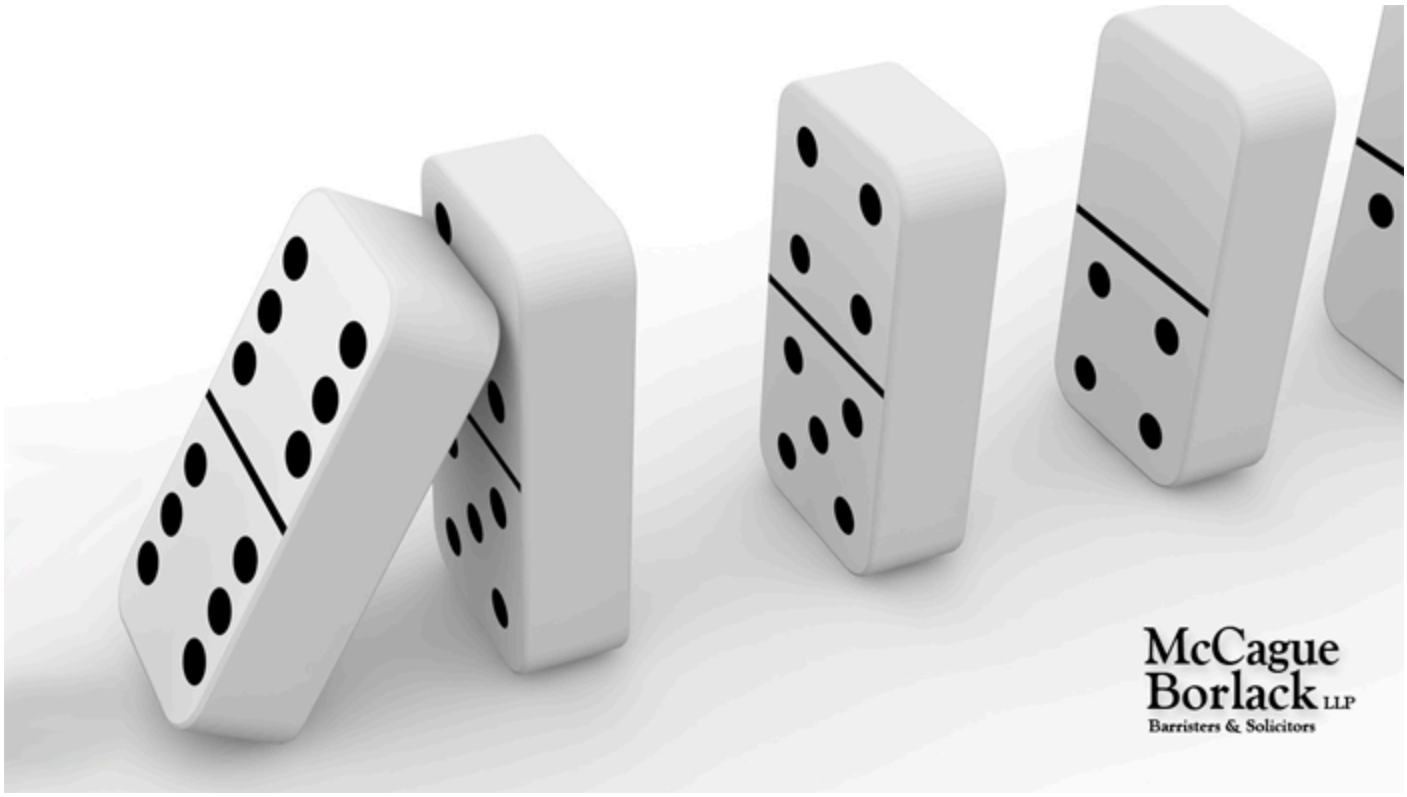

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Novus Actus Interveniens (Intervening Cause) And "But For" Causation

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Introduction

This paper follows on from an earlier one which discussed the defence of intermediate examination in a product liability claim,[1] and which included some brief comments on the doctrine[2] of *novus actus interveniens*. Some of the comments made in that earlier paper are repeated, although the issue is considered here in significantly greater detail and from a more analytical standpoint.

It should be noted that this paper is directed at *novus actus interveniens* in the context of tort claims, not criminal cases, where considerations may well differ. In addition, several of the cited decisions originate in Quebec and involve *Civil Code*-related issues, although they consider and apply intervening cause in the same manner as do those from the common law provinces. Finally, this paper does not consider semi-philosophical issues such as whether NESS[3] causation is preferable to "but for" causation.[4]

For reasons outlined below, the standard "but for" test of causation, upon which *novus actus interveniens* is based, breaks down when there are two or more independent wrongdoers and leads to blatant injustice. A different method of satisfying, or at least addressing, the element of causation must then be employed. We suggest two such alternatives.

A. THE DEFENCE IS OFTEN UNAVAILABLE

Conditions and limitations

The defence of novus actus interveniens is ringed in by various conditions and limitations to the extent that there is relatively little opportunity for its application. The major limitation is that it is unavailable where the later negligent conduct was reasonably foreseeable,[5] "was the very thing that should have been anticipated",[6] or "the very kind of thing which is likely to happen":[7]

> Nowadays it is no longer open to serious question that the operation of an intervening force will not ordinarily clear a defendant from further responsibility, if it can fairly be considered a not abnormal incident of the risk created by him – if, as sometimes expressed, it is 'part of the ordinary course of things.'[8]

For example (and the overlap between intervening cause and remoteness of damage is particularly clear here), the initial wrongdoer may allege that incorrect or negligent care provided by the attending physician when treating injuries suffered as a result of the original wrongdoing is a *novus actus interveniens*. That position will generally fail because of the foreseeability of incorrect or negligent care:

> [W]here a plaintiff has used reasonable care to employ a competent physician to treat injuries sustained by him as a result of the negligence of the defendant, such defendant tortfeasor must assume the inherent risks of complications, misadventure or

> *bona fide* medical error arising during the course of such physician's treatment. Based on the principle that such risks are reasonably foreseeable, the original tortfeasor would be responsible for damages resulting from such complications, misadventure, or medical error.[9]

There are other conditions and limitations:

- "Jurisprudence in Canada and in other common law jurisdictions and academic scholarship have given rise to efforts to formulate a principle to deal with intervening acts. Professor Stanley Yeo describes many of them:

  > Several efforts...may be gleaned from the case authorities. They include statements to the effect that a defendant is relieved of causal blame if the intervening event was "abnormal", "an unreasonable act", a "coincidence", "not a natural consequence", comprised the "voluntary conduct of the intervener" or "was not reasonably foreseeable" ("Blamable Causation" (2000) 24 *Crim L.J.* 144, at p. 151). The difficulty in formulating one test to determine when an intervening cause interrupts the chain of causation lies in the vast range of circumstances in which this issue arises."[10]

