon what is meant by the "but for" question, and the Court was correct that in applying the test, one must make findings as to (1) what in fact happened to bring about the injury, and (2) whether this injury would have happened had the defendants not breached the standard of care. Beyond this, however, the Court's attempt to break down the reasoning process underpinning the "but for" test is likely to cause confusion in the future, for a few reasons.

First, the Court did not define what it meant by "what likely happened in actuality". Justice Lauwers attempted to explain by stating: "The trier of fact must determine, on the evidence, whether the delay in treatment led to the plaintiff's injury, considering only what the plaintiff needed by way of timely

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[49] Its reasons include what the respondents later referred to as "nearly 100 paragraphs of *obiter dicta*" respecting a trier-of-fact's cognitive reasoning process in determining causation: Response to the Application for Leave to Appeal (Theodore Ross, Aliyah Kanji, Anna Maureen Bendzsak and Jeffrey Singer, Respondents), submitted to the Supreme Court of Canada January 21, 2018.

[50] *Sacks* at para. 46.

[51] *Ibid.* at para. 47.

[52] See *Sacks*, *ibid.* at paras. 47-48, 96-105, and 130-131.

diagnosis and treatment in order to avoid injury, and without considering the presence or absence of any breaches of the standard of care."[53]

However, the Court did not explain how the trier of fact would determine "whether the delay in treatment led to the plaintiff's injury" other than by applying the "but for" test. In addition, the Court gave no guidance on how to separate the delay analysis from "the presence or absence of any breaches of the standard of care". In a case like *Sacks*, in which the jury did not find that the *entire* period of delay was occasioned by the defendants' breaches of the standard of care, this proposed step does not appear to serve any purpose.

Moreover, the third step of the stated process, "to allocate fault among the negligent defendants", is not a question of causation, but an issue of how *damages* are to be allocated amongst the various defendants whose breaches are found to have caused the plaintiff's injuries. This inquiry can occur only *after* causation is determined.

Finally, the proposed step of determining "what would likely have happened had the defendant not breached the standard of care" is a restatement of the traditional "but for" test as applied to a single tortfeasor. This step does not address the circular causation problem arising in a case with multiple contributing tortfeasors, because it proposes to apply the "but for" test to an *individual* defendant in isolation.

In explaining this step of the process, Justice Lauwers held that the trier of fact

> . . . must "chunk out," or separate for analytical purposes, the events in the flow, and apply the causal reasoning process to *each event* in sequence.
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> The basic idea is that the jury must analyze *each event* in the sequence while ignoring any decision it might have made with respect to an earlier event.[54]

Respectfully, this proposal is impractical and counterproductive. It reflects the "too rigid application" of the traditional approach to causation that Justice Sopinka criticized over 25 years ago in *Snell*. Indeed, the Court's illustration of how such a process would apply on the facts of *Sacks* serves to demonstrate the problem of circular causation that arises as a result of the granular application of the "but for" test.

The Court provided an example relating to two alleged breaches: (1) a nurse, who had entered a STAT bloodwork order at 5:08 pm, failed to check the lab results before ending her shift at 7:50 pm, and (2) the hospital failed to perform the STAT bloodwork within the one-hour turnaround time required by its policies, instead entering the results at 9:51 pm.[55]

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[53] *Ibid.* at para. 98.

[54] *Ibid.* at paras. 100-101 [emphasis added].

[55] This was a curious example for the Court of Appeal to use, because the nurse in question was one of the two (out of seven) defendants who was *not* found to have breached the

Justice Lauwers explained that "the jury was required to keep its assessment of the two events separate".[56] It was to consider the hospital's alleged breach in the context of the facts *as they actually occurred*, not consider whether the hospital would have processed the bloodwork earlier if the nurse had followed up earlier.[57]

There are two problems with this analysis. First, assessing the hospital's alleged breach in the manner described is a question relating to standard of care, not causation. More importantly, however, when applying this separate analysis in the context of causation, the problem of applying the "but for" test to each defendant in isolation is made plain.

If the jury had found both the nurse and hospital had breached the standard of care in the manner alleged in the Court's example, the "but for" analysis would break down when applied to each defendant individually. When viewed in isolation, the delayed diagnosis and treatment still would have occurred but for the nurse's failure to check the bloodwork at 7:40 pm, because even if she had checked the computer, the hospital did not enter the results until 9:51 pm (because it had not followed its one-hour turnaround time policy). Similarly, the delayed diagnosis and treatment still would have occurred but for the hospital's failure to follow its one-hour turnaround time policy when viewed in isolation, because even if the lab had entered the results earlier in the evening, no one checked for them.

