COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***Mooney v. British Columbia (Attorney General),***

2004 BCCA 402

Date: 20040722

Docket: CA028582; CA028875

Between:

Bonnie Mooney, Michelle Mooney, an infant by her guardian ad litem, Bonnie Mooney, and Kristy Mooney, an infant by her guardian ad litem, Bonnie Mooney

Appellants
(Plaintiffs)

And

The Attorney General of the Province of British Columbia, The Attorney General of Canada, and Constable C. Andrichuk

Respondents
(Defendants)

And

Vancouver Rape Relief and Women's Shelter

Intervenor

Before:	The Honourable Mr. Justice Donald The Honourable Mr. Justice Hall The Honourable Mr. Justice Smith
H.C. Wood	Counsel for the Appellants
G. Carruthers and E. Burnet	Counsel for the Respondents
G. Dickson, Q.C.	Counsel for the Intervenor
Place and Date of Hearing:	Vancouver, British Columbia 20 & 21 November 2003
Place and Date of Judgment:	Vancouver, British Columbia 22 July 2004
	The Honourable Mr. Justice Donald **Written Reasons by:** The Honourable Mr. Justice Hall (p. 52, paragraph 105)

Written Reasons concurring in the result by:
The Honourable Mr. Justice Smith (p. 84, paragraph 146)

Reasons for Judgment of the Honourable Mr. Justice Donald:

[1] This appeal examines whether the failure of the Royal Canadian Mounted Police ("RCMP") at Prince George to investigate a complaint of domestic violence can result in liability for an event that occurred seven weeks later.

[2] The subject of the complaint, Ronald Kruska, arrived at the home of the plaintiff Bonnie Mooney, shot and killed her friend, shot and grievously wounded her daughter, the plaintiff Michelle Mooney, and then killed himself. The plaintiff Kristy Mooney, then a small child, escaped physical injury but was traumatized by the event.

[3] The trial judge found the police failed in their duty of care but dismissed the action because he could find no causal connection between the default and the later event: 2001 BCSC 419.

[4] The plaintiffs appeal from the order dismissing the action on the contention that the police materially added to the risk of serious violence by failing to act on the complaint. They say that on the modern law of causation the default should be seen as having materially contributed to the event and consequently liability must follow.

[5] The defendants support the trial judge's finding of no causation. However, they also say that the trial judge should not have found a private law of duty of care on the facts of this case and that had he ruled correctly on this issue the action would have failed on that additional ground. They assert that the decision not to investigate was only an error in judgment rather than a breach of the standard of care. If liability is found the defendants allege that Bonnie Mooney was guilty of contributory negligence. Finally the defendants take issue with several heads of damage assessed by the trial judge.

[6] The organization known as the Vancouver Rape Relief and Women's Shelter intervenes with leave on the appeal and submits that causation must be found in order to give force to policies designed to protect women from domestic violence.

[7] I would allow the appeal and give judgment for the plaintiffs in the amounts assessed by the trial judge.

[8] In my opinion, the facts justify the imposition of a private law of duty of care and I would accordingly uphold the trial judge on this point. I would reject the argument that the decision not to investigate was only an error of judgment; in my view, it fell below the standard of care.

[9] The more difficult question is causation. Kruska might have acted as he did even if the police had responded appropriately. The failure to investigate the complaint was not necessary to the event; it cannot be said that but for the default the event would not have occurred. The police made it clear to Bonnie Mooney that they were not going to act on the complaint, so they did not increase the risk by leaving Bonnie Mooney with a false sense of security that she was under

their protection. Neither is there any evidence that Kruska knew the police refused to investigate thereby giving him a sense of impunity. The plaintiff's case for causation must rest on the basis that the police did not lessen the risk of harm by intervening and that their failure amounts to a material contribution to the loss within the principles in ***Athey v. Leonati***, [1996] 3 S.C.R. 458.

[10] In my opinion, the law has evolved to the stage where the plaintiffs' theory of causation can be given effect. Where a breach of duty occurs and a loss is suffered by the person to whom the duty is owed in circumstances where direct proof of causation is impossible, considerations of fairness and justice may require relaxation of the conventional requirements for causation: ***Haag v. Marshall*** (1989), 39 B.C.L.R. (2d) 205 (C.A.); ***Snell v. Farrell***, [1990] 2 S.C.R. 311; and ***Fairchild v. Glenhaven Funeral Services Ltd. and others.***, [2002] UKHL 22, 3 All E.R. 305.

[11] The particular want of care in this case occurred in spite of an emphatic policy promulgated by the Ministry of the Attorney General for British Columbia and adopted by the RCMP requiring an assertive and timely police response to domestic violence. The policy reflects a modern understanding of abuse in the home and particularly the complex phenomenon known as the battered wife syndrome. It makes domestic violence a public issue rather than a private matter where previously the police were reluctant to intrude. The policy acknowledges the need to take a new approach. Studies have shown that police intervention is effective in reducing domestic violence, although complete elimination is impossible.

[12] Would it have been effective in this case? That cannot be proved definitively one way or another. Is it enough for liability that the terrible violence that occurred in this case might have been avoided even though the plaintiffs cannot raise the probability to more likely than not? In my judgment, the right to police protection in these circumstances is so strong and the need for teeth in the domestic violence policy so great that the causal linkage must be found sufficient to ground liability. Contemporary authority, examined later, requires flexibility in the rules of causation so that compensation for a wrong will be provided where fairness and justice require.

[13] The respondents have not made out a case of contributory negligence on the part of Bonnie Mooney.

[14] I would not disturb the assessment of damages. The awards are neither excessive nor are they the product of an error in principle or a misapprehension of the evidence.

FACTUAL BACKGROUND

[15] Bonnie Mooney began to live with Ronald Kruska in 1991. Her two previous domestic relationships went badly. In the first, her spouse was physically abusive. The second relationship ended with the disclosure that her husband sexually interfered with her daughter, Michelle. He was charged and acquitted. The relationship with Kruska was also deeply troubled.

[16] Kruska, 48 years old at the time of his death, had a history of serious violence. His adult criminal record begins in 1968 when he received a sentence of 12 months definite and 12 months indeterminate for trafficking in a narcotic. He was given probation for two years on a conviction for breaking and entering and theft in 1971. In 1979 he was convicted of assault causing bodily harm and unlawful confinement and given 12 months concurrent on each count; and on the same day he was sentenced to three years consecutive on a conviction for manslaughter. In 1985 he was convicted of sexual assault, forcible confinement and a second count of sexual assault. For the first two counts he received six months concurrent on each and on the third count, five years consecutive.

[17] The plaintiff Michelle Mooney, born 15 May 1983, is the eldest of three siblings. At the time of the shooting her younger brother Cody, born 14 October 1986, was living with his father. The youngest child Kristy, born 16 April 1989, was at home when the shooting occurred but escaped injury.

[18] Hazel White was Bonnie Mooney's close friend. She was going to live on the property in a cabin to be built for her. It was an argument over the construction of the cabin that appears to have provoked Kruska's murderous rampage. He killed Hazel White with a shotgun blast.

[19] The scene of the shooting was on property near Vanderhoof on Cluculz Lake. Bonnie Mooney bought it with the proceeds from the sale of her former matrimonial home and put the title in joint tenancy with Kruska. The dwelling was a rustic structure with few amenities. Kruska fixed it up.

[20] The fatal event on 29 April 1996 was preceded by four incidents of domestic violence. Early in their common-law relationship, Kruska threw the contents of a paint can on Bonnie Mooney's head. On a later occasion he threw her down and pushed her head onto the floor. In another incident he sprayed her in the face with bear repellent. On 4 November 1995 he flew into a jealous rage and choked her with his hands and struck her with a cane.

[21] She testified that she feared him and felt powerless under his control. Kruska expressed remorse after each incident and she took him back.