- For *novus actus interveniens* to apply, the subsequent cause must be independent of the earlier cause; it must not have come into being solely because of that earlier cause.[11] It must not have been "the *causa causans* in the sequence of events which led to the damage suffered by the [plaintiffs]."[12] "This is not a case involving an independent intervening act that is causally unrelated to the defendant's conduct."[13]

- "It is true that a person who commits a fault is not liable for the consequences of a new event that the person had nothing to do with and has no relationship to the initial fault. This is sometimes referred to as the principle of *novus actus interveniens*: that new event may break the direct relationship required under art. 1607 *C.C.Q.* between the fault and the injury. Two conditions must be met for this principle to apply, however. First, the causal link between the fault and the injury must be completely broken. Second, there must be a causal link between that new event and the injury. Otherwise, that initial fault is one of the faults that caused the injury, in which case an issue of apportionment of liability may arise."[14]

In addition, there is case law which indicates that a *novus actus interveniens* is a "conscious act of human origin."[15] Other remarks to the same effect are: "Whether the intervening act of another person...is an act of conscious volition amounting to a *novus actus interveniens* is often a very nice question,"[16] and "Often, in a negligence case, the chain of causation will be broken where an independent voluntary human action intervenes between the negligent act and the injury. This principle [is] often expressed in Latin as *novus actus interveniens*".[17] While other decisions have made some reference to this approach, it appears to be a minority view.[18] Otherwise, an event not involving human choice, such as an illness or an unintentional or negligent act based solely on carelessness, would not be considered an intervening act.

Other considerations

On a more general level, comment has been made regarding the sheer difficulty of determining whether *novus actus interveniens* may apply in any given fact situation:

> Whether or not the intervening conduct amounts to a *novus actus interveniens* is a question that has plagued the courts for centuries.[19]

> Whether a new intervening act is of sufficient magnitude, or of such quality, to break the chain of causation involves complicated questions of causation and foreseeability...[20]

Most far-reaching, were it generally adopted, is the following statement:

> The concepts of the last wrongdoer and *novus actus interveniens*, which in the past occasionally shielded negligent defendants from responsibility for these consequences, are largely spent forces, being employed only in the rarest of situations. The modern view is that the "negligent conduct of others is within the recognizable risk of the dangerous situation created by the original actor."[21]

B. IS *NOVUS ACTUS INTERVENIENS* A VIABLE THEORY?

An underlying principle: The obligation to prove "but for" causation

Among the foundational elements that a plaintiff must prove in a negligence claim is that "the damage was caused, in fact and in law, by the defendant's breach."[22] "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...*caused* the injury."[23]

Absent special circumstances, the basic or general test of causation is the "but for" test,[24] which asks whether the wrongdoing was a necessary cause[25] of the injury – "in other words that the injury would not have occurred without the defendant's negligence."[26] The test is articulated as follows: "[T]he plaintiff must show on a balance of probabilities that 'but for' the defendant's negligent act, the injury would not have occurred."[27] Another test, known as "material contribution to the risk", may be applied in exceptional circumstances, and that will be discussed below.

"Breaking the chain of causation"

The term *novus actus interveniens* (almost) literally means "A new act intervenes."[28] The language generally used to describe the mechanism and core nature of this defence is that a subsequent event "breaks the chain of causation" between the preceding wrongdoing and the loss or harm ultimately sustained by the plaintiff: "The intervening cause doctrine presupposes a new event that caused a break in the chain of causation between the initial fault and the injury."[29] But just what does "a break in the chain of causation" really mean?

The terminology indicates that there is no longer a "chain of causation" – put more simply, a causal link or connection - between the initial wrongdoing and the plaintiff's injury (or at least that overlapping or common part of it which is being contested). The reason why the "chain of causation" no longer exists is because the initial wrongdoing is no longer considered to be a cause in law of the injury. In turn, the reason why it is no longer considered to be a cause in law is that, as the injury would have occurred in any event, the wrongdoing is no longer a "but for", or necessary, cause of the injury.

The inevitable loss explanation

The "break in the chain of causation" reasoning is illustrated in the following two examples. They are essentially identical, except that in one the "intervening cause" does not involve wrongful conduct, while in the other it does:

- A claim for loss of income is made by a plaintiff injured by the defendant's wrongdoing. The plaintiff later (but prior to trial) suffers a stroke, the effect of which is to similarly disable the plaintiff from gainful employment. The occurrence of the stroke is entirely unrelated to the

defendant's initial wrongful conduct and would have occurred regardless of that wrongdoing. Both the wrongdoing and the stroke result in a common type of harm: loss of income.

- Instead of a natural event such as a stroke, the subsequent event which causes work disability is some form of wrongful conduct by a third person. Here again that subsequent wrongful conduct is entirely unrelated to the initial wrongdoing and would have occurred in any event.

The subsequent event in those situations – either the stroke or the later wrongdoing by a third person - is considered a *novus actus interveniens*. It is unexpected and unconnected to the initial wrongful act. In both cases, the overlapping part of the loss is inevitable; it would have been sustained regardless of whether the initial wrongdoing had occurred. From a logical standpoint, the initial wrongdoing therefore is no longer a "but for", or necessary, cause of the loss. The "chain of causation", which more accurately would be termed the "chain of necessary causation,"[30] between the initial wrongdoing and the loss of income is "broken."

The term "chain of necessary causation" is appropriate because the causal attribute of the initial wrongdoing is not entirely eliminated. While it is no longer a "but for" cause, it is still a "cause" of the injury. It can now be described as an incidental cause. It matters not whether the subsequent event involves wrongdoing; in either case the initial wrongdoing is no longer a "but for" (necessary/legal) cause of the injury.

Does intervening cause act in both "up" and "down" directions?

The usual application of *novus actus interveniens* is based on an incomplete analysis. It considers the issue from one standpoint only – that of the initial wrongdoer. Apart from an outlier decision (and even there only indirectly),[31] there has been little if any consideration of the matter from the standpoint of a subsequent wrongdoer. In other words, while consideration has been given to the issue of liability being affected in a "down" direction (a later event – a *novus actus interveniens* - providing a defence to an earlier wrongdoer), would the principle similarly operate in an "up" direction (the earlier event providing a defence to a later wrongdoer)?

The terms "*novus actus interveniens*" and "intervening cause" are biased toward a "downward" effect. A "new event", or one that "intervenes", is naturally taken to refer to a subsequent, not a preceding, event. A prior event is neither a "new" event nor one that "intervenes". That, however, is a matter of semantics. It is the substance of the matter, not the title given to it, that should be the governing consideration.

The principle logically operates in both directions. Let's postulate a simple scenario in which there are two tortfeasors, with both torts occurring prior to trial. The first will be Tortfeasor ("TF") 1, and the second, TF 2. The harm resulting from TF 1's wrongdoing is the plaintiff's disability to work for an estimated one year. The injury caused by TF 2 is more serious; it is estimated to disable the plaintiff from returning to work for several years. Therefore, the common, or overlapping, injury is loss of income for one year.