The Court of Appeal did not apply its own proposed causal reasoning process, noting only that "a jury considering a negligence claim against multiple tortfeasors requires careful instructions on the reasoning process it must employ in moving through the events in order to determine causation".[58] Had the Court worked through the application of its proposed process on the facts, it would have become apparent that parsing out the analysis at this granular, defendant-by-defendant level simply does not work.

(ii) Much ado about nothing: The failure to apply the causation test to the facts of Sacks

The full extent of the Court of Appeal's application of the causation analysis came in three paragraphs at the end of the reasons. After reproducing the jury's findings of five defendants' breaches of standard of care in the context of a high-level summary of the events that occurred to Mr. Sacks, the Court held:

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standard of care. The same principle applies, however, to several similar examples arising from the breaches of the standard of care that the jury did find on the part of five defendants, including the hospital.

56 *Sacks* at para. 104.

57 *Ibid.* at para. 103-104.

58 *Ibid.* at para. 105.

> [171] Crucially, the jury did not find that any of the breaches of the standard of care by the defendants caused the injuries for which Mr. Sacks claimed compensation. Given the clarity and vigour of the positions considered by the jury, this is dispositive.
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> [172] As I read the jury's answers, the appellants' case foundered at the first logical question in the causal reasoning process: have the plaintiffs proven, on a balance of probabilities, that a delay in treatment led to Jordan Sacks's injuries, considering only what he needed by way of timely diagnosis and treatment in order to avoid the injuries? Although this was not a formal jury question, it tracks the trial judge's instructions, to repeat:
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> > In an action alleging delay in diagnosis and treatment, such as this one, the plaintiff must establish on a balance of probabilities that the failure to diagnose the anastomotic leak in a timely fashion was a necessary cause of the unfavourable outcome for Jordan.
>
> [173] The jury's answer to that question was plainly "No". Had it been "Yes", then the delays mentioned in the jury's answers would have resulted in positive findings of causation.

With respect, this analysis is circular and conclusory. It assumes the answer to the ultimate issue.

The jury answered "no" to causation questions asked in respect of each individual defendant in isolation. The Court of Appeal agreed those questions were "problematic" and "could create confusion in the minds of the jury and lead to injustice".[59] It does not follow from the jury's answers to those "problematic" questions that the jury was of the view that the plaintiffs had not established that a delay in treatment led to Mr. Sacks' injuries. All that follows is that they were of the view that each *individual* defendant's breach—considered separately from numerous other breaches relating to the delayed diagnosis—was not a necessary cause of Mr. Sacks' injuries *on its own*.

It cannot be said that if the jury had thought the delay caused Mr. Sacks' injuries, they would have made findings of causation. Not only were the jury's answers to the individual questions consistent with both sides' causation theories, but it was impossible for the jury to make positive findings of causation on the questions they were asked; the delay was the result of multiple defendants' combined negligence, but the questions were asked in respect of each defendant on his or her own. The Court of Appeal did not, address this point; it simply filled the gap with speculation. It is impossible to know what answers the jury would have given to the properly formulated inquiry.[60]

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[59] *Ibid*. at paras. 8, 121.

[60] See also Maria Damiano, "The Changing Landscape of Causation in Medical Malpractice Cases: *Sacks v Ross*" (2018) 48 Adv Q 119 at 131-132 [Damiano].

(iii) ''Contribute" and ''necessary": The semantics of framing causation questions

In its reasons respecting *Sacks*, the jury questions the Court of Appeal held that ''the trial judge should not have rejected the use of the phrase 'caused or contributed to' in the formulation of the jury questions and the instructions".[61]

The Court's reasons in this regard overlook the 16 years of confusion that resulted from the Supreme Court's reference to ''where the defendant's negligence '*materially contributed*' to the occurrence of the injury" in *Athey*.[62] Rather than clarify the law as to what questions should be asked to determine cause-in-fact, the Court in *Sacks* muddied the waters.[63]

In his reasons, Justice Lauwers adopted the approach to causation preferred by Professor Jane Stapleton in her article ''Unnecessary Causes".[64] Professor Stapleton, having considered a number of the circular causation hypotheticals referred to above,[65] argues that ''private law should adopt a notion of a 'cause' that is wider than the relation necessity that is encapsulated in the but-for test".[67] Instead of using the ''but for" test, Professor Stapleton proposes that the causation inquiry

> . . . should be framed as no more than whether that factor was *a* cause of the injury. This catchment is also neatly achieved by the well-known phrase 'caused or contributed to'. The word 'caused' will easily identify necessary factors and the phrase 'contributed to' also accommodates the positive, albeit unnecessary, contributions being discussed here.[68]

Accepting Professor Stapleton's perspective, Justice Lauwers criticized the use of the word ''necessary" in causation questions on the basis that it ''could create confusion . . . and lead to injustice" in cases involving multiple tortfeasors

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61 *Sacks* at para. 122.

