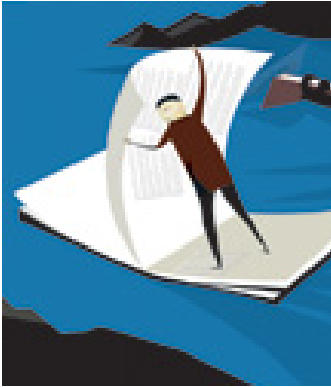


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## FIRE ON THE ICE: RECENT DEVELOPMENTS IN THE LAW OF NEGLIGENCE REGARDING CAUSATION

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Adjusters and insurers investigating and considering an insured's legal liability for compensatory damages under a Commercial General Liability policy will be interested in a recent decision of the Supreme Court of Canada, *Resurface Corp v Hanke*, 2007 SCC 7, which provides clarity on the causation test in the law of negligence. The judgment is notable for its brevity, as well as being delivered by the Chief Justice on behalf of a unanimous full (nine-member) Court. In particular, the reasons for judgment discuss the general principles of negligence in a clear and succinct manner, without traversing the extensive judicial and academic commentary in this area of the law.

### I. The CGL Policy

The Commercial General Liability ("CGL") policy is one of the most common insurance policies issued for business liability. Generally speaking, a CGL policy seeks to cover the risk of bodily injury or property damage to third parties arising out of the conduct of an insured's business or work product.

Standard CGL policies cover the sum (up to insured limits of course) that an insured is legally obligated to pay as compensatory damages for bodily injury or property damage to which the insurance applies.

### II. Negligence

Claims based on negligence make up a large part of liability claims.

Negligence is part of tort law, which seeks to enforce reasonable standards of civil conduct and prevent the creation of circumstances that involve reasonably foreseeable risks of harm. Tort law provides compensation to address injury that is caused by someone breaking such standards. It thus seeks to deter risk-taking behaviour and prevent accidents.

Negligence is perhaps the most important field of tort liability, as it regulates most of our daily activities. Generally speaking, negligence is based on duties owed to others to "take care" and to conduct one's self to a standard required by society. That standard is said to involve notions of conduct that is considered "reasonable" in the circumstances.

The principal elements of negligence are:

- the existence of a duty of care;
- a breach of that duty;

- damage (that is, an injury to property or to a person has been suffered); and
- causation (that is, there is a causal link between the breach and the damage suffered).

This seminar focuses on the final element set out above: causation.

The causation element requires that a wrongdoer's conduct must have caused a claimant's loss. Put another way, there must be a direct connection between an insured's negligent act and an accident suffered by a claimant. Without such a causative link, there is no liability.

There has been a lot of ink spilled and paper printed by lawyers, judges, and academics regarding the proper test for causation in negligence cases. However, the Supreme Court of Canada recently set out some general principles in *Hanke*.

### III. Mr. Hanke

The facts of *Hanke* arose out of a tragic injury incurred by a man involved in an accident at an ice hockey rink.

Mr. Hanke was employed by the City of Edmonton, Alberta to look after the ice rink. His job included operating a Zamboni. One day, when starting up the machine, Mr. Hanke placed a water hose into the gasoline tank rather than the water tank. Hot water soon overflowed the gasoline tank, and vapourised gasoline was released into the air. The gasoline vapour was then ignited by an overhead heater, which caused an explosion and a fire. Mr. Hanke suffered serious burns to his face, lost most of his fingers, and spent two years in hospital.

As a result of his injuries, Mr. Hanke sued the manufacturer and distributor of the Zamboni machine for damages, alleging design defects. In particular, he alleged that the gasoline tank and the water tank were similar in appearance and placed close together on the machine, which made it easy to confuse the two tanks.

### IV. The Trial Decision

The trial judge decided that Mr Hanke had not established that the accident was caused by negligence. Regarding causation, the Judge decided that Mr. Hanke had failed to establish that his injuries were caused by negligent design. On this point, the trial judge applied a "but for" test to determine causation and decided that "but for" Mr. Hanke putting or leaving the hose in the gasoline tank, the explosion would not have occurred.