What will the result of the "but for" test of causation be when it is separately applied to each TF?

TF 1

TF 1 says: The plaintiff cannot show that, but for my negligent act, the harm caused by that act (one year's loss of income)[32] would not have occurred. It is undisputed that that loss (and in fact one of even greater magnitude) would have occurred in any event as a result of TF 2's negligence. My wrongdoing was not a necessary cause of the

harm. TF 2's wrongdoing broke the chain of causation between my negligence and the harm and therefore I cannot be held liable. (It is on this basis that TF 1 is normally accorded the benefit of a *novus actus interveniens* defence, so long as none of the conditions and limitations referenced above apply.)

TF 2

TF 2, however, makes a similar argument: The plaintiff cannot show that, but for my negligent act, the first year's loss of income would not have occurred. It is undisputed that that loss in fact occurred as a result of TF 1's negligence and would have been present even had I done nothing wrong. My wrongdoing was not a necessary cause of the harm. As a result, there is no chain of causation between my negligence and the first year's loss of income, and I cannot be held liable for that harm.

TF 2, in other words, can advance the same "but for" argument that TF 1 makes insofar as the overlapping and contested part of the harm is concerned:

> 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...her action against the defendant fails.[33]

Both TF 1 and TF 2 are readily able to rely on a "but for" causation defence. By focusing attention on the result of the other's wrongdoing, *each* can show (although, of course, the onus of proof rests with the plaintiff) that its negligence was not necessary to bring about the harm in question; each can show that the harm would have occurred without its negligence. The plaintiff therefore is unable to show that the "but for" test is satisfied insofar as *either* of the defendants is concerned, with the result that the plaintiff has no right of recovery against anyone for her loss of income for the first year. She can make a claim only against TF 2, and then only for her loss of income after the first year.

As TF 1's wrongdoing precedes that of TF 2, it would be awkward to refer to the latter's shield against liability as a *novus actus interveniens* defence, but the reality is that both TF 1 and TF 2 effectively rely, *via* the "but for" test, on some form of the intervening cause principle.

This bizarre result is obviously both unintended and unjust. A rule of law, based on what can best be described as a logical quirk, which leaves a plaintiff without recourse for a loss, even though there was negligence on the part of both defendants and the negligence of each was clearly connected to the loss, cannot be permitted to result in such blatant injustice.[34] As described below, it is our view that there are two suitable responses to this conundrum: either the application of the "material contribution to the risk" test, or the replacement of "but for" causation with the milder standard of "substantial connection".

Another explanation – "overwhelming cause"

Another explanation that has been given for the *novus actus interveniens* principle, one that does not rely on the "It would have happened in any event" argument, is that the causal impact of the supervening event is of such magnitude that it "overwhelms" the causal impact of the initial wrongdoing.[35] But if the initial wrongdoing remains a "but for" cause of the loss, this explanation carries little logical weight. While one cause may certainly be more impactful than another, what rational justification can there be for writing down to zero the causal impact of a necessary cause, one without which the loss would not have occurred?[36] If, on the other hand, the lesser cause is not

a "but for" cause, then there is no need to invoke the intervening cause principle because no liability would attach in any event to wrongdoing which is not a "but for" cause of the injury.

In addition, so long as both wrongdoings are "but for" causes of any overlapping injury, the theory does not address the conundrum posed by the TF 1/TF 2 example, whereby both wrongdoers would have an absence-of-causation defence, regardless of whether the causal impact of one wrongdoing overwhelms the causal impact of the other.

Suppose also that it is the initial wrongful conduct whose causal impact overwhelms that of the later event. Can the initial wrongdoing be described as an "intervening event" when it precedes the later event? This semantic issue is touched on above.

The "overwhelming" nature of the causal impact of one "but for" cause as compared to the causal impact of another "but for" cause ought not to be a factor other than in the determination of apportionment of liability.

What if one of the events does not involve wrongdoing?

In one of the examples given above, the later event (a stroke unconnected to the initial negligence) does not involve wrongdoing. There is no second tortfeasor, so the plaintiff can make a claim only against the initial wrongdoer. Will that claim be defeated by a *novus actus interveniens* defence? The short answer is Yes.[37] A "but for" analysis shows that the injury would have occurred in any event, but in this case, there is no injustice in that result.

We are not a no-fault society. A claim for damages is based (in part) on wrongdoing which causes injury. In the situation where the negligence of each of two wrongdoers is causally connected to the injury, it is obviously unjust to permit both of them to escape liability, leaving the plaintiff without recourse. Where, however, there is only one wrongdoer and the injury would have occurred without fault on anyone's part in any event, it is difficult to contend that there is an injustice requiring remedy.[38] Recovery in that situation would be more in the nature of a windfall. This would apply in the reverse situation as well – a wrongdoer would have no liability for that part of a loss that had already been caused without wrongdoing.

An off-note decision: *Sunrise Co. v Lake Winnipeg (The)*[39]

In this atypical decision, the approaches taken in both the majority and dissenting opinions differed from the usual application of the *novus actus interveniens* defence. When an unforeseen and unrelated subsequent event (one that did not involve wrongful conduct) gave rise to part of the same loss as had been caused by the initial wrongdoing, it was not treated as an intervening cause which insulated the wrongdoer from liability for that overlapping part of the loss. To the contrary, the wrongdoer was held liable for the full loss. The dissenting opinion[40] took the position that the wrongdoer was relieved of liability for half only of that part of the loss which would have been sustained in any event as a result of the later incident.

In the 30-plus years since its release, *Sunrise* has been infrequently cited. It nevertheless brings into focus some of the issues discussed in this paper. Note should also be taken that *Sunrise* involved a maritime loss. That happenstance, in fact, was expressly mentioned in the majority decision, although its relevance was discounted in the dissenting opinion, and the general law has often adopted principles originating in maritime cases.[41]

In brief, the facts in *Sunrise* were as follows. Ships A and B were travelling in opposite directions on the St. Lawrence River. As a result of the negligent operation of ship B, ship A went aground and was damaged. Later, in proceeding to an anchorage area, ship A again went aground and sustained

further damage. Ship B had no involvement in the second grounding, nor was it foreseeable. Had they been conducted separately, repairs for the damage caused by the first grounding would have required 27 days in dry dock, and the repairs for the damage sustained as a result of the second grounding would have required 14 days in dry dock. The repairs for the totality of the damage resulting from both groundings were, however, performed concurrently, and this was accomplished in 27 days in dry dock.

The later event – the second grounding – was not the result of wrongdoing. There was no one to whom the owners of ship A could look for recovery of any loss arising from that grounding. They had recourse only against ship B. The question for the court was: What was the extent of the loss for which ship B, the only wrongdoer, was liable?