62 *Athey* at para. 15, emphasis added. Interestingly, Justice Lauwers noted Professor Black's observation ''*Athey* spawned 16 years of confusion", and accepted that in *Resurfice*, *Clements*, and *Ediger*, ''the Supreme Court was trying to corral the material contribution test that originated with its decision in *Athey*": *Sacks* at para. 128, citing Vaughan Black, ''The Rise and Fall of Plaintiff-Friendly Causation" (2016) 53: 4 Alta. L. Rev 1013, at 1018.

63 Although it is beyond the scope of this paper, it is worth noting that the reasons in *Sacks* are also inconsistent with the reasons of a different panel of the Court of Appeal for Ontario earlier the same year in *Surujdeo v. Melady*, 2017 ONCA 41 (C.A.). See Damiano, *supra*, at 132-134.

64 Jane Stapleton, ''Unnecessary Causes" (2013) 129 L.Q.R. 39 [Stapleton].

65 Indeed, in *Sacks* at para. 113, the Court quoted a version of the ''car leaner" example noted above, citing Michael D. Green & William C. Powers Jr., *Restatement of Torts: Liability for Physical and Emotional Harm*, 3d ed. (St. Paul, MN: American Law Institute Publishers, 2010) at section 27, illustration 3.

67 Stapleton at 45.

68 *Sacks* at para. 115, citing Stapleton at 45.

with the potential for circular causation.[69] Justice Lauwers cited Ontario's *Negligence Act*,[70] *Snell*, *Athey*, and various decisions of the Ontario Court of Appeal as support for the use of the phrase "caused or contributed" to determine causation.[71] Indeed, he described "caused or contributed to" as the "customary" phrase for determining causation.

Justice Lauwers held that "the use of the word 'necessary' should be avoided in describing the 'but for' test".[72] Rather, he held, the circular causation problem would not arise if the causation inquiry asked whether a defendant's failure to meet the standard of care "caused or contributed to" the injuries.[73] He concluded: "There is nothing innately confusing about the phrase 'caused or contributed to'."[74]

Importantly, however, Professor Stapleton did not merely take issue with the use of *the word* "necessary". She criticized the use of the "but for" test itself, which relies on the *concept* of necessity. In relying on Professor Stapleton's comments and criticisms of the law of causation, the Court of Appeal for Ontario effectively called the applicability of the "but for" test into question.

By repudiating the word "necessary" and embracing the framing of "caused or contributed to", the Court of Appeal's decision in *Sacks* may have resurrected the confusing alternative "material contribution to injury" test that the Supreme Court had firmly renounced in *Clements*.

Justice Lauwers briefly considered whether there was a conflict between "the customary and statutory phrase 'caused or contributed to'" and "the *Clements* expression of the 'but for' test", but concluded that there is no conflict when *Clements* is understood purposively.[75] He held:

> As I interpret *Clements*, in specifying the "but for" test, McLachlin C.J. used the word "necessary" in a purposive manner in order to underscore the legal requirement for the plaintiff to prove that there was a real and substantial connection between the defendant's breach of the standard of care by an act or omission and the plaintiff's injury. Recall her words in para 8 of *Clements*: "Inherent in the phrase "but for" is the

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69 *Ibid.* at paras. 121, 117.

70 *Negligence Act*, R.S.O. 1990, c. N.1, s. 1.

71 *Sacks* at para. 117, citing *Cottrelle v. Gerrard* (2003), 67 O.R. (3d) 737 (C.A.) at para. 25, leave to appeal refused 2004 CarswellOnt 1622 (S.C.C.), cited in *van Dyke v. Grey Bruce Regional Health Centre*, 2005 CarswellOnt 2217, [2005] O.J. No. 2219 (C.A.) at para. 44, leave to appeal refused *Van Dyke v. Grey Bruce Regional Health Centre*, 2005 CarswellOnt 7439 (S.C.C.); *Beldycki Estate v. Jaipargas*, 2012 ONCA 537 (C.A.) at para. 44, *Wilson v. Beck*, 2013 ONCA 316 (C.A.) at para. 46, leave to appeal refused 2013 CarswellOnt 15113 (S.C.C.); and *Mangal v. William Osler Health Centre*, 2014 ONCA 639 (C.A.) at para. 56, additional reasons 2014 CarswellOnt 16304 (C.A.), leave to appeal refused 2015 CarswellOnt 7729 (S.C.C.).

72 *Sacks* at para. 130.

73 *Ibid.* at paras. 130-131.

74 *Ibid.* at para. 122.

75 *Ibid.* at para. 120.

> requirement that the defendant's negligence was *necessary* to bring about the injury — *in other words that the injury would not have occurred without the defendant's negligence* (My emphasis)."
>
> As is shown by McLachlin C.J.'s alternative wording, it is possible to set the causation test without using the word "necessary" at all.[76]

There is no question that the word "necessary" need not be used to articulate the "but for" test. But the word "necessary" is not the problem—and the Court's focus on it skirts the real issue.