[22] Bonnie Mooney did not complain to the police about the first three incidents but she did report the assault on 4 November 1995. Kruska was arrested and charged with assault causing bodily harm and assault with a weapon. He was afraid of serving another long prison term. He implored her to change her story by saying that she struck him first with a poker. He promised to transfer his interest in the property if she withdrew her complaint. She testified that she was too afraid to refuse. She went to the prosecutor to get the charges dropped but the prosecutor did not believe her new story and refused her request.

[23] However, when the matter went to Provincial Court on 20 November 1995, Kruska's lawyer struck a plea bargain with the prosecutor with

the result that the Crown accepted a plea to common assault. Bonnie Mooney spoke up for Kruska in the sentence hearing.

[24] The judge gave him 21 days in jail and probation for one year and given what Bonnie Mooney said on Kruska's behalf, he imposed no protective conditions specific to the family. The only term of the order was that Kruska keep the peace and be of good behaviour. The judge's reasons for sentence are as follows:

> THE COURT: Thank you.
>
> Mr. Kruska has pled guilty to assaulting Bonnie Mooney on November the 4th, 1995. The circumstances of the assault are, in my view, certainly horrific; considering that at least one of the children, a twelve-year-old, was present for part of the assault.
>
> Now, Ms. Mooney has addressed the Court stating that this is an unusual event, and blaming Mr. Kruska's consumption of alcohol for what occurred. Crown counsel takes a different view, stating that it is not an isolated incident.
>
> What Mr. Kruska wants, if I can interpret what he says, is he is sorry, and he has shown remorse for the events of November the 4th, 1995. I have no difficulty in accepting Mr. Kruska's remorse.
>
> What Ms. Mooney says is that Mr. Kruska has been a very good husband to her; has been a very good father to the two children, ages twelve and six. And what they both say to me is they want to put this incident behind them and get on with their lives, with Mr. Kruska supplying the support that Bonnie Mooney requires, and that her children require and that they have received in the past.
>
> This Court also has to take into account Mr. Kruska's convictions for assault causing bodily harm, unlawful confinement and manslaughter in 1979 in Prince George, and also charges of sexual assault, forcible confinement and sexual assault in 1985.
>
> If what the Crown states is accurate insofar as the actions of Mr. Kruska are concerned, then it is likely that Mr. Kruska may find himself back in these courts with a similar complaint.
>
> These are difficult matters to consider insofar as how far should the courts go with respect to interfering in the relationship between Mr. Kruska and Ms. Mooney. Certainly Ms. Mooney ought to feel confident enough in the judicial court system that if Mr. Kruska was to raise one hand or make one threat against Ms. Mooney, she should not hesitate for one instance to complain to the authorities.

> Mr. Kruska, would you stand for a moment.
>
> Mr. Kruska, I may be placing too much emphasis upon your rehabilitation and not enough emphasis upon protection of the public and protection of Ms. Mooney, but I'm relying a great deal upon what Ms. Mooney has told me.
>
> The sentence is twenty-one days. But, Mr. Kruska, I'm also placing you on probation for a year following that sentence, and the conditions are that you are to keep the peace and be of good behaviour.
>
> Mr. Kruska, I'd like you to think about this, also: consider what effect your actions on November the 4th, 1995, have on a twelve-year-old girl who witnessed how you treated Ms. Mooney on that date.
>
> [Emphasis added]

[25] The underlined passages bear a direct relationship to the public policy considerations supporting liability in this case. An experienced trial judge predicted further violence and gave Bonnie Mooney an assurance that the authorities would respond to any complaint if she was threatened again.

[26] Kruska served his time and went to live with his parents in Prince George some 80 kilometres away from Cluculz Lake. Bonnie Mooney called him on the telephone from time to time. She explained that she did so because the disposition of the property was unresolved, he now wanted $15,000 for his interest, and since she feared his unexpected arrival she wanted assurance that he was in Prince George and not lurking around the property. On one such call he proposed that they meet in Prince George to discuss the property issue.

[27] They agreed to meet on 11 March 1996 at Fort George Park. Bonnie Mooney felt it was safe to meet there because it was an open public place. They parked their trucks beside one another. She went into his vehicle but before long she felt he was becoming agitated. She returned to her truck and tried to leave. Kruska moved his truck into her path. She manoeuvred around him and left the parking lot. She says he chased her through the downtown area and she went through stop signs and red lights to evade him. Finally she circled a block where she knew a friend lived, sounding her horn to attract attention. Kruska gave up the chase at that point.

[28] Bonnie Mooney spoke to her friend briefly and then proceeded to the detachment office of the RCMP in Prince George. She complained about Kruska's behaviour but the police did nothing. This is how the trial judge described the encounter:

> [19] Rebecca Jones, a civilian R.C.M.P. employee, completed a standard occurrence report and asked Ms. Mooney to write her own statement. Ms. Jones, an impressive witness, testified that Ms. Mooney's hands shook violently

> and that she seemed frightened. Of the many such complainants Ms. Jones has met, only Bonnie Mooney and one other stand out in her memory as "the most upset".
>
> [20] Constable Craig Andrichuk was designated to deal with the complaint. He testified that Ms. Mooney seemed calm when he met her in the reception area. After showing Ms. Mooney into an interview room, Constable Andrichuk examined her written statement, questioned her briefly about her encounter with Kruska, obtained a copy of Kruska's criminal record, then took the documents to his watch commander, Staff Sergeant John Lloyd.
>
> [21] On the basis of what he read and what Constable Andrichuk told him, Staff Sergeant Lloyd agreed with Constable Andrichuk that there were insufficient grounds to recommend a complaint under s. 810 of the *Criminal Code*, and Constable Andrichuk returned to the interview room to so inform Ms. Mooney.
>
> [22] Constable Andrichuk recommended that Ms. Mooney see a lawyer about obtaining a restraining order. He also advised her to "stay in public places in the future", advice that made no sense since Bonnie Mooney and her family lived in a rural area.
>
> [23] In cross-examination, Ms. Mooney dramatically commented about Constable Andrichuk's response to her complaint, stating that: "Basically, he left me to die". She did not consult a lawyer and, until the morning of April 29th, heard nothing more from Kruska.

[29] Between then and the fatal event there were one or two phone calls between Kruska and Bonnie Mooney, and on one occasion, she dropped off land transfer papers where he was living but did not see him at that time.

[30] During a telephone call on the morning of 29 April 1996, Kruska objected to the people who were helping with the construction of the cabin for Hazel White. Each told the other to shut up and they ended the call. She did not expect him to come out to the property and do her any harm.

[31] Kruska's arrival late that night was described in this way by the trial judge:

> [25] However, late that night Kruska used the butt of his shotgun to smash in a sliding glass door and enter the house. Apparently believing that Kruska was after only Bonnie Mooney, Hazel White urged Ms. Mooney to leave, and Ms. Mooney broke and leaped from a bathroom window. After Kruska shot and killed Hazel White, he saw Michelle Mooney (then 12 years old) sitting on the stairs, and shot her in her right shoulder. After setting fire to the house, Kruska killed himself.

> [26] Michelle Mooney was able to boost her sister Kristy up to the same bathroom window from which their mother had escaped, and the girls fled in opposite directions. Michelle ran to the same home where Bonnie Mooney had found refuge, and Kristy was later discovered huddling in another neighbour's dog house.
>
> [27] Officers from the Vanderhoof R.C.M.P. detachment soon arrived, as did volunteer firemen who extinguished the fire.

[32] The trial judge found in assessing damages that as a result of this event Bonnie Mooney suffers from post traumatic stress disorder; Michelle sustained emotional harm and a serious injury to her left shoulder leaving her with a partial disability; and Kristy, who is coping better, experienced emotional trauma: 2001 BCSC 1079.