The trial judge[42] held that ship B was liable for ship A's loss of income for the full 27 days in dry dock. The Court of Appeal[43] modified that judgment, holding that ship B's liability was limited to loss of income for 13 days. Although no express consideration was given to the defence of intervening cause, the Court of Appeal effectively held that the second grounding was a *novus actus interveniens*, saying there could be no recovery from ship B "for the fourteen days during which [ship A] would not have been a profit-making machine even if the first grounding had not taken place."[44] In a 5-2 decision, the SCC restored the trial judgment.[45] The dissent did not, however, adopt the Court of Appeal result; instead, they would have awarded loss of income for 20 days in dry dock: the 13 days that would have been necessary regardless of whether a second grounding had occurred, plus 7 days, consisting of half of the overlapping 14 days in dry dock.

The majority decision effectively turned the notion of *novus actus interveniens* on its head. While here too the usual language of intervening cause was not employed, the fact that a subsequent incident unconnected to any fault in the operation of ship B (or, for that matter, to the fault of anyone) made 14 days in dry dock necessary in any event was not considered to be an intervening cause absolving ship B of liability for loss of income during those 14 days. Although not expressed in these terms, the second grounding did not "break the chain of causation" between ship B's negligence and the contested 14 days in dry dock.

Relying mostly on English maritime case law,[46] the court adopted the principle that a later event which causes a loss of the same type as had already been caused by previous wrongdoing can be disregarded as causally irrelevant, because the loss had effectively already been sustained by the time of the later event – it was, so to speak, "baked in the cake". Furthermore, the later event (had it involved wrongdoing) would attract no liability.[47] The initial (and only) wrongdoer (ship B) was therefore held liable for the loss of income during the entire 27 days in dry dock:[48]

> While the second incident caused time in dry dock it did not have as a consequence any loss of profit [because the vessel was already incapable of making profit during the contested 14-day period due to the damage resulting from the first grounding].[49]
>
> In summary, there is no causal link between the second incident and the loss of profit suffered by the owners of [ship A], such damage being merely incidental.[50]

The result in *Sunrise* was the opposite of that from the usual application of *novus actus interveniens*. The initial wrongdoer was not given a pass in respect of that part of the loss which would have been sustained in any event as a result of a later incident.

Sunrise essentially applied the *novus actus interveniens* approach in an "up", rather than the usual "down", direction (although in *Sunrise* there was no second wrongdoer to receive that benefit). In the usual application, it is the inevitability of the same loss because of the later event that removes

the sting of the loss arising from the initial wrongdoing, thereby "breaking the chain of causation". Conversely, in the *Sunrise* reasoning, it is the fact that the same loss has already been established as a result of the initial wrongdoing which removes the sting of the later event.

The final player in the *Sunrise* series of decisions (the dissenting opinion) took a hybrid third approach. While no express reference was made to *novus actus interveniens* it was, in all but name, considered and applied (although only to a partial degree). A straightforward and usual application of the principle would have adopted the decision in the Court of Appeal. Recovery would have been denied for the loss of profit during the 14 days in dry dock that would have been necessary in any event as a result of the second grounding. Instead, one-half of the contested 14 days was added to the 13 days that were not in dispute.

The proper question, it was said, was not just whether the initial negligence in the operation of ship B caused the need for 27 days in dry dock, but also whether the contested harm – the loss of income during the 14 days in dispute – was caused by that negligence.[51] The following comments were then made:

> Perhaps the most fundamental principle governing the assessment of damages in tort is the rule that the purpose of the damages is to restore the plaintiff to the position that it would have been in had the tort not occurred – *restitutio in integrum*. Damages are to be full and complete, but at the same time, the plaintiff is not entitled to compensation in excess of the actual loss which he has established to have been caused by the tort.[52]
>
> To the extent the loss is caused by a cause other than the tort, it is not compensable. On this approach, the plaintiffs would be entitled to damages for loss of use of their ship for 13 days, being 27 days less the 14 days that the ship would have been out of use in any event due to an unrelated cause.[53]

Had the dissenting opinion ended there, it would have amounted to an unqualified and usual application of the *novus actus interveniens* defence, but it did not. The opinion went on to refer to the need to fashion an approach that would ameliorate unfair consequences,[54] ultimately leading to the modified assessment summarized above.

The outcome in *Sunrise* was wrong, but part of its reasoning was correct and significant

We believe that the outcome in *Sunrise* was incorrect (as too the suggested outcome in the dissent).

As noted above,[55] the question that ought to have been asked was: "Has ship A shown that, but for ship B's negligent act, the injury (the contested 14 days in dry dock) would not have occurred?" The only answer that could have been given was: "No. Ship A would have required those 14 days in dry dock because of the second grounding even if ship B had not been negligent." The first grounding, in other words, was not a "but for", or necessary, cause of the overlapping part of the loss.

This was not, however, a case where there was a second tortfeasor who could similarly argue that its negligence was not a "but for" cause of the overlapping and contested part of the loss, thereby leaving ship A caught between two stools, having no recourse despite the presence of two wrongdoers, each of whose negligent conduct was causally connected to the 14 days of loss of income. The cause of the later event did not involve wrongdoing on the part of anyone and was not foreseeable. In those circumstances (and for reasons outlined above),[56] ship B ought to have been excused from liability for the overlapping 14 days.

Despite that error, however, the majority decision is nevertheless both relevant and significant in that the court (and the English decisions on which it relied) adopted the real-world notion that the injury is already in place after the initial wrongdoing.[57] A subsequent wrongdoer would then, albeit with illogical consequences, be entitled to rely on that reality, saying that its negligence was not a "but for" cause of the injury. *Sunrise* and the English decisions, in other words, confirm the reasoning, as outlined in the TF 1/TF 2 example described above, that the "but for" causation defence operates in both directions where there are two or more wrongdoers, thereby leaving the plaintiff with no recourse for damages unless some extraordinary measure is employed to avoid that injustice.

There is, to some degree, additional support on this point in the "overwhelming cause" theory, in which it appears to be assumed that *both* the initial and subsequent wrongful acts are "but for" causes of the loss. That too would lead to the anomalous result described above.

Negligence statutes

Account must be taken of legislation, such as the Ontario *Negligence Act,*[58] enacted to reverse or ameliorate the harshness of some common law rules, one of which is a bar to a claim for contribution made by one tortfeasor against another. Contrary to that clear statutory objective, however, the *novus actus interveniens* principle in its usual application continues to preclude such claims. The effect of the principle therefore is to circumvent one of the basic and unmistakable remedial purposes of the legislation. It is also contrary to the modern judicial approach to such issues:

> Like the contributory negligence bar, the idea that there can be no contribution between tortfeasors is anachronistic and not in keeping with modern notions of fairness.[59]

Another unambiguous purpose of negligence statutes is to overcome the common law rule that a plaintiff who is himself negligent is not entitled to make a claim against a wrongdoer (the "contributory negligence bar" referenced in the passage above). The *Dallaire* decision[60] discussed below appears to permit the *novus actus interveniens* principle to trump that statutory purpose as well. In fact, were the path traveled to its logical conclusion, the plaintiff would be denied a claim altogether where there are two or more wrongdoers because, as explained above, both wrongdoers would rely on the "but for" test to show an absence of causation. That would effectively render much of the statute meaningless.