As Chief Justice McLachlin explained in *Clements*, the concept of necessity is *inherent* in the "but for" test—whether or not the word is used in its articulation. Indeed, Professor Stapleton's paper describes the concept of necessity as "encapsulated in the but-for test".[77]

The concepts of a "but for" cause and a "necessary" cause are synonymous—to repudiate the requirement that the negligent acts be necessary to constitute a cause-in-fact is to repudiate the "but for" test itself. If an injury would not have occurred but for a negligent act, that negligent act was *necessary* for the injury to occur. If a negligent act was necessary for an injury to occur, that injury would not have occurred *but for* the negligent act.

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[76] *Ibid.* at paras. 118-119. This passage introduces further potential for confusion in the law of causation by using the phrase "real and substantial connection" to describe the relationship between a breach of the standard of care and an injury. "Real and substantial connection" is a concept used in civil procedure to determine the appropriate jurisdiction for a dispute to be heard: See, e.g., *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17 (S.C.C.). It is not clear what, if anything, the phrase connotes in the law of causation and negligence. Can there be a real and substantial connection even if an injury would have happened but for the negligent conduct? Can an act have a real and substantial connection with an injury if it is an unnecessary but "material contribution" to the injury?

Justice Lauwers further observed that in their leading treatise *Canadian Tort Law*, Professors Linden and Feldthusen do not use the word "necessary" in their specification of the test: *Sacks* at para. 119. While this observation is correct, in our view, Linden and Feldthusen's articulation of what must be proven to satisfy the causation element in negligence similarly runs afoul of the Supreme Court's rejection of the "material contribution to injury" test in *Clements*, as they state: "It is not necessary . . . for a plaintiff to prove positively that, if it were not for the negligent conduct, the accident would have been prevented; it is enough to show that the negligent act *substantially contributed* to the accident": Allen M. Linden and Bruce Feldthusen, *Canadian Tort Law* 10th ed. (Toronto: Butterworths, 2015) at ss. 4.32-3 [emphasis added]. In the authors' view, neither of these two statements of the requirements for causation is correct; while *Snell* and *Ediger* make clear that courts may draw inferences without scientific or positive proof in a "robust and pragmatic" application of the "but for" test, a finding that a negligent act "substantially contributed" to an injury is nothing more than a synonym for material contribution, and may fall short of meeting the "but for" threshold.

[77] Stapleton at 45.

If an act *contributes* to an injury, but was not *necessary* for the injury to occur, that injury still would have occurred *but for* the act. Although all three terms are often used interchangeably (both in common parlance and by lawyers and judges), there is a difference between a contributing cause, on the one hand, and a "but for" or "necessary" cause, on the other. The Supreme Court has held that mere "contribution" is not sufficient to satisfy the causation element in negligence, stating: "a plaintiff cannot succeed unless she shows as a matter of fact that she would not have suffered the loss 'but for' the negligent act or acts of the defendant".[78]

By proposing that the circular causation problem can be addressed by the phrase "caused or contributed to", the Court of Appeal's decision in *Sacks* regressed to a pre-*Clements* age of confusion as to the applicability of the "but for" and "material contribution" tests.

Under our current law, a causation threshold that can be met by an unnecessary contributing cause cannot co-exist with the "but for" test. Over two decades of inconsistent jurisprudence on causation since *Athey*—including the Court of Appeal's decision in *Sacks*—have belied Justice Lauwers' conclusion that "There is nothing innately confusing about the phrase 'caused or contributed to'."[79]

IV. BACK TO FIRST PRINCIPLES: THE PURPOSE OF THE CAUSATION ELEMENT AND THE "BUT FOR" TEST

1. Causation in Negligence

Before assessing how the "but for" test for determining factual causation can and should be applied to address the circular causation problem created by multiple contributing tortfeasors, it is worthwhile to consider why our law is concerned with causation in the first place.

In *Clements,* the Supreme Court of Canada explained how the causation element fits in the law of negligence as follows:

> On its own, proof by an injured plaintiff that a defendant was negligent does not make that defendant liable for the loss. The plaintiff must also establish that the defendant's negligence (breach of the standard of care) *caused* the injury. That link is causation.[80]

Chief Justice McLachlin continued to explain the justification for recovery in negligence law, adopting Professor Ernest Weinrib's explanation of the theory of corrective justice:

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78 *Clements* at para. 46.
79 *Sacks* at para. 122.
80 *Clements* at para. 6.