[33] Bonnie Mooney filed a complaint under the ***Royal Canadian Mounted Police Act***, R.S.C. 1985, c. R-9, alleging that Constable Andrichuk and other officers failed in their duty. An internal investigation upheld her complaint. The trial judge set out the result in his reasons:

> [34] Following the shootings, Bonnie Mooney filed a complaint pursuant to Part VII of the *Royal Canadian Mounted Police Act*, R.S.C., c.R-9. She named Constable Andrichuk and several other officers she perceives to have been derelict with respect to their involvement in the tragedy and its aftermath.
>
> [35] Following an internal review, Superintendent R.D. Hall, in charge of the Prince George detachment, wrote to Constable Andrichuk on April 7, 1997, as follows:
>
> > "Pursuant to Force policy, I am at this time providing you with a "final report" concerning this matter.
> >
> > I find Ms. MOONEY's complaint that you failed to conduct an adequate investigation when she attempted to complain about being stalked, harassed and threatened by Roland KRUSKA on March 11, 1996 at the Prince George Detachment, to be ***SUBSTANTIATED***."
> >
> > (his emphasis)
>
> [36] Superintendent Hall also wrote to Bonnie Mooney, stating, in part:
>
> > "The investigation into this allegation reveals that Constable Andrichuk did not complete a thorough investigation on March 11, 1996 when you came to the Prince George Detachment complaining about the actions of Mr. Kruska. Constable Andrichuk failed to follow up on your very brief statement which you prepared yourself and he did not pursue other aspects

> of your case which he could have at the time. I therefore find that the allegation against Constable Andrichuk is supported. I would also like to assure you that the necessary corrective action will be taken to prevent any similar occurrence on his part."

[37] Superintendent Hall's letter concluded as follows:

> "I do wish to offer you my condolences for the loss of your friend Ms. Hazel White and the injuries sustained by your daughter as a result of this tragic incident. Although I have found Constable Andrichuk could have been much more thorough in his investigation of March 11, 1996, it is impossible to say whether any actions by Constable Andrichuk would have altered the eventual course Mr. Roland Kruska took on April 29, 1996. The R.C.M.P. expects its members to be professional at all times, and in this instance Constable Andrichuk fell short of those expectations. On behalf of the R.C.M.P., I apologize for his actions."

JUDGMENT UNDER APPEAL

[34] The trial judge dealt with the duty of care and standard of care at the same time. He found a breach under both heads. He rejected the defendants' argument that the police owed only a public duty of care and relied on the Ontario Divisional Court's decision in ***Doe v. Metropolitan Toronto (Municipality) Commissioners of Police*** (1990), 74 O.R. (2d) 225 as authority supporting a private duty of care. Such a duty was said in that case to exist because of "a special relationship of proximity".

[35] Here the trial judge identified the special relationship as having arisen from the circumstances of the complaint. He said:

> [48] In the present case, in considering the prospect of imposing liability for R.C.M.P. operational functions, two factors seem significant: Constable Andrichuk was well aware of current policies concerning investigation of relationship violence; and, the Internal Affairs Unit appointed to look into Bonnie Mooney's complaint determined that Constable Andrichuk's handling of the complaint failed to meet investigative standards.
>
> [49] Turning to the first factor, both the Attorney General's 1993 policy directive on "Violence Against Women and Children" and the "proactive arrest and charge" changes included in the 1995 revisions of the R.C.M.P. operational manual were filed during the trial. Although Constable Andrichuk testified about his understanding of the importance of the policy changes, he overlooked the fundamental issue raised by Bonnie Mooney's complaint - her continuing fear of Roland Kruska. Ms. Mooney told Constable Andrichuk that she felt threatened by Kruska's

> behaviour on March 11, 1996, but the officer's determination of the appropriate course to follow seems to have been based solely upon the absence of an explicit or overt threat.
>
> [50] Turning to the second factor, in advising Constable Andrichuk of the results of the internal investigation, Superintendent Hall stated: "Based on what I have before me, there really was no investigation completed." He listed the following concerns: (1) the failure to consider the importance of Ms. Jones' reference in the occurrence report to Kruska's earlier attempt to kill Bonnie Mooney; (2) the perfunctory questioning of Bonnie Mooney, given Ms. Jones' observations of Ms. Mooney's upset state, mention of the earlier threat, and the brevity of her written statement; and (3) the officer's failure to contact the two named witnesses or, for that matter, Kruska himself.

[36] He went on to reject the contention that the police were not in default of their duty for three reasons:

> [53] First, Constable Andrichuk's observations of Bonnie Mooney's demeanour deserve little if any weight. He knew that day that Ms. Mooney was there because she felt threatened. He knew that day that Kruska had been "flagged" in the police information system as a violent person. He also knew that day that Kruska was on probation for assaulting Ms. Mooney three months earlier. However, what he did not seem to appreciate that day was that his principal duty was to assess Bonnie Mooney's subjective feelings of fear.
>
> [54] Second, anyone aware of the troubled Mooney-Kruska background could and should have known that Kruska's conduct on March 11th would cause Ms. Mooney to fear him. Constable Andrichuk's duty was to question Ms. Mooney thoroughly about her history with Roland Kruska before consulting with Staff Sergeant Lloyd and purporting to make an informed decision about the appropriate action to take. That aside, the consultation simply proceeded on the wrong premise.
>
> [55] Third, with reference to s. 810 of the Criminal Code, Bonnie Mooney's arrival at the Prince George police office clearly alerted Rebecca Jones to Bonnie Mooney's fear of Kruska and, Constable Andrichuk's apparent concern about problems of proof inherent in alleging breach of probation was misplaced. The provisions of s. 810 of the Criminal Code allow for the appearance of the parties so that a judge can decide whether one has "reasonable grounds" for fearing the other. If what Ms. Mooney said in her written statement left any doubt about whether s.810 should have been invoked, Constable Andrichuk owed her a greater duty than was demonstrated. A careful investigation was warranted but was not undertaken.

[37] On causation, the trial judge discussed whether the breach of duty materially contributed to the shooting within the terms of ***Athey v. Leonati***, *supra*, and concluded that it did not. He said he could see little connection between the 11 March meeting and the fatal event. He saw no useful purpose in speculating whether acting on the complaint would have presented the harm since Kruska's behaviour was unpredictable. He considered a finding of liability here would make the police virtual insurers. He put it this way:

> [61] In the circumstances I have reviewed, can it be said that the negligence of Constable Andrichuk caused or materially contributed to the Cluculz Lake shootings? I think not.
>
> [62] Roland Kruska's capacity for brutish behaviour was a matter of record, and Bonnie Mooney's brief description of what preceded the four assaults suffered at his hands suggest that his violent outbursts were simply unpredictable. For that reason, nothing is to be gained by speculating about whether confronting Kruska concerning his behaviour on March 11th would have either dissuaded him from later violence or precipitated its earlier expression. In my view, a more important exercise in addressing the vexing issue of causation is to determine whether, by his March 11, 1996 nonfeasance, the officer materially contributed to the later tragedy.
>
> [63] Kruska had been on probation for four months when he phoned Bonnie Mooney on March 11, 1996. During that time there had been discussions about the contemplated property transfer, but even after the unusual meeting at Fort George Park on March 11th no indication that Kruska was bent on harm. For reasons that Bonnie Mooney could not explain, her plan to build a small home at the rear of her property for her friend, Hazel White, prompted the angry telephone conversation on the morning before the shootings. Although I suppose a tenuous connection can be made between Kruska's desire to discuss the status of the Cluculz's Lake title on March 11, 1996 and his later upset about Hazel White's proposed residence on the property, the absence of any communication between Ms. Mooney and Kruska in the intervening seven weeks suggests that the brief encounter on March 11th was of little if any significance with respect to what happened on April 29th.
>
> [64] Although I do not accept the defence contention that Constable Andrichuk fulfilled his duty to Bonnie Mooney on March 11, 1996, I cannot disagree with counsel's observation that:
>
> > "There can be no absolute immunity from risk or danger in this world, and no one can be expected to provide such immunity."
>
> Put another way, having regard to Ms. Mooney's claim that Constable Andrichuk failed to ensure the plaintiffs' safety

> and security, it can reasonably be suggested that the police are guardians, not guarantors, of public wellbeing.
>
> [65] There was no clear connection between Constable Andrichuk's failure to act on March 11, 1996 and Roland Kruska's fateful trip to Cluculz Lake seven weeks later. The officer's inaction did not materially increase the risk of harm to the extent that he must bear responsibility for Kruska's acts. Accordingly, the action is dismissed.