The language of s. 1 of the Ontario *Negligence Act* is itself relevant: "Where damages have been caused or contributed to by the fault or neglect of two or more persons...". It is not a stretch to interpret those words (or those employed in the statutes of the other provinces)[61] as encompassing causation at a global as well as an individual level, or to incorporate a substantial causal connection test. This is discussed in section C below regarding suggested solutions.

In the event of a conflict or inconsistency between a statute and a common law rule, the statute must prevail unless it is shown that the conflict/inconsistency is more apparent than real, and that the underlying purpose of the statute is not being defeated. The correct approach here is to apply the contributory negligence provisions mandated by negligence statutes, employing a test of causation other than "but for" (see our two suggestions below) to accomplish that objective.

A negligent plaintiff – two cautionary tales

In a case where the plaintiff's negligence was "beyond question", it was held that the subsequent negligence of the defendant and of a third party broke the chain of causation between the plaintiff's

negligence and the loss, so that the plaintiff's negligence was not an effective cause of the loss.[62] Even apart from the questionable nature of that finding,[63] the defendant ought not to have been deprived of a statutory contributory negligence defence.

A similar error was made in the difficult-to-understand decision in *Dallaire v Paul-Emile Martel Inc.*,[64] although from the opposite standpoint.[65] The plaintiff (who was 11 years of age) was injured while using a conveyer at a farm. A claim was made against the manufacturer of the conveyer. The court apparently held, at least initially, that the conveyer had not been negligently designed or manufactured[66] – a finding which should immediately have ended all consideration of the defendant's liability – but then relied on the finding that the negligence of the plaintiff and his father in the use of the conveyer amounted to a *novus actus interveniens*.[67] Later passages make it unclear whether the conveyer was both dangerous and negligently used, or whether it was merely negligently used.[68] The former appears to have been the case, because the nub of the decision is contained in the following statement: "The faults committed by the [plaintiff] and his father are a 'new event', a *novus actus interveniens*, and were the cause of the damage as a whole suffered by the [plaintiff]."[69]

Novus actus interveniens applies only when the defendant's wrongdoing is no longer a "but for" cause of the injury. If the manufacturer had in fact negligently designed the conveyer so that it was dangerous, then that wrongdoing remained a "but for" cause of the harm. It appears that the injury would not have occurred had the conveyer not been dangerous, regardless of the negligent conduct of the plaintiff and his father.

More fundamentally, the application of *novus actus interveniens* in circumstances such as those in *Dallaire* is to return to the common law rule that a negligent plaintiff has no cause of action against those whose wrongdoing contributed to the injury. The abolition of that rule is one of the primary purposes of negligence statutes. A return, *via* the back door of *novus actus interveniens*, to the bad old days when a negligent plaintiff had no claim against a wrongdoer is unacceptable.

While *Dallaire* was a claim made under the Quebec *Civil Code*, the defence of *novus actus interveniens* was explicitly considered and applied so as to dismiss the claim.[70] Here too – so long as the manufacturer was in fact negligent – the correct decision would have been to treat this as an ordinary case of contributory negligence and apportion some – but not all – of the liability to the plaintiff and his father.[71]

How does all this affect *novus actus interveniens*?

In circumstances where there are two or more wrongdoers, the problem is that *both* can legitimately make the argument that there is no "but for" causal connection between their wrongdoing and the overlapping part of the injury, with the result that the plaintiff is left without a claim against either. The absurdity and injustice of that result call for a different test of causation in those circumstances,[72] as well as a reconsideration of the intervening cause defence, the foundation of which is the "but for" test of causation; if the "but for" test is not to be applied, then the intervening cause defence falls by the wayside.

There is unfairness and injustice even without taking into account the plaintiff's inability to make a claim against either wrongdoer. The usual application of *novus actus interveniens* imposes liability solely on the later tortfeasor, who is left with no right to seek contribution from the initial tortfeasor. It subjects the plaintiff to the obligation to prove liability on the part of the later wrongdoer, when proof on the part of the other might be less problematic or just less difficult. It subjects the plaintiff to the risk that the later wrongdoer will be unable to satisfy a judgment. These are serious objections in themselves.

However, *novus actus interveniens*, as well as the "but for" test of causation, should continue to apply in situations where one of the events does not involve wrongdoing.[73] For reasons outlined above, the plaintiff should not be entitled to recover damages when the injury caused by the wrongdoing would have been sustained in any event without wrongdoing.

So, to answer the question earlier raised: *novus actus interveniens* is a viable theory, but only where one of the events does not involve wrongdoing; it is not viable where there are two or more wrongdoers.

C. TWO SUGGESTED SOLUTIONS

To repeat the example given above, TF 1 says: "The loss[74] would have occurred in any event", while TF 2 says: "I caused no injury that wasn't already there." Both correctly say that their wrongdoing was not a *necessary* ("but for") cause of the overlapping part of the plaintiff's injury. How does the plaintiff regain the right to claim damages (and how avoid the other unfair consequences of the usual application of *novus actus interveniens*)? A theme that ran through the various judgments in the Australian decision in *March*[75] was the application of common sense to determine whether causation had been proved.[76] However, despite the inclusion of the word "common", one person's view of common sense may not be another's. We believe that the situation under consideration warrants a more focused and tangible – a slightly more objective - approach, and we suggest two such below.

Apply the material contribution test

One response is to bypass the "but for" test of causation and turn instead to the test of "material contribution to the risk". The following passage sets out the justification for applying a more lenient test:

> "But for" causation and liability on the basis of material contribution to risk are two different beasts. "But for" causation is a factual inquiry into what likely happened. The material contribution to risk test removes the requirement of "but for" causation and substitutes proof of material contribution to risk. As set out by Smith J.A..."material contribution" does not signify a test of causation at all; rather it is a policy-driven rule of law designed to permit plaintiffs to recover in such cases despite their failure to prove causation...That is because to deny liability "would offend basic notions of fairness and justice".[77]

The type of situation considered here fits comfortably within that rationale. The plaintiff is unable to prove "but for" causation on the part of either wrongdoer insofar as the overlapping part of the loss is concerned, and therefore requires a mechanism that "permits recovery despite the failure to prove ['but for'] causation". To deny recovery of damages in those circumstances "would offend basic notions of fairness and justice".