> Recovery in negligence presupposes a relationship between the plaintiff and defendant based on the existence of a duty of care — a defendant who is at fault and a plaintiff who has been injured by that fault. If the defendant breaches this duty and thereby causes injury to the plaintiff, the law "corrects" the deficiency in the relationship by requiring the defendant to compensate the plaintiff for the injury suffered. This basis for recovery, sometimes referred to as "corrective justice", assigns liability when the plaintiff and defendant are linked in a correlative relationship of doer and sufferer of the same harm.[81]

The lengthy discussion of the law of causation that followed invokes "the theory of corrective justice that underlies the law of negligence" throughout.[82]

The central feature of corrective justice is its correlative structure.[83] Private law will find liability, and accordingly provide a remedy for a wrong, only if the allegedly negligent actions at issue correspond to the consequences for which damages are sought.

Because of this correlative structure, the only factors relevant to liability are those that apply equally to both parties. A factor relating to only one party—such as the defendant having "deep pockets", or the plaintiff being in need—is inappropriate and insufficient to justify liability.[84] A plaintiff's entitlement at private law "exists only in and through the defendant's correlative obligation."[85] Liability is determined with reference to the

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[81] *Ibid.* at para. 7, citing E. J. Weinrib, *The Idea of Private Law* (1995) at 156.

[82] *Clements* at para. 21; see also paras. 13, 19, 32, 37, and 41. Interestingly, although the theory dates back to Aristotle, *Clements* represents the first time our nation's highest court has expressly adopted corrective justice as the justificatory principle underlying tort law. However, the Supreme Court had previously described restitution as "a tool of corrective justice" (see *Kingstreet Investments Ltd. v. New Brunswick (Finance)*, 2007 SCC 1, (*sub nom.* Kingstreet Investments Ltd. v. New Brunswick) [2007] 1 S.C.R. 3 (S.C.C.)) and in two other decisions, justices authoring dissenting reasons have similarly adopted the theory of corrective justice as the justificatory principle for tort law. In *Whiten v. Pilot Insurance*, Justice LeBel explained that since the Middle Ages, when a clear distinction was drawn between criminal pleas and common pleas (actions for damages), "tort law has been viewed primarily as a mechanism of compensation. Its underlying organizing structure remains grounded in the principle of corrective justice . . .": *Whiten v. Pilot Insurance Co.*, 2002 SCC 18, [2002] 1 S.C.R. 595 (S.C.C.) at para. 152 (per LeBel J, dissenting). See also *Kazemi Estate v. Islamic Republic of Iran*, 2014 SCC 62, [2014] 3 S.C.R. 176 (S.C.C.) at para. 198 per Abella J, dissenting ("corrective justice is the justificatory structure that renders tort law intelligible from within", citing Professor Ernest Weinrib, "The Special Morality of Tort Law" (1989), 34 *McGill L.J.* 403, at p. 413).

[83] See generally, Ernest J Weinrib, "Corrective Justice in a Nutshell" (2002) 52 U. Toronto L.J. 349 [Weinrib, Corrective Justice] at 350.

[84] Weinrib, Corrective Justice at 350.

[85] *Ibid.* Weinrib adds (at 352): "Evil and need are moral categories that may well figure in other contexts, but they are not pertinent to liability."

plaintiff's *right* and the defendant's *corresponding duty* not to interfere with that right.

Without expressly referring to corrective justice, Justice Sopinka accepted and relied upon these principles in *Snell*. Setting the stage for the Court's examination of whether the "traditional approach to causation" was satisfactory, he explained:

> Causation is an expression of the relationship that must be found to exist between the tortious act of the wrongdoer and the injury to the victim in order to justify compensation of the latter out of the pocket of the former.[86]

In *Snell*, the Supreme Court disavowed an alternative test for causation that would require the plaintiff to prove only that the defendant *created a risk* that the plaintiff's injury would occur. Although such a test had been discussed by the U.K. House of Lords in *McGhee v. National Coal Board*,[87] the Supreme Court of Canada held that it could "have the effect of compensating plaintiffs where a substantial connection between the injury and the defendant's conduct is absent".[88]

The underlying theory of corrective justice was implicit in Justice Sopinka's reasons in *Snell*, in which he explained that "the requirement that the plaintiff prove that the defendant's tortious conduct caused or contributed to the plaintiff's injury" ensures that the law does not require a defendant to compensate a plaintiff "for an injury that may very well be due to factors unconnected to the defendant and not the fault of anyone".[89] After all, there is no justification to hold a defendant liable to a plaintiff whose injury resulted not from the defendant's breach but from neutral factors or non-tortious causes. In such a case, the defendant's act does not correspond to the plaintiff's injury.