[38] After issuing his decision on liability, the trial judge was asked to assess damages which he did in a separate set of reasons.

[39] Non-pecuniary damages for Kristy were agreed at $15,000. They are not challenged in this Court.

[40] As mentioned, Michelle was shot in the right shoulder leaving a gaping wound. She underwent surgery and will require more surgery in the future. Movement of her arm is restricted and painful. The shooting damaged her emotionally. The trial judge assessed her non-pecuniary damages at $150,000, cost of future care at $25,000, and diminished earning capacity at $100,000.

[41] For Bonnie Mooney's post-traumatic stress disorder, the trial judge awarded $75,000 in non-pecuniary damages. For past earnings loss he gave $90,000. He made no award for diminished earning capacity because he found that she did not prove any continuing inability to work.

ISSUES ON APPEAL

[42] The issues under appeal are as follows:

1. Was there a private duty of care?
2. Did the police breach the standard of care?
3. Was there causation?
4. Did Bonnie Mooney contribute to her loss?
5. Was there an erroneous assessment of damages?

DISCUSSION

Duty of Care

[43] The defendants argue the police are subject only to a public duty of care, owed to all residents, and enforceable by internal discipline and the statutory complaint processes. Imposing tort liability for a failure to investigate is contrary to the public policy which recognizes that the police have to make difficult choices with limited resources. It is against the public interest that police should have to squander time and money in defending private claims.

[44] These arguments are supported by English authority, most notably ***Hill v. Chief Constable of West Yorkshire***, [1988] 2 All E.R. 238 (H.L.). The trial judge did not find that case helpful, nor do I. The public policy considerations were said there to apply where a claim is from a member of a large indeterminate class of persons to whom a general duty of protection is owed. The House of Lords did not exclude private law responsibility for claims arising within a proximity of relationship between the police and the claimant: ***Home Office v. Dorset Yacht Co. Ltd.***, [1970] A.C. 1004, 2 All E.R. 294.

[45] In ***Hill***, *supra*, the mother of a victim of Peter Sutcliffe, the Yorkshire ripper, sued the police for negligent investigation of his serial crimes. Her claim was rejected on the ground that the victim was not a person having the requisite proximity of relationship with the police. She was just one of many at risk in the region. Lord Keith of Kinkel set forth public policy reasons for not enlarging the scope of liability at 243 to 244:

> That is sufficient for the disposal of the appeal. But in my opinion there is another reason why an action for damages in negligence should not lie against the police in circumstances such as those of the present case, and that is public policy. In *Yuen Kun-yeu v A-G of Hong Kong* [1987] 2 All ER 705 at 712, [1988] AC 175 at 193, I expressed the view that the category of cases where the second stage of Lord Wilberforce's two-stage test in *Anns v Merton London Borough Council* [1977] 2 All ER 492 at 498, [1978] AC 728 at 752 might fall to be applied was a limited one, one example of that category being *Rondel v Worsley* [1967] 3 All ER 993, [1969] 1 AC 191. Application of that second stage is, however, capable of constituting a separate and independent ground for holding that the existence of liability in negligence should not be entertained. Potential existence of such liability may in many instances be in the general public interest, as tending towards the observance of a higher standard of care in the carrying on of various different types of activity. I do not, however, consider that this can be said of police activities. The general sense of public duty which motivates police forces is unlikely to be appreciably reinforced by the imposition of such liability so far as concerns their function in the investigation and suppression of crime. From time to time they make mistakes in the exercise of that function, but it is not to be doubted that they apply their best endeavours to the performance of it. In some instances the imposition of liability may lead to the exercise of a function being carried on in a detrimentally defensive frame of mind. The possibility of this happening in relation to the investigative operations of the police cannot be excluded. Further, it would be reasonable to expect that if potential liability were to be imposed it would be not uncommon for actions to be raised against police forces on the ground that they had failed to catch some criminal as soon as they might have done, with the result that he went on to commit further crimes. While some such actions might involve allegations of a simple and straightforward types

> of failure, for example that a police officer negligently tripped and fell while pursuing a burglar, others would be likely to enter deeply into the general nature of a police investigation, as indeed the present action would seek to do. The manner of conduct of such an investigation must necessarily involve a variety of decisions to be made on matters of policy and discretion, for example as to which particular line of inquiry is most advantageously to be pursued and what is the most advantageous way to deploy the available resources. Many such decisions would not be regarded by the courts as appropriate to be called in question, yet elaborate investigation of the facts might be necessary to ascertain whether or not this was so. A great deal of police time, trouble and expense might be expected to have to be put into the preparation of the defence to the action and the attendance of witnesses at the trial. The result would be a significant diversion of police manpower and attention from their most important function, that of the suppression of crime. Closed investigations would require to be reopened and retraversed, not with the object of bringing any criminal to justice but to ascertain whether or not they had been competently conducted.
>
> [Emphasis added]

[46] The facts in the instant case are quite different from ***Hill***, *supra*. Bonnie Mooney sought police assistance and had a direct engagement with an officer when she presented her complaint. She had a pressing need for protection as a potential victim of Kruska's violence and the police should have recognized that. She cannot be said to fall into a large indeterminate class; to the contrary she was a person, in Lord Keith's words at 243 of ***Hill***, *supra*, with a "special distinctive risk".

[47] In any event, Canadian courts are not so protective of the police. A private duty of care was found in two cases where the victims were part of a class rather than individuals specifically at risk.

[48] ***O'Rourke v. Schacht***, [1976] 1 S.C.R. 53 was a case where after a motor vehicle accident the police failed to replace a sign warning motorists of an open culvert under construction on the highway. The plaintiff drove into the culvert and was injured. Like the present case, the police failed to do something to protect members of the public. The court found liability on the basis of a private duty of care. The plaintiff was one of many potential victims who could have driven into the hazard, but that was not a bar to recovery.

[49] The second case involving a class rather than a specific unique individual is ***Doe v. Metropolitan Toronto***, *supra*. A serial rapist in downtown Toronto preyed on white single women who lived in apartments with second and third floor balconies. The police were aware that the criminal operated within a narrowly circumscribed area yet they did not warn the women in that neighbourhood. Their reasoning was that they did not want the residents to act hysterically and scare off the

criminal, thus making his capture more difficult. The plaintiff was attacked and she sued the police. The Divisional Court upheld the ruling by Mr. Justice Henry of the Ontario Supreme Court that a special relationship of proximity existed and the case could proceed. The plaintiff ultimately succeeded at trial: (1998), 39 O.R. (3d) 487.

[50] Reference must be made to the policies laid down by the Ministry of the Attorney General and adopted by the RCMP in relation to domestic violence. They relate not only to the special proximity between police and complainants but they also give content to the duty of care and set the standard of care. The general duty of the police is to protect, but in the area of domestic violence the degree of protection is heightened by government policy. The discretion whether to act on a complaint is very limited. The RCMP operational manual incorporates the Ministry's "Violence Against Women in Relationships Policy" which includes the following:

> **A. Introduction**
>
> Violence within relationships has distinctive dynamics not found in other violent crimes. The use of violence within a relationship is not easily prevented. Increased public awareness, however, coupled with a rigorous arrest and charge policy have been shown to reduce violence committed against women by their partners.
>
> For the safety and security of victims, the arrest and prosecution of offenders is of paramount importance.
>
> **B. Response**
>
> 1. All “spouse assault” calls and calls relating to violence within a relationship, as defined in this policy, must be given priority, as the victim may be at risk.
>
> 2. The attending officer will conduct a complete investigation and ensure that the victim is provided with the attending officer’s name or number, the case number, and a contact phone number.
>
> 3. No-contact conditions of bail/probation orders, peace bonds and civil restraining orders (eg., *Family Relations Act* orders) provide the victim some measure of protection, so it is important that police respond promptly to reported breaches of court orders. Police action should include a recommendation that for breach of the order charges when evidence is available.
>
> . . .
>
> **D. Investigation/Charge**

> 9. A proactive charge policy is based on the assumption that police will conduct a complete investigation in every case, including those cases that do not immediately appear likely to proceed to prosecution. The officer will pursue the investigation with a view to obtaining sufficient evidence to proceed even without the cooperation of the victim. The evidence could include an admission by the offender, photographs of injuries, medical evidence, physical evidence, or a written statement by an independent witness.