The case law indicates that the circumstances in which the "material contribution" test is available are severely limited. It is only where "the loss would not have occurred 'but for' the negligence of two or more possible tortfeasors, but the plaintiff cannot establish on a balance of probabilities which negligent actor or actors caused the injury."[78] "'[M]aterial contribution' as a substitute for the usual requirement of 'but for' causation only applies where it is impossible to say that a particular defendant's negligent act in fact caused the injury."[79]

The type of situation discussed in this paper – where there are two tortfeasors, one wrongdoing following the other, and where each tortfeasor can legitimately take the position that the plaintiff

cannot show that, but for that tortfeasor's negligence, the overlapping part of the injury would not have occurred – involves the type of exceptional circumstances which the material contribution test is designed to accommodate. It is a variation of the classic *Lewis v Cook*[80] scenario, where it was impossible to say which of two hunters negligently fired the shot that injured the plaintiff:

> Only one of the defendants had *in fact* injured the plaintiff. But both defendants had breached their duty of care to Mr. Lewis and had subjected him to unreasonable risk of the injury that in fact materialized. The plaintiff was the victim of negligent conduct "but for" which he would not have been injured. To deny him recovery, while allowing the negligent defendants to escape liability by pointing the finger at each other, would not have met the goals of negligence law of compensation, fairness and deterrence, in a manner consistent with corrective justice.[81]

The distinctions in our situation are inconsequential. While here it could generally be said that both defendants, and not just one of them, had in fact injured the plaintiff, that merely strengthens the justification for holding both liable despite the inability to show "but for" causation on the part of either of them. The fact is that both defendants breached their duty of care to the plaintiff, and that "but for" those breaches (in a global sense), the plaintiff would not have been injured.[82] It would be unjust to "deny him recovery, while allowing the negligent defendants to escape liability by pointing the finger at each other."[83] The application of the material contribution test cuts this Gordian knot and produces a fair and just result.

As previously stated, an interpretation of the language of s. 1 of the Ontario *Negligence Act*[84] to encompass causation on a global as well as an individual scale is entirely reasonable. As outlined above, the essence of the justification for a material contribution test is the fact that a causal connection can be proved only at a global level.

For reasons previously discussed, the material contribution test would not apply where one of the events does not involve wrongdoing (and was not foreseeable). The material contribution test therefore would not have been applicable in the circumstances in *Sunrise.*

Substantial connection

Another response is to temper the required strength of the causal connection between the wrongdoing and the overlapping part of the injury from "but for" (necessary) - which simply does not work in the circumstances under consideration - to the more relaxed standard of "substantial connection". Unlike the material contribution test, this would have the advantage of retaining the requirement for a meaningful causal connection at the individual level, while avoiding the impossibility of satisfying that requirement. The following comments suggest that that level of connection would be sufficient:

> Causation under the "but for" test merely requires that there be a "substantial connection" between the defendant's conduct and the injury suffered by the plaintiff.[85]
>
> *"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"...*Sopinka J. went on to underline the importance of establishing a *substantial connection* between the injury and the defendant's negligence.[86]
>
> 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.[87]

More generally: "[A] court exercising equitable jurisdiction is not precluded from considering the principles of remoteness, causation, and intervening act where necessary to reach a just and fair result;"[88] "[P]eople who create a dangerous nuisance on a highway will not save themselves by trying to divert the argument into refined discussion about negligence and intervening acts of third persons."[89]

Only in rare cases will there be any real doubt as to whether there was a "substantial connection" between the wrongdoing and the injury.

D. CONCLUSION

While *novus actus interveniens* is subject to a number of limitations and conditions, most notably the matter of foreseeability, it remains a live principle whose internal inconsistencies and irrational consequences have not been adequately identified and analyzed. It is our view that, other than in situations where one of the injury-causing events does not involve wrongdoing, not only is the *novus actus interveniens* principle nonsensible, but it actively creates unjust results. This is because, as outlined below, the standard "but for" test of causation, the foundation upon which the intervening cause principle rests, is being employed in circumstances for which it is not suited.

One of the elements that a plaintiff must prove in a tort claim is causation. The general test of causation is the "but for" test, which asks whether the wrongdoing was a necessary cause of the injury. The *novus actus interveniens* principle is based on the theory that the chain of causation between the wrongdoing and the plaintiff's injury is broken when there has been subsequent wrongdoing which effectively eliminates the "but for" nature of that causal connection. Stated more succinctly, the injury would have occurred in any event, so the initial wrongdoing can no longer be considered a necessary cause – a cause in law – of the loss.

A more rigorous analysis, however, shows that the application of the "but for" test provides a no-causation defence not only to the first wrongdoer, but to the later one as well, with the result that the plaintiff would be left without recourse against *either* wrongdoer. That result would be patently irrational and unjust, calling for judicial reconsideration. We suggest either of two different approaches in circumstances where *novus actus interveniens* would now be applied.

The first is the application of the material contribution to the risk test of causation. While it has been said that this is not truly a test of causation at all,[90] we believe it is, although it is a test for causation at a global, rather than individual, level. The justification that has previously been given for the application of this more lenient test is in place: The plaintiff is unable to prove "but for" causation on the part of either wrongdoer, and that calls for a mechanism that "permits recovery despite the failure to prove ['but for'] causation". The fact is that both wrongdoers breached their duty of care to the plaintiff, and that "but for" those breaches (in a global sense), the plaintiff would not have been injured. It would be unjust to "deny him recovery, while allowing the negligent defendants to escape liability by pointing the finger at each other".

The second is to lower the required standard of causal connection from "but for" (*i.e.* necessary) to "substantial". This would have the advantage of retaining the requirement for a meaningful causal connection at the individual level, while avoiding the injustice arising from the impossibility of satisfying the stricter "but for" standard.

In both instances, the suggested approaches would advance the remedial goals of the negligence statutes that have been enacted across Canada, whereas the current common law principles defeat them.