In reaching this conclusion, the trial judge rejected the design errors alleged by Mr. Hanke, and found that Mr. Hanke should not have been confused by the placement or appearance of the tanks. In particular, the

judge rejected Mr. Hanke's allegations regarding similar tank caps (the caps on the two tanks as designed and delivered had been different, but had been subsequently replaced by Mr. Hanke's employer), the location of the two tanks, similarity between the two tanks (one was actually much taller than the other), and warning signs (the gas tank had a label on it that said "Gasoline Only"). Further, Mr. Hanke admitted in evidence that he knew the difference between the two tanks. The trial judge therefore considered that the accident had been caused by Mr. Hanke's decision to turn the water on when he knew, or should have known, that the water hose was in the gasoline tank.

## V. The Court of Appeal

The Alberta Court of Appeal set aside the trial judge's decision and ordered a new trial.

On the issue of causation, the Court of Appeal stated that the trial judge had erred in failing to conduct a proper contributory negligence analysis in not considering the "comparative blameworthiness" of Mr. Hanke and the defendants. The Court of Appeal also criticised the trial judge for applying a "but for" test for causation instead of a "material contribution" test.

("Material contribution" refers to circumstances where a wrongdoer's negligent conduct materially increases the risk of damage and that damage occurs. Under a "material contribution" test, such circumstances are sufficient to satisfy the requirement that a wrongdoer's conduct caused the damage.)

## VI. The Supreme Court of Canada

The principal focus of the judgment delivered by the Supreme Court of Canada was on one of the issues that divided the Alberta courts: causation.

The Supreme Court of Canada confirmed that the primary test for determining causation in negligence remains the "but for" test. That is, a plaintiff or claimant bears the burden of showing that "but for" the negligent act or omission of a defendant, the injury would not have occurred. The Court stated that:

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

The Court noted that a "material contribution" test will only apply in special circumstances as an exception to the "but for" test. Cases in which the "material contribution" test is applied involve two requirements. First, it must be impossible, due to factors beyond the plaintiff's control, for a plaintiff to prove that the defendant's negligence caused the plaintiff's injury using the "but for" test. Second, the plaintiff's injury must fall within the ambit of the risk created by the defendant's breach of a duty of care owed to the

plaintiff. The Court justified that liability may be imposed in such exceptional cases, because it would offend basic notions of fairness and justice to deny liability by applying a “but for” approach. An example the Court gave is where it is impossible to say which of two negligent acts caused an injury, such as where two shots are carelessly fired at a victim but it is impossible to say which shot injured the victim.

The “material contribution” test is therefore only to be used in circumstances where a wrongdoer’s negligent conduct materially increases the risk of damage and that damage occurs, but it is not possible to say that the negligent conduct actually had any part in causing the damage.

## VII. The Outcome for Mr. Hanke

The trial judge in *Hanke* had found not only that Mr. Hanke’s carelessness was responsible for his injuries, but also that the alleged design defects were not responsible for Mr. Hanke’s injuries. In these circumstances, the Supreme Court of Canada considered that the material contribution test was neither necessary nor justified, and that the trial judge had correctly applied a “but for” test.

## VIII. Concluding Comment on the “But For” Test for Causation

*Hanke* is a short decision that succinctly sets out the Supreme Court of Canada’s approach to determining the issue of causation in tort cases.

To summarise: the legal test for determining causation in negligence is the “but for” test.

If the accident would not have occurred but for the wrongdoer’s negligence, the wrongdoer’s conduct is a cause of the injury. Put another way, the conduct of the wrongdoer must have made a difference: if such conduct had nothing to do with the injury suffered, the wrongdoer escapes liability.

Therefore, when investigating and considering an insured’s liability, ask yourself: did the insured’s negligent conduct make a difference to the course of events that would have normally taken place so that the course of events instead resulted in an injury? You should also be aware that it does not matter whether the insured’s negligence was the only factor that made the difference or is one of the factors that makes the difference.