[51] The RCMP manual itself identifies violence in relationships as a significant problem and directs an aggressive response:

> Violence in relationships is a major concern to both the public and the Government. The Ministry of Attorney General has provided guidelines for crown prosecutors, corrections and the police. The guidelines emphasize a proactive arrest and charge policy. Refer to Div. Ops. Man. App. IV-1-3.
>
> [Emphasis added]

[52] Since the hearing of the appeal, the Supreme Court of Canada issued its reasons in ***Odhavji Estate v. Woodhouse***, 2003 SCC 69. It concerns an action framed in tort alleging misfeasance in public office and negligence against police authorities and others. Marvish Odhavji was shot and killed by officers of the Metropolitan Toronto Police Service after a robbery. The Special Investigations Unit was called in to investigate the conduct of the officers. The officers refused to cooperate and thereby compromised the investigation. Members of the family of the shooting victim sued to recover damages for psychological harm resulting from the unsatisfactory investigation. They alleged that the failure of the Chief of Police and the Police Services Board to command the officers' cooperation was misfeasance and negligence.

[53] On appeal to the Supreme Court of Canada the broad issue was whether the claims against various defendants should be struck out. The court allowed the claims to proceed against the police officers and the Chief of Police. Of particular relevance to the instant case is the discussion of the duty of care under the rubric of negligence.

[54] The court affirmed that whether the police owed a private duty of care is to be determined in the same way as other claims against public authorities, namely, by reference to ***Anns v. Merton London Borough Council***, [1978] A.C. 728. The judgment of the court was given by Mr. Justice Iacobucci who wrote at para. 46 of ***Odhavji Estate***, *supra*:

> 46 It is now well established in Canada that the existence of such a duty is to be determined in accordance with the two-step analysis first enunciated by the House of

Lords in *Anns v. Merton London Borough Council*, [1978] A.C. 728, at pp. 751-52:

> First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter -- in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise.

See for example *Kamloops (City of) v. Nielsen*, [1984] 2 S.C.R. 2; *B.D.C. Ltd. v. Hofstrand Farms Ltd.*, [1986] 1 S.C.R. 228; *Canadian National Railway Co. v. Norsk Pacific Steamship Co.*, [1992] 1 S.C.R. 1021; *London Drugs Ltd. v. Kuehne & Nagel International Ltd.*, [1992] 3 S.C.R. 299; *Winnipeg Condominium Corporation No. 36 v. Bird Construction Co.*, [1995] 1 S.C.R. 85; and *Cooper v. Hobart*, [2001] 3 S.C.R. 537, 2001 SCC 79.

[55] He elaborated on the two-part ***Anns*** test with these remarks:

> 50 Consequently, the essential purpose of the inquiry is to evaluate the nature of that relationship in order to determine whether it is just and fair to impose a duty of care on the defendant. The factors that are relevant to this inquiry depend on the circumstances of the case. As stated by McLachlin J. (as she then was) in *Norsk*, *supra*, at p. 1151, "[p]roximity may be usefully viewed, not so much as a test in itself, but as a broad concept which is capable of subsuming different categories of cases involving different factors" (cited with approval in *Hercules Managements*, *supra*, at para. 23; and *Cooper*, *supra*, at para. 35). Examples of factors that might be relevant to the inquiry include the expectations of the parties, representations, reliance and the nature of the property or interest involved.
>
> 51 The second stage of the *Anns* test requires the trial judge to consider whether there exist any residual policy considerations that ought to negative or reduce the scope of the duty or the class of persons to whom it is owed. In *Cooper*, McLachlin C.J. and Major J. wrote, at p. 554, that this stage of the analysis is not concerned with the relationship between the parties but, rather, with the effect of recognizing a duty of care on other legal obligations, the legal system and society more generally. At this stage of the analysis, the question to be asked is whether there exist broad policy considerations that would

> make the imposition of a duty of care unwise, despite the fact that harm was a reasonably foreseeable consequence of the conduct in question and there was a sufficient degree of proximity between the parties that the imposition of a duty would not be unfair.
>
> [Emphasis added]

[56] The present case goes beyond mere propinquity; in my opinion, it is "just and fair" to impose a duty on the police because of the Domestic Violence Policy and the assurance by the Provincial Court judge at the sentence hearing that the police would respond to Bonnie Mooney's safety needs. On that same basis, I see no policy reason to negative the duty.

[57] In summary on the question of the duty of care, having made herself known to the police as a person in fear of a violent abuser, Bonnie Mooney established a special relationship of proximity with the police thereby creating a private duty of care. The duty on the police was to act on the complaint promptly. I am in substantial agreement with the trial judge's ruling on this issue.

Standard of Care

[58] The policy and manual to which I have just referred leave little doubt that the complaint required immediate action. The internal investigation report by Superintendent Hall quoted in part by the trial judge (see para. 33 of these reasons) criticized the failure to respond and stands as powerful proof of the standard expected of the officers involved.

[59] I reject the defendants' submission that, at most, the failure to investigate was an error in judgment. I have already observed that the policy left little discretion. The clear directive is to take immediate action. Given Kruska's horrific record and the recent conviction for assault on Bonnie Mooney herself, the decision not to deal with the complaint goes well beyond an error of judgment.

[60] It is implied in the trial judge's reasons that he found the conduct of the police fell below the requisite standard and I am in respectful agreement with him.

Causation

[61] Causation is the real issue in this case. Counsel for the appellants argues that the trial judge erred in two ways:

1. In applying an unduly onerous standard for the determination of causal connectivity;

2. In failing to make an inference of causation in the particular circumstances of this case.

[62] The first ground relates to the trial judge's conclusion at para. 65 of his reasons that: "...the officer's inaction did not materially increase the risk of harm to the extent that he must bear responsibility for Kruska's acts" [Emphasis added]. In ***Athey***, *supra*, it was said that a material contribution is one above the *de minimis* range. At para. 15 of ***Athey***, *supra*, Mr. Justice Major, giving the judgment of the court, wrote:

> The "but for" test is unworkable in some circumstances, so the courts have recognized that causation is established where the defendant's negligence "materially contributed" to the occurrence of the injury: *Myers v. Peel County Board of Education*, [1981] 2 S.C.R. 21; *Bonnington Castings, Ltd. v. Wardlaw,* [1956] 1 All E.R. 615 (H.L.); *McGhee v. National Coal Board*, *supra*. A contributing factor is material if it falls outside the *de minimis* range: *Bonnington Castings, Ltd. v. Wardlaw, supra*; see also *R. v. Pinske* (1988), 30 B.C.L.R. (2d) 114 (B.C.C.A.), aff'd [1989] 2 S.C.R. 979.

[63] It is argued that since the domestic violence policy is expressly premised on the efficiency of timely intervention, the trial judge must have set the degree of connection much too high in reaching the aforesaid conclusion.

[64] I cannot say where on the scale the trial judge put the contribution requirement. The difficulty arises from the statement at para. 62 that:

> ...nothing is to be gained be speculating about whether confronting Kruska concerning his behaviour on March 11th would have either dissuaded him from later violence or precipitated its earlier expression....

[65] In order to measure the materiality of the increase in risk of harm, it is in my view necessary to hypothesize, speculate if you will, about what might have happened. I do not think it reasonable to find on the evidence that an appropriate police response to the complaint would have been futile. At para. 55 of the reasons the trial judge makes specific reference to s. 810 of the ***Criminal Code***, the peace bond section, as a measure the police should have considered in the circumstances. I infer that he thought it might have deterred Kruska from further violence.