1. David, Borlack, and Bawolska, *Products Liability – Time to Reconsider Intermediate Examination* (2023) 53 Adv. Qly. 417.
2. *Novus actus interveniens* apparently has attained that exalted, but in our view undeserved, status: *British Columbia v Zastowny* 2008 SCC 4 at para. 34.
3. No, it's not the lake in Scotland: "Necessary Element of a Sufficient Set". One of a set of necessary elements sufficient as a unit to bring about a consequence; a sort of sub-necessity necessity.
4. See, for example (available online), Richard W. Wright, *The NESS Account of Natural Causation: A Response to Criticisms*, ch 14 (2011).
5. *Cotic v Gray* (1981) 33 O.R. (2d) 356, C.A. at para. 81; *Booth v City of St. Catharines* [1948] S.C.R. 564 at para. 55. In *Corothers v Slobodian* [1975] 2 S.C.R. 633, it was said (at paras. 13-16) to be reasonably foreseeable that a rescuer would herself be injured, so that the initial wrongdoer was not shielded from liability for such injury on the basis of a *novus actus interveniens* (or at least not during the immediate course of the rescue attempt: para. 36). Conversely, "defendants should not be held liable for objectively unforeseen consequences of their actions": *Hussack v Chilliwack School District No. 33* 2011 BCCA 258 at para. 87.
6. *Booth v City of St. Catharines, ibid*, at para. 7.
7. *Renaissance Leisure Group Inc. v Frazer* (2004) 242 D.L.R. (4th) 229, Ont. C.A. at para. 40. An early decision set a stricter test: "The intervention of a third party may break a link in the chain which connects the wrong and the injury resulting from the wrong if the intervention is the near cause of the injury, *that is, if the original wrongdoer had no reason to contemplate the possibility of the intervention": Belanger v The King* (1916) 54 SCR 265 at para. 4, following *Crane v South Suburban Gas Co*. [1916] 1 K.B. 33 (emphasis added).
8. *Derksen v 539938 Ontario Ltd*. 2001 SCC 72 at para. 33, adopting a passage in Fleming, *The Law of Torts*, 9th ed. See also *Lumbermens Mutual Casualty Co. v Herbison* 2007 SCC 47 at para. 13; *Chisholm v Liberty Mutual Group* (2002) 60 O.R. (3d) 776, C.A. at para. 29.
9. *Katzman v Yaeck* (1982) 37 O.R. (2d) 500, C.A. at para. 16. See also *Parliament v Conley* 2019 ONSC 3996 at paras. 19-30; *Scarff v Wilson* (1986) 10 B.C.L.R. (2d) 273, S.C. at paras. 81-86, aff'd 33 B.C.L.R. (2d) 290, C.A., rev'd on damages only [1989] 2 S.C.R. 776.
10. *R. v Maybin* 2012 SCC 24 (a criminal law decision) at paras. 24-25.
11. *Roberge v Bolduc* [1991] 1 S.C.R. 374 at para. 212.
12. *Ibid*, at para. 213.
13. *Renaissance Leisure Group Inc. v Frazer, supra*, footnote 7, at para. 40.
14. *Salomon v Matte-Thompson* 2019 SCC 14 at para. 91.
15. *Goodyear Tire & Rubber Co. of Canada Ltd. v MacDonald* (1974) 9 N.S.R. (2d) 114, C.A. at para. 10; reference was made to "an act of independent volition" at para. 12.
16. *Carter v Van Camp* [1930] S.C.R. 156 at para. 7.
17. *Ray v Bates* 2015 BCCA 216 at para. 12.
18. See, for example, *Carl B. Potter Ltd. v Mercantile Bank of Canada* (1979) 31 N.S.R. (2d) 402, A.D. at paras. 113-25, where other conditions for qualification as a *novus actus interveniens* were emphasized.
19. *Mitchell v Rahman* 2002 MBCA 19 at para. 30.
20. *Caron v Omers Realty Corp.* 2019 ONSC 1374 at para. 108.
21. *Gallant v Beitz* (1983) 42 O.R. (2d) 86, H.C.J. at para. 15. It does not appear that this sweeping view has been adopted in other case law. A less categorical statement was made in *Ragoonanan Estate v Imperial Tobacco Canada Ltd.* (2000) 51 O.R. (3d) 603, S.C.J. at paras. 74-76.
22. *Mustapha v Culligan of Canada Ltd*. 2008 SCC 27 at para. 3.
23. *Clements v Clements* 2012 SCC 32 at para. 6 (original emphasis).
24. *Resurfice Corp. v Hanke* 2007 SCC 7 at paras. 21-22 and 29; *Fullowka v Pinkerton's of Canada Ltd*. 2010 SCC 5 at para. 93; *Clements v Clements, ibid*, at paras. 8 and 46(1); *Ediger v Johnston* 2013 SCC 18 at para. 28; *Burr v Tecumseh* 2023 ONCA 135 at para. 50.
25. Sometimes referred to as a *causa sine qua non*.
26. *Burr v Tecumseh*, supra, footnote 24 at para. 50.
27. *Ediger v Johnston, supra*, footnote 24, at para. 28; *Nelson (City) v Marchi* 2021 SCC 41 at para. 96. Stated slightly differently: "without the defendant's negligent act, the injury would not have occurred".
28. *British Columbia v Zastowny, supra,* footnote 2, at paras. 15 and 34.
29. *Godbout v Page* 2017 SCC 18 at para. 50.
30. Or, more formally, the "chain of causation in law".
31. *Sunrise Co. v Lake Winnipeg (The)* [1991] 1 S.C.R. 3.
32. There can, of course, be complications. Damages are assessed at the time of trial. The initial estimate of one year of disability may, perhaps because of innovative medical treatment, be reduced to 6 months by the time of trial. That just means that the overlapping and contested part of the loss is reduced.
33. *Clements v Clements, supra*, footnote 23, at para. 8 (original emphasis); *Ediger v Johnston*, supra, footnote 24, at para. 28; *Burr v Tecumseh, supra*, footnote 24 at para. 50.
34. Policy considerations of course matter. More on this at the end of this paper.
35. In *Smith v Inglis Ltd*. (1978) 83 D.L.R. (3d) 215, N.S.C.A., the court (at para. 59) cited the following definition: "[A] *novus actus interveniens* [is]â€¦some overwhelming supervening event which is of such a character that it relegates into history matters which would otherwise be looked on as causative factors". See also *R. v Maybin, supra*, footnote

10, at paras. 57 and 59, and *Mitchell v Rahman, supra*, footnote 19, at para. 31. In an early decision, the concept of *novus actus interveniens* was equated with the interposition of *a vis major: Vandry v Quebec Railway, Light, Heat and Power Co.* (1916) 53 SCR 72 at para. 94.