2. Why Do We Use the "But For" Test?

Importantly, the Supreme Court of Canada's discussion of causation in *Snell* did not contemplate or rely on the "but for" test in the strict sense often seen today. On the contrary, the Court concluded that "dissatisfaction with the traditional approach to causation stems to a large extent from its too rigid application by the courts in many cases",[90] and espoused the need for a "robust and pragmatic approach" to factual causation.[91]

In *Snell*, the Court considered whether it should "depart from traditional principles in the law of torts that the plaintiff must prove on a balance of

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[86] *Snell* at para. 26.
[87] *McGhee v. National Coal Board* (1972), [1973] 1 W.L.R. 1 (U.K. H.L.).
[88] *Snell* at para. 26.
[89] *Ibid.* at para. 26.
[90] *Ibid.* at para. 29.
[91] *Ibid.* at para. 33.

probabilities that, but for the tortious conduct of the defendant, the plaintiff would not have sustained the injury complained of".[92] Interestingly, in describing these "traditional principles", Justice Sopinka used the terms "cause", "contribute", and "connection" interchangeably, variously referring to the need for defendants' conduct to "have a substantial connection to the injury" and "the requirement that the plaintiff prove that the defendant's tortious conduct caused or contributed to the plaintiff's injury".[93]

So where did the "but for" test come from? Is there a basis for conflating the "traditional approach" with a strict, granular application of the "but for" test?

The use of "but for" as an aid to determining factual causation in Canadian negligence law dates back over a hundred years. In the early twentieth century, the Supreme Court of Canada and provincial appellate courts used a version of the "but for" test to determine whether there was *contributory* negligence in a number of cases involving alleged negligence by railway companies, holding that the trier of fact had to determine whether the plaintiff was "guilty of negligence which caused the accident or which so contributed to it that but for his negligence the accident would not have happened".[94]

The "but for" inquiry appears to have become more common in Canadian law after Lord Denning described the test in his reasons in *Cork v. Kirby MacLean, Ltd.*, in which he stated:

> Subject to the question of remoteness, causation is, I think, a question of fact. If you can say that the damage would not have happened *but for* a particular fault, then that fault is in fact the cause of the damage; but if you can say that the damage would have happened just the same, fault or no fault, then the fault is not a cause of the damage . . .[95]

This passage was cited by the Ontario High Court of Justice in 1969 in *Matthews v. McLaren* as support for the proposition that "It is trite law that liability does not follow a finding of negligence, even where there exists a legally recognized duty, unless the defendant's conduct is the effective cause of the loss".[96] Notably, "but for" was introduced into Canadian law not as a test to be

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92 *Ibid.* at para. 14.

93 *Ibid.* at para. 26.

94 *Grand Trunk Railway Co. of Canada v. Mayne* (1917), 56 S.C.R. 95 (S.C.C.), per Idington J, dissenting. See also *Jaroshinsky v. Grand Trunk R.W. Co.* (1916), 31 D.L.R. 531 (Ont. C.A.) ("was the plaintiff guilty of negligence which caused the accident or so contributed to it that but for his negligence the accident would not have happened?") and *Grand Trunk Pacific Railway Co. v. Earl*, [1923] S.C.R. 397 (S.C.C.), citing *Deyo v. Kingston Pembroke Ry. Co.* (1904), 8 O.L.R. 588 (C.A.) ("it must be an answer to such an action that the injury was caused by the deceased's own act or omission; that it was caused by or could not have happened but for the servant's direct disobedience of some order or rule of his employers").

95 *Cork v. Kirby MacLean, Ltd.*, [1952] 2 All E.R. 402 (C.A.) at p. 407 [emphasis added].

96 *Matthews et al. v. MacLaren et al.* (1969), (*sub nom.* Matthews v. MacLaren) 4 D.L.R.

applied strictly, but as a practical way to frame the inquiry of what effectively caused a plaintiff's injury.

Although the role of the "but for" test is rarely analyzed in this manner, this notion of the "but for" inquiry as a *tool* used to determine whether there is a relationship between the tortious act and the injury sufficient to justify compensation in law is helpful and important. The "but for" test is nothing more than a means by which to assess whether the breach(es) of the standard of care at issue in fact caused the injury, thus establishing the correlative relationship between plaintiff(s) and defendant(s) required to justify requiring compensation at law.

Courts in South Africa, which share Canada's common law origins, have helpfully framed the "but for" test as "a mental exercise in order to evaluate whether probable factual causation has been shown on the evidence presented to court".[97] They describe the "but for" test as a "hypothetical enquiry. . . involv[ing] the mental elimination of the wrongful conduct and the substitution of a hypothetical course of lawful conduct and the posing of the question as to whether upon such an hypothesis plaintiff's loss would have ensued or not".[98]

Emphasizing that "there is no magic formula by which one can generally establish a causal nexus", the Constitutional Court of South Africa (the nation's highest court) recently reiterated that "Substitution and elimination in applying the but-for test is no more than a mental evaluative tool to assess the evidence on record."[99]

Writing shortly after the Supreme Court's decision in *Clements*, Professor Erik Knutsen similarly emphasized that "the goal of the causal inquiry is to be a rough-and-ready tool for evidentiary assessment linking fault-based conduct to harm".[100]

(3d) 557 (Ont. H.C.), reversed on other grounds [1970] 2 O.R. 487 (C.A.), affirmed [1972] S.C.R. 441 (S.C.C.). The appeals, which related to whether a boat owner had a duty to rescue a guest who had fallen overboard, did not refer to the "but for" test; the Supreme Court of Canada noted that "Whatever the origins of this duty may be, the finding of the learned trial judge that no breach of such duty either caused or contributed to the death of Matthews has not been questioned."