[66] Then the trial judge poses a question at para. 62 on whether the nonfeasance of the officer "materially contributed to the later tragedy". The appellants argue that instead of answering that pertinent question, he proceeded on a wrong course of reasoning by examining at para. 63 whether there was any causal relationship between the events of 11 March and 29 April. He found "little if any significance". I agree with the appellants' argument that it is beside the point on causation whether the chase on 11 March led to the shooting on 29 April. Surely the significance of the 11 March event

was that despite the recent conviction and incarceration for spousal assault and the ongoing probation order, Kruska continued to engage in threatening behaviour. The incident made future violence reasonably foreseeable. That being so, the inquiry should have focused on whether the police's inaction failed to reduce in a material way, i.e. more than *de minimis*, the risk of future violence.

[67] Framed in this way, the issue is fraught with problems of proof. For reasons which I will address shortly, these problems should not stand in the way of recovery by the appellants. Before doing so I want to explore the last aspect of the causation analysis by the trial judge to which the appellants take exception.

[68] At para. 64 the trial judge says in part:

> Put another way, having regard to Ms. Mooney's claim that Constable Adrichuk failed to ensure the plaintiffs' safety and security, it can reasonably be suggested that the police are guardians, not guarantors, of public wellbeing.

[69] The appellants' objection is that a finding of liability would not make the police guarantors. The police defaulted in their duty and harm occurred in the area covered by the duty. The rhetorical use of the words guarantor or insurer in the discussion of tort liability normally refers to an attribution of responsibility in the absence of fault. Fault has been found in this case. In my view, this argument is subsumed in the larger issue of establishing causation where a direct causal link is impossible to prove.

[70] That brings me to the second error alleged, namely, that the trial judge failed to draw an inference of negligence. A useful starting point for this discussion is Mr. Justice Lambert's formulation in ***Haag v. Marshall***, *supra*, of the inference principle derived from ***McGhee v. National Coal Board***, [1972] 3 All E.R. 1008 (H.L.). At 213 he said:

> The "inference" principle derived from *McGhee*, and from the three Canadian cases to which I have referred, is this: Where a breach of duty has occurred, and damage is shown to have arisen within the area of risk which brought the duty into being, and where the breach of duty materially increased the risk that damage of that type would occur, and where it is impossible, in a practical sense, for either party to lead evidence which would establish either that the breach of duty caused the loss or that it did not, then it is permissible to infer, as a matter of legal, though not necessarily logical, inference, that the material increase in risk arising from the breach of duty constituted a material contributing cause of the loss and as such a foundation for a finding of liability.
>
> The legal inference permitted by the principle may be prodded along by the concept that as between an innocent plaintiff and a defendant who has committed a breach of duty to the plaintiff and by so doing materially increased

> the risk of loss to the plaintiff, in a situation where it is impossible, as a practical matter, to prove whether the breach of duty caused the loss, it is more in keeping with a common sense approach to causation as a tool of justice, to let the liability fall on the defendant...

[71] ***Haag***, *supra*, was cited with approval in ***Snell v. Farrell***, *supra*, and the specific passage I have just quoted was favourably mentioned by Lord Hutton at paras. 103 and 114 in ***Fairchild v. Glenhaven Funeral Services***, *supra*.

[72] There are four parts to the ***Haag*** formulation. I will address each in turn.

1. "Where a breach of duty has occurred"

[73] The trial judge found a breach of the duty of care.

2. "The damage [has] arisen within the area of risk which brought the duty into being"

[74] The domestic violence policy defines the duty. It was created to prevent the kind of tragedy that occurred here.

3. "The breach of duty materially increased the risk that damage of that type would occur"

[75] By not dealing with Kruska's intimidation and threatening behaviour, the police failed to reduce the risk of more violence. Should that be treated the same as increasing the risk? In my judgment, it should.

[76] In ***Swanson Estate v. Canada*** (1991), 80 D.L.R. (4th) 741 (F.C.A.) Mr. Justice Linden said in a case where Transport Canada failed in its duty to perform safety inspections of an airline which experienced a crash of one of its aircraft (at 757):

> In addition to a duty and a breach of duty, the plaintiffs, in order to recover, must establish that the defendant caused their loss. Normally the test employed to decide the causation issue is the "but for" test. If the accident would not have occurred but for the conduct of the defendant, there was causation. If the accident would have occurred in any event, there was no causation. Where multiple forces contribute to an accident, the test is modified; if a person's negligence substantially contributed to an accident, it is also a cause of the accident. <u>It is, therefore, possible to be a cause of an accident</u> by acting along with others or <u>by failing to prevent it</u>.
>
> [Emphasis added]

[77] ***McGhee***, *supra*, was also a case of omission. The defender failed to provide washing facilities as required by the industrial health and safety regulations to the pursuer who developed dermatitis. It was impossible to say whether the disease was caused by exposure to brick dust during his shift, which would not have involved a breach of the regulations, or the prolongation of the exposure by having to travel home without showering. The pursuer succeeded on what can only be described as a failure by the defenders to reduce the risk.

[78] In ***O'Rourke***, *supra*, the police failed to reduce the risk of an accident by neglecting to replace the sign warning of the open culvert. In ***Doe v. Metropolitan Toronto***, *supra*, the police failed to reduce the risk of the sexual assault by not warning the plaintiff of the rapist.

[79] The recent case of ***K.L.B. v. British Columbia***, 2003 SCC 51 involved neglect on the part of provincial authorities overseeing foster child placements. The liability of the government was upheld because it failed to lessen the likelihood of abuse of children in foster care. Speaking of the difficulty of proving a connection between the abuse and government inaction, Chief Justice McLachlin said at para. 13:

> These unchallenged findings are fully supported on the record. Before turning to this, however, it is worth noting that the private nature of the abuse may heighten the difficulty of proving the abuse and its connection to the government's conduct in placement and supervision. As in other areas of negligence law, judges should assess causation using what Sopinka J., citing Lord Bridge in *Wilsher v. Essex Area Health Authority*, [1988] 2 W.L.R. 557, at p. 569, referred to as a "robust and pragmatic approach" (*Snell v. Farrell,* [1990] 2 S.C.R. 311, at p. 330). As Sopinka J. emphasized, "causation need not be determined [with] scientific precision" (*Snell*, at p. 328). A common sense approach sensitive to the realities of the situation suffices.
>
> [Emphasis added]

[80] Insight into that approach is provided by Lord Reid's speech in ***McGhee***, *supra*, where he speaks at 1011 of "a broader view of causation":

> ...But I think that in cases like this we must take a broader view of causation. The medical evidence is to the effect that the fact that the man had to cycle home caked with grime and sweat added materially to the risk that this disease might develop. It does not and could not explain just why that is so. But experience shews that it is so. Plainly that must be because what happens while the man remains unwashed can have a causative effect, although just how the cause operates is uncertain. I cannot accept the view expressed in the Inner House that once the man left the brick kiln he left behind the causes which made him

> liable to develop dermatitis. That seems to me quite inconsistent with a proper interpretation of the medical evidence. Nor can I accept the distinction drawn by the Lord Ordinary between materially increasing the risk that the disease will occur and making a material contribution to its occurrence.
>
> There may be some logical ground for such a distinction where our knowledge of all the material factors is complete. But it has often been said that the legal concept of causation is not based on logic or philosophy. It is based on the practical way in which the ordinary man's mind works in the every-day affairs of life. From a broad and practical viewpoint I can see no substantial difference between saying that what the respondents did materially increased the risk of injury to the appellant and saying that what the respondents did made a material contribution to his injury.

4. "[I]t is impossible, in a practical sense, for either party to lead evidence which would establish either that the breach of duty caused the loss or that it did not"

[81] In my opinion, it was not in the power of either side in this case to prove that timely intervention would have prevented the shooting or conversely that it would not have made any difference. Human behaviour is notoriously unpredictable; the behaviour of an erratic, irrational man like Kruska even more so. All that can be determined from the evidence is that police intervention is, in many cases, an effective deterrent, and hence, the Attorney General's policy. Whether it would have been effective in any given case cannot be proved with scientific certainty. In this connection, I repeat the introductory words of the Attorney General's policy:

> Violence within relationships has distinctive dynamics not found in other violent crimes. The use of violence within a relationship is not easily prevented. Increased public awareness, however, coupled with a rigorous arrest and charge policy have been shown to reduce violence committed against women by their partners.
>
> For the safety and security of victims, the arrest and prosecution of offenders is of paramount importance.