36. In *Lawrence v Prince Rupert (City)* 2005 BCCA 567, a "but for" cause of the injury was disregarded because of the minimal nature of its causal impact. We disagree with the decision.
37. Unless the later event was a foreseeable consequence of the wrongdoing, or some other limitation to the applicability of the defence as listed above were to apply.
38. See *Athey v Leonati* [1996] 3 S.C.R. 458 at paras. 31-32. However, as indicated below, the dissenting opinion in *Sunrise Co. v Lake Winnipeg (The), supra*, footnote 31, makes the argument that equity calls for some measure of recovery.
39. *Ibid.*
40. Authored by McLachlin J (as she then was).
41. Such as the two *Wagon Mound* decisions – see *Mustapha v Culligan of Canada Ltd., supra*, footnote 22, at paras. 12-13.
42. Decision reported at 1987 CarswellNat 1110.
43. *Sunrise Co. v Lake Winnipeg (The)* [1988] F.C.J. No. 918.
44. *Ibid*, at para. 26.
45. *Sunrise Co. v Lake Winnipeg (The), supra*, footnote 31.
46. A notable exception was the non-maritime decision in *Performance Cars Ltd. v Abraham* [1962] 1 Q.B. 33, considered and relied upon at para. 29 of *Sunrise*.
47. The same result would have obtained had the second grounding been due to another person's negligence - ship B would have remained liable for the full 27-day period, and the other person whose negligence would have caused the second grounding would have been absolved of liability: *Sunrise Co. v Lake Winnipeg (The), supra*, footnote 31, at paras. 31-33.
48. *Ibid*, at paras. 24-33.
49. *Ibid*, at para. 30.
50. *Ibid*, at para. 33.
51. *Ibid*, at paras. 47-52.
52. *Ibid*, at para. 58.
53. *Ibid*, at para. 80.
54. *Ibid*, at paras. 81-85.
55. See footnote 27, *supra*.
56. See heading *supra*: "What if one of the events does not involve wrongdoing?"
57. All this was perhaps best explained in paras. 29-33 in *Sunrise*.
58. RSO 1990 c. N.1. Negligence statutes in other jurisdictions: *Contributory Negligence Act* RSNL 1990 c. C-33; *Contributory Negligence Act* RSPEI 1988 c. C-21; *Contributory Negligence Act* RSNS 1989 c. 95 and *Tortfeasors Act* RSNS 1989 c. 471; *Contributory Negligence Act* RSNB 2011 c. 131 and *Tortfeasors Act* RSNB 2011 c. 231; *Civil Code of Quebec* Art. 1478 *CCQ; Tortfeasors and Contributory Negligence Act* CCSM c. T90; *Contributory Negligence Act* RSS 1978 c. C-31; *Contributory Negligence Act* RSA 2000, c. C-27 and *Tort-Feasors Act* RSA 2000 c. T-5; *Negligence Act,* RSBC 1996 c. 333; *Contributory Negligence Act* RSNWT 1988 c. C-18; *Contributory Negligence Act* RSY 1986 c. 32.
59. *Bow Valley Husky (Bermuda) Ltd. v Saint John Shipbuilding Ltd.* [1997] 3 S.C.R. 1210 at para. 101.
60. *Dallaire v Paul-Emile Martel Inc*. [1989] 2 S.C.R. 419.
61. In most of the other provinces, the typical statutory language is: "Where by the fault of two or more persons damage or loss is caused to one or more of them, the liability to make good the loss or damage shall be in proportion to the degree in which each person was at fault".
62. *Bator v Chief Mountain Gas Co-operative Ltd.* (1980) 22 A.R. 302, C.A. at para. 44.
63. The plaintiff's negligence clearly remained a "but for" cause of the loss. The chain of causation therefore was not broken.
64. *Supra*, footnote 60.
65. Instead of insulating a plaintiff from the consequences of his unquestionable negligence (as in *Bator*), the court here shielded a defendant from liability on the basis of *novus actus interveniens* arising from the plaintiff's conduct.
66. The accident "did not occur because the conveyer was dangerous but rather because it was carelessly used": *Dallaire v Paul-Emile Martel Inc., supra*, footnote 60, at para. 13.
67. *Ibid*, at paras. 9-10 and 14.
68. *Ibid*, at paras. 11-14. For example, "It is clear that the use of the conveyer involved some danger": at para. 11.
69. *Ibid*, at para. 14.
70. *Ibid*, at paras. 10 and 14.
71. That is the correct approach even where the plaintiff acted illegally: "Plaintiff wrongdoing is integrated into the analysis through contributory negligence": *Rankin (Rankin's Garage & Sales*) v J.J. 2018 SCC 19 at para. 63.
72. This essentially is why the "but for" test is no longer the sole test of causation in Australia: *March v E & MH Stramere Pty Ltd.* (1991) 171 CLR 506. The following comment was made in *Fairchild v Glenhaven Funeral Services Ltd*. [2003] 1 A.C. 32 at para. 10: "[The decision of Mason CJ in *March*] did not accept that the 'but for' (*causa sine qua non*) test ever was or now should become the exclusive test of causation in negligence cases".

73. Subject to the limitations applicable to the defence (primarily foreseeability).
74. Meaning the overlapping and contested part of the loss.
75. *Supra*, footnote 72.
76. Mirroring the approach taken in *Snell v Farrell* [1990] 2 S.C.R. 311 at para. 30. An insightful consideration of the difficulties and problems associated with the "but for" test may be found in Andrew Stephenson and Ian Bailey, *Concurrency Causation Common Sense and Compensation* 2010 J. Can. C. Construction Law.1 (at s. 8). Two other Australian decisions considered there are *Henville v Walker* (2001) 206 CLR 459 (HCA) and *I & L Securities v HTW Valuers* (2002) 210 CLR 109 (HCA). The application of common sense was a common theme throughout.
77. *Clements v Clements, supra,* footnote 23, at para. 14. See also *Edmondson v Edmondson* 2022 NBCA 4 at para. 73.
78. *Clements v Clements, ibid*, at para. 50. See also paras. 40 and 46(2) in *Clements*, and *Henry v British Columbia (Attorney General)* 2015 SCC 24: "The 'but for' causation test may, however, be modified in *situations involving multiple alleged wrongdoers*" (at para. 98, emphasis added).
79. *Clements v Clements, ibid*, at para. 15.
80. [1951] S.C.R. 830.
81. *Clements v Clements, supra*, footnote 23, at para. 19 (original emphasis).
82. The statement that "'material contribution' does not signify a test of causation at all" (*supra*, footnote 77) is overly broad. It is an alternative test of causation, but one made at a global rather than individual level.
83. Similarly: "[T]he goals of tort law and the underlying theory of corrective justice require that the defendant [in this situation, the defendants] not be permitted to escape liability by pointing the finger at another wrongdoer [in this case, at each other]": *Clements v Clements, supra*, footnote 23, at para. 13.
84. "Where damages have been caused or contributed to by the fault or neglect of two or more persons..." The typical language employed in the negligence statutes in other provinces is reproduced in footnote 61, *supra*.
85. *Stacey Estate v Lukenchuk* 2020 SKCA 55 at para. 78.
86. *Clements v Clements, supra*, footnote 23, at para. 21 (quoting, with original emphasis, from *Snell v Farrell, supra*, footnote 75). A "real and substantial connection" test is routinely applied in determining whether a local forum has jurisdiction to entertain a claim arising from wrongdoing committed outside that forum. A "substantial connection" has also been treated as sufficient in a criminal context: *R. v Sundman* 2022 SCC 31 at para. 29(4).
87. *Resurfice Corp. v Hanke, supra*, footnote 24, at para. 23.
88. *Hodgkinson v Simms* [1994] 3 S.C.R. 377 at para. 80, summarizing a principle set out in *Canson Enterprises Ltd. v Boughton & Co.* [1991] 3 S.C.R. 534. "The law of negligence seeks to impose a result that is fair to both plaintiffs and defendants, and that is socially useful": *Mustapha v Culligan of Canada Ltd., supra*, footnote 22, at para. 16. "The overarching consideration is the interests of justice": *Barendregt v Grebliunas* 2022 SCC 22 at para. 3. "[I]t would seem to me contrary to principle to insist on application of a rule which [appears] to yield unfair results": *Fairchild v Glenhaven Funeral Services Ltd., supra*, footnote 72, at para. 13.
89. *Belanger v The King, supra*, footnote 7, at para. 4.
90. *Supra*, footnote 77.