97 *Lee v. Minister of Correctional Services*, [2012] ZACC 30, 2013 (2) BCLR 129 (CC) at para. 57 [*Lee*].

98 *International Shipping Company (Pty) Ltd. v. Bentley*, [1989] ZASCA 138, [1990] 1 All SA 498 at para. 65.

99 *Lee* at para. 58.

100 Erik Knutsen, "Coping with Complex Causation Information in Personal Injury Cases" (2013) 41 Adv Q 149 at 161. Knutsen's argument in this regard is worth quoting in full; he states: "The answer to questions about causation doctrine should really not be about which test to use but instead about what the tort system itself is trying to do by using causation as an analytic tool. One must be careful not to get caught up in the system's doctrinal trappings. Remember: causation is a human-made construct. Courts overly fixate on which test to use and whether the special circumstances arise to apply the

It is helpful to recall this conception of "but for" as a tool for detecting a causal relationship, or a mental exercise used to assess the evidence on factual causation, when reviewing Justice Sopinka's holding in *Snell* that causation is "essentially a practical question of fact which can best be answered by ordinary common sense rather than abstract metaphysical theory".[100]

V. PROPOSED APPROACH: APPLYING "BUT FOR" TO NEGLIGENT CONDUCT, NOT INDIVIDUAL ACTORS

Causation ensures that there is in fact a connection or relationship between the defendants' wrongful acts and the injuries for which the plaintiff seeks recovery. It is only on this basis that our law justifies requiring defendants to compensate plaintiffs.

The "but for" test is not the only way to assess the relationship between defendants' negligent conduct and a plaintiff's injuries. As noted above, Professor Stapleton prefers an inquiry that considers as causal those factors "that are not only unnecessary but also insufficient for the occurrence of an injury but which *in some sense made a contribution* to the mechanism by which it occurred".[101] For at least a generation, some academics have espoused an approach requiring that the defendant's negligent act constitute a "Necessary Element of a Sufficient Set".[102] The "NESS" approach, despite some acceptance amongst the academy, has been entirely ignored by Canadian courts—it does not appear to have been considered or even referred to in a single reported case in Canada.

Our courts have made a normative decision that the "but for" framework is the best way to test the sufficiency of the relationship that must be present to justify ordering defendants to compensate plaintiffs. In *Clements,* the Supreme Court soundly rejected the idea that there is a "material contribution to injury" test in Canadian law, holding that (in the absence of truly exceptional

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alternative, material contribution test for causation. The goal of the causal inquiry is to be a rough-and-ready tool for evidentiary assessment linking fault-based conduct to harm. Instead, the inquiry often degenerates to an abstract and far less productive goal of slicing and dicing generalizable legal constructs for their own sake. Judges stop sorting through facts and weighing evidence and instead start playing with what test will drive the result that the evidence and justice demand. This is goal displacement at its best. That needs to change."

[100] *Snell* at para. 29, citing Lord Salmon in *Alphacell Ltd. v. Woodward*, [1972] 2 All E.R. 475 (U.K. H.L.) at 490.

[101] Stapleton, *supra* at 42 [emphasis added].

[102] See, e.g., Richard W. Wright, "Causation in Tort Law", (1985) 73.6 Cal L Rev 1735; Richard W. Wright, "The NESS Account of Natural Causation: A Response to Criticisms", in Perspectives on Causation, ed. R. Goldberg (Oxford: Hart Publishing, 2011), 285; and David Chiefetz, "Factual Causation in Negligence after *Clements*" (2013) 41 Adv Q 179 at 347*ff*.

circumstances that have yet to occur in a Canadian case in which the "material contribution to *risk*" workaround to factual causation must be applied) "a plaintiff cannot succeed unless she shows as a matter of fact that she would not have suffered the loss 'but for' the negligent act or acts . . .".[103]

Rather than adopt new or alternative tests for causation, Canadian courts have insisted that, when properly applied, the traditional "but for" approach to causation is "adequate to the task".[104] The Supreme Court has confirmed that "but for" is up to the task of assessing factual causation, and in so doing has consistently emphasized the importance of common sense in the analysis.