[82] As discussed earlier, the trial judge declined to speculate whether police action would have done any good. With respect, speculation is the best anyone can do in these circumstances. It should not have been a basis for dismissing the claim.

[83] Since the four elements found in ***Haag***, *supra*, have been satisfied, a legal inference of causation should follow. Whether the process of reaching such a conclusion on causation is an inference or the lessening of the requirements of proof was a question addressed by

the five Lords in ***Fairchild***, *supra*. Four of the Lords preferred to express it as applying a less stringent test than the 'but for' requirement. Lord Hutton was content to leave it as the drawing of an inference. In discussing the majority view on this issue, Lord Hoffmann emphasized at para. 52 that the nature of the test is a question of law which may vary with the case:

> ...The causal requirements for liability often vary, sometimes quite subtly, from case to case. And since the causal requirements for liability are always a matter of law, these variations represent legal differences, driven by the recognition that the just solution to different kinds of cases may require different causal requirement rules.

[84] In ***Athey***, *supra*, the inference terminology is used. Mr. Justice Major said at para. 16:

> In *Snell v. Farrell*, *supra*, this Court recently confirmed that the plaintiff must prove that the defendant's tortious conduct caused or contributed to the plaintiff's injury. The causation test is not to be applied too rigidly. Causation need not be determined by scientific precision; as Lord Salmon stated in *Alphacell Ltd. v. Woodward*, [1972] 2 All E.R. 475, at p. 490, and as was quoted by Sopinka J. at p. 328, it is "essentially a practical question of fact which can best be answered by ordinary common sense". Although the burden of proof remains with the plaintiff, in some circumstances an inference of causation may be drawn from the evidence without positive scientific proof.

[85] However the process of reasoning is labeled, there must be a justification for operating on less than the 'but for' test. In ***Haag***, *supra*, Mr. Justice Lambert suggested that a legal inference may be drawn on the principle that as between two parties, one in breach of a duty and the other innocent, liability should justly fall on the wrongdoer.

[86] ***Fairchild***, *supra*, offers another justification for treating a material increase in risk as sufficient for causation which is compelling in this case. Lord Hoffmann said that to insist upon strict proof would in Fairchild's case drain the duty of care of any significance. In para. 62 he said:

> In these circumstances, a rule requiring proof of a link between the defendant's asbestos and the claimant's disease would, with the arbitrary exception of single-employer cases, empty the duty of content.

[87] The problem of proof in ***Fairchild***, *supra*, arose from the fact that the pursuers were unable to establish at which of several

employers' plants where they were exposed, did they contract mesothelioma.

[88] In the present matter, the general duty of care on the police to provide protection was heightened by government policy addressing the serious problem of domestic violence. The duty owed to potential victims of spousal abuse would be virtually unenforceable if claimants had to do more than show a material contribution of the risk because of the difficulty of proof to which I have referred. To insist upon strict proof would leave a right without a remedy.

[89] The demands of justice for a finding of causation here are reinforced by the sentencing judge's assurance that the police would respond to Bonnie Mooney's call for help.

[90] After the hearing of this appeal, the Ontario Court of Appeal issued its decision in ***Cottrelle v. Gerrard***, [2003] O.J. No. 4194. This is a medical malpractice case where the defendant doctor failed to follow a diabetic patient with a foot infection. The plaintiff lost her leg to gangrene. The doctor argued she would have lost the leg anyway because of the vascular problems in her leg related to diabetes. The trial judge found liability but was reversed on the ground that she erred with respect to the legal test on causation.

[91] In giving the judgment for the court, Mr. Justice Sharpe discussed many of the cases to which I have referred on causation. He did not think it appropriate to depart from the rule that the plaintiff must prove on the balance of probabilities that the breach of the doctor's duty caused the loss of her leg, in other words, the 'but for' test. In his opinion, the evidence went no further than to show the plaintiff suffered the loss of a chance of saving her leg by prompt medical attention and in the medical malpractice area, recovery on that basis was unavailable: ***Laferrière v. Lawson***, [1991] 1 S.C.R. 541.

[92] Unlike the present case, the experts in ***Cottrelle***, *supra*, were able to give evidence on the likelihood of the outcome had the defendant doctor performed his duty. The defence proved on the balance of probabilities that timely care would not have made any difference. Since the central question was capable of proof, I do not regard the decision as having any bearing on this appeal.

[93] I will end my discussion of finding causation as a demand of justice by quoting the following portion of Lord Bingham's opinion in ***Fairchild***, *supra*, at 313-4:

> McLachlin J, extra-judicially ('Negligence Law - Proving the Connection', in Mullany and Linden *Torts Tomorrow, A Tribute to John Fleming* LBC Information Services 1998, at p 16), has voiced a similar concern:
>
> > 'Tort law is about compensating those who are wrongfully injured. But even more fundamentally, it is about recognising and righting wrongful conduct by one person or a group of persons that harms others. If tort law becomes incapable of recognising important wrongs, and hence incapable of righting

> them, victims will be left with a sense of grievance and the public will be left with a feeling that justice is not what it should be. Some perceive that this may be occurring due to our rules of causation. In recent years, a conflation of factors have caused lawyers, scholars and courts to question anew whether the way tort law has traditionally defined the necessary relationship between tortious acts and injuries is the right way to define it, or at least the *only* way. This questioning has happened in the United States and in England and has surfaced in Australia. And it is happening in Canada. Why is this happening? Why are courts now asking questions that for decades, indeed centuries, did not pose themselves, or if they did, were of no great urgency? I would suggest that it is because too often the traditional "but-for", all-or-nothing, test denies recovery where our instinctive sense of justice - of what is the right result for the situation - tells us the victim should obtain some compensation.'

[94] In summary on causation, I conclude that the trial judge erred in law in the approach he took to the requirements of proof. Justice requires a lessening of the requirements in this case. The dereliction of the duty of the police to act on the complaint added to the risk of the occurrence to a degree above *de minimis*. This amounted to a material contribution to the loss and accordingly the appellants' action should succeed.

Contributory Negligence

[95] Counsel for the respondents did not present oral argument on this point and was content to rely on his factum.

[96] The contention, applicable only to Bonnie Mooney, is that she contributed to the loss by her own negligence. It is said she should have left Kruska earlier, taken more steps for her own protection, stopped communicating with him and so on.

[97] There is no merit to this position. The relationship between Bonnie Mooney and Kruska fits the classic profile of the battered wife syndrome. She felt powerless under his control; her decisions, often unwise, were prompted by fear and low self-esteem. Some internal dark force draws her to abusive partners. Modern law enforcement now recognizes that some victims of abuse cannot act rationally in their own best interests. I refer again to the Attorney General's policy:

> **Dynamics of Violence Against Women in Relationships**
>
> Violence is used by batterers to establish authority over their partners. They use abusive tactics to control partners' actions. These tactics are often successful because of the fear and isolation a victim feels.

> It may be difficult or impossible for a woman to leave the relationship because of love, cultural/religious values, socio-economic condition, fear or the denial of the violence in the relationship. Violence often escalates and may continue or worsen if the woman leaves the relationship. In addition, unique to the situation of violence in relationships, the accuser and accused usually reside within the same home, enabling the accused to further control or abuse the victim.
>
> When abuse occurs, there is usually a power imbalance between the partners in the relationship. That power imbalance is perpetuated by societal and individual messages undermining the potential for women to gain control of their situations, and for men to be held accountable for their actions within a relationship. For example, a woman may receive constant indications from the abuser, and even family members, that it is inappropriate or futile for her to seek assistance with a "family problem" from outside agencies. When police comply with the victim's wishes and do not recommend charges, or when Crown Counsel refuse to approve charges because the victim is a reluctant witness, the abuser is reinforced in his belief that his behaviour is acceptable and more importantly, the false message that is repeatedly conveyed to the victim, that no help is available, is fortified by the inaction.
>
> Accordingly, it is important that criminal justice system personnel recognize the power imbalance and the dynamics which operate to prevent a woman from taking steps to end abuse. A rigorous approach to arrest, charge and prosecution, as promoted by this policy, is necessary to help eliminate violence within relationships.