Although the Supreme Court of Canada has generally framed its expression of the "but for" test as applying to the singular "defendant",[105] this is simply a consequence of the facts of the cases that have gone before it. The Court has not had occasion to apply the "but for" test to a complex multiple tortfeasor case—and it has never held that the "but for" test must be applied to individual defendants or individual breaches, one by one.

Where it cannot be said that any one defendant tortfeasor was, on her own, a necessary or "but for" cause, but the collective actions of multiple tortfeasors combined to cause the injury, the "but for" test is workable and can determine factual causation using a robust and pragmatic approach. This requires consideration of "but for" not in respect of each individual defendant or each individual breach, but in respect of the *collective negligent conduct* that purportedly caused the injury—that is, the delayed diagnosis and treatment; the force of leaning on the car; the Board's vote; the pollution.

When the historic origins of causation in general and the "but for" test in particular are reviewed, it is clear that causation was meant to ensure the existence of a connection or relationship between the defendants' wrongful acts and the injuries for which the plaintiff seeks recovery—not to permit defendants who breach the standard of care to escape liability.[106]

Applying the "but for" test to the *collective negligent conduct* rather than to individuals or their breaches in isolation makes common sense. Moreover, in some cases of multiple tortfeasors such as *Sacks*, it is the only way to determine causation in a manner consistent with the underlying goals of the law of negligence. As stated by the Supreme Court of Canada in *Clements*:

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[103] *Clements* at para. 46. See also René E. Brewer, "The end of material contribution to injury: *Clements v Clements*" (2013) 42 Adv Q 217.

[104] *Snell*, *supra,* at para. 26.

[105] See e.g., *Clements* at paras. 9 and 10.

[106] See *Snell* at para. 26: "If I were convinced that defendants who have a substantial connection to the injury were escaping liability because plaintiffs cannot prove causation under currently applied principles, I would not hesitate to adopt one of these alternatives."

> Compensation for injury is achieved. Fairness is satisfied; the plaintiff has suffered a loss due to negligence, so it is fair that she turns to tort law for compensation. Further, each defendant failed to act with the care necessary to avoid potentially causing the plaintiff's loss . . . Deterrence is also furthered; potential tortfeasors will know that they cannot escape liability by pointing the finger at others. And these goals are furthered in a manner consistent with corrective justice; the deficit in the relationship between the plaintiff and the defendants viewed as a group that would exist if the plaintiff were denied recovery is corrected. The plaintiff has shown that she is in a correlative relationship of doer and sufferer of the same harm with the group of defendants as a whole . . .[107]

Of course, each defendant's actions must be analysed individually to determine if there was a breach of the standard of care, and whether that breach is connected to, or formed a component of, the conduct that constitutes a "but for" cause of the injury. An individual defendant who did not breach the standard of care, or whose breach was unconnected to the harm suffered by the plaintiff, would not be held liable when the "but for" test is applied in this manner. Common sense must govern, and the usual elements of negligence continue to apply.

Once multiple tortfeasors' breaches—comprising the negligent *conduct*—are found to be a necessary or "but for" cause of the injury, the trier of fact must still analyse each defendant's contribution to the injury and apportion liability. This is a separate step related to the allocation of *damages*, which does not form part of the causation inquiry. As Chief Justice McLaughlin stated in *Clements*:

> In such cases, the defendants are said to be jointly and severally liable. The judge or jury then apportions liability according to the degree of fault of each defendant pursuant to contributory negligence legislation.[108]

Applying the "but for" test to negligent *conduct* rather than to individuals is in keeping with the Court's instructions to apply the test in a pragmatic, common-sense fashion. It also avoids the undesirable outcome of negligent defendants escaping liability because of an overly technical, granular misapplication of the "but for" test.

VI. CONCLUSION

The "but for" test articulated by the Supreme Court in *Clements* is effective and, when properly applied, adequate to the task of determining factual causation in a just manner in both straightforward negligence cases and complex, multiple tortfeasor situations. In the cases where judges or lawyers

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[107] *Clements* at para. 41.
[108] *Ibid.* at para. 12.

have had difficulty applying the "but for" test, the confusion stems not from the test itself, but rather from its overly strict or "too rigid" application.[109]

Even in multiple tortfeasor situations in which no single defendant's breach can be said to be a necessary cause *on its own*, the "but for" test can still be used to establish causation. Once the defendants' breaches are determined, the trier of fact can ask whether this collective negligent *conduct* was a necessary cause of the injury: "But for" the defendants' negligence, would the plaintiff's injury have occurred? Individual tortfeasors' role in the injury is then assessed, and their fault apportioned accordingly.

This common-sense approach ensures that causation is addressed through the use of the "but for" test in a robust and pragmatic fashion, and remains true to the historic origins and purposes of causation in negligence.

[109] *Snell* at para. 29.