[98] On 11 March 1996, the police left Bonnie Mooney to her own devices. She kept in contact with Kruska for the comfort of knowing where he was and to resolve the property issue. I can see no basis for attributing any negligence to her.

[99] The respondents argue that the general damages award for Bonnie Mooney was wrongly based on a diagnosis of post-traumatic stress syndrome which was unsupported by the evidence. The trial judge relied on the opinion of the family physician to make his finding. While that may not have been the most compelling body of evidence, the trial judge's reliance on it cannot, in my opinion, amount to palpable and overriding error: ***M.B. v. British Columbia***, 2003 SCC 53 at para. 54.

[100] Nor can I give effect to the contention that insufficient attention was given to her psychological condition before the tortious event. Her history was before the trial judge. I can see no such error manifest in the reasons.

[101] Next it is said that the amount given for past income loss vastly exceeds her prior record of earnings. This is another area of fact

which attracts a high degree of deference. The respondents submit that she was compensated twice for the loss as it formed part of the general damages. Such an error is not evident. I would not interfere with the award under this head.

[102] On the assessment of damages for Michelle Mooney, the respondents maintain that the trial judge must have disregarded her pre-existing emotional problems in arriving at the general damages figure of $150,000; and in regard to the $25,000 award for future care, the trial judge erred in not taking into account that she was not cooperating with the rehabilitation programs set up for her. It is not apparent that the trial judge overlooked these matters.

[103] No reversible error has been demonstrated in the assessment of damages.

DISPOSITION

[104] For the foregoing reasons I would allow the appeal, set aside the order below, and substitute an order giving judgment for the appellants in the amounts assessed by the trial judge.

"The Honourable Mr. Justice Donald"

Reasons for Judgment of the Honourable Mr. Justice Hall:

[105] This case arises from a violent incident that occurred in a rural area near Prince George, B.C. on 29 April 1996. On that evening, Roland Kruska broke into a residence then occupied by the plaintiff Bonnie Mooney, her two daughters Michelle and Kristy, aged 12 and 6 respectively, and a friend of Bonnie Mooney, Hazel White. He was armed with a gun. He fatally shot Ms. White and wounded Michelle Mooney in the shoulder. Bonnie Mooney and her daughter Kristy escaped without serious injury from the house. After this, Kruska proceeded to set the residence on fire and killed himself.

[106] In 1997, Bonnie Mooney, the appellant, sued, among others, the federal government, the provincial government, and Constable C.S. Andrichuk, a member of the Prince George R.C.M.P. detachment, for damages on her own behalf and on behalf of her two daughters. She claimed damages for post-traumatic stress disorder for herself and Kristy and for physical injury and loss on behalf of Michelle. She also claimed for income loss on her own behalf. She asserted in her pleadings that the police, in particular Constable Andrichuk, had not acted appropriately in their response to her complaint about an incident that occurred between her and Kruska on 11 March 1996. She claimed the police and, vicariously, the governments should be found liable in damages for the harm occasioned to the plaintiffs arising from the violent actions of Kruska on 29 April.

[107] The trial judge, Collver J., delivered Reasons on 5 June 2001 dismissing the action against the defendants: 2001 BCSC 419. He concluded that the plaintiffs could not succeed in establishing liability because there was no satisfactory proof of causality. Although Collver J. did not find liability against any of the defendants, he nonetheless proceeded to assess damages: 2001 BCSC 1079. He assessed the non-pecuniary damages of Kristy Mooney at $15,000. He assessed damages concerning Bonnie Mooney at $75,000 non-pecuniary and fixed her past income loss at $90,000. He assessed damages concerning Michelle Mooney at $150,000 non-pecuniary, the cost of her future care at $25,000, and future income loss at $100,000.

[108] The appellant Bonnie Mooney became involved with Kruska around 1991 after she was divorced from her former spouse. That divorce was caused by an allegation that her former spouse had been assaulting one of the children. Kruska began living with Bonnie Mooney in 1991, and they resided together for a short time in Edmonton. They then purchased a home located at Cluculz Lake. This property is located in a rural area that is approximately a half hour drive out of Prince George. Kruska, over the years from 1991 to the time he and Bonnie Mooney separated in November 1995, made certain improvements to the property. There was violence at intervals in the course of the relationship. What precipitated the 1995 separation was a serious assault perpetrated by Kruska on the appellant on 4 November 1995 (the "November Assault"). Michelle Mooney did not have a good relationship with Kruska. She reported that on a number of occasions her mother had kicked Kruska out of the house.

[109] As the trial judge noted, as a result of the November Assault, Kruska was arrested and charged with assault with a weapon and assault causing bodily harm. In the November Assault Kruska choked and beat Bonnie Mooney with a cane; this assault caused significant injury to the appellant Bonnie Mooney and was properly characterized by Collver J. as "brutal".

[110] The November Assault would probably have resulted in a substantial period of incarceration for Kruska because he had a bad record, including convictions for manslaughter, trafficking, sexual assault and unlawful confinement. The Crown prosecutor who testified at this trial estimated that he could have been sentenced to something in the range of two years if the original charges stood. In 1979, Kruska received a federal sentence of five years, and in 1985 he received a sentence of six years. Given his record and the aggravated circumstances of the November Assault, it seems likely that he could have received another penitentiary term for this incident. However, Kruska managed to persuade the appellant to resile from her initial complaint to the police and furnish the authorities with a false story about how the incident occurred. She also told the Crown prosecutor she did not wish to testify against Kruska. The police and the prosecutor told her they did not believe her new story. However, in the result, without her testimony it was decided to take a plea to a charge of simple assault. Kruska received a sentence of 21 days in jail and was placed on a probation order for one year to keep the peace and be of good behaviour. He was still subject to the terms of that probation order when he committed the crimes of April 1996.

[111] After the November Assault, Kruska returned to Prince George to reside with his parents. Kruska was often in trouble and he would periodically reside with his parents or a brother from time to time when he was out of jail. Some history of Kruska that may explain his often erratic and violent behaviour emerges from the reasons of an Immigration Panel dated 25 July 1991, which reasons are found in the record of the trial proceedings. The hearing before the panel occurred on an appeal from a deportation order issued against Kruska when he had been incarcerated at Mission Institution in 1986. At this hearing he told the panel that if he was allowed to remain in Canada he proposed to reside in Prince George with his parents and work. He was liable to deportation because he had killed the boyfriend of a female companion (the 1979 manslaughter conviction) and had later been convicted of sexual assault and confinement in 1985.

[112] At the hearing, testimony was adduced from the siblings and parents of Kruska. It emerged in evidence that Kruska had been born in Germany in 1948 and entered Canada with his family in 1955. His parents became citizens of Canada but he did not. There was evidence adduced before the appeal board that at the age of three Kruska had been hit by a truck in Germany. He was in a coma for eight days. He had to learn to walk and speak again after this accident. He was not able to perform satisfactorily in school – he eventually reached a level of grade eight after being taught in special classes. He suffered from a reading disability. At one point in her evidence the appellant described Kruska as "nuts". What she was describing was probably consistent with his entire adult life pattern. At times he would be capable of working in labouring situations, but he frequently got into serious trouble and he had a history of sporadic and dangerous

violence. It seems fair to describe him as having a mental difficulty and a "short fuse". His aggression could be fuelled on occasion by alcohol. The appellant Bonnie Mooney described an occasion not long before the November Assault when she discovered him stabbing a male companion with whom he had been drinking. The appeal board ultimately decided to stay the execution of the deportation order for a period of years. In closing they observed as follows:

> The appellant should understand that we have not allowed his appeal; the deportation order is valid and hangs over his head. His future in Canada is entirely in his own hands. He must comply faithfully with the conditions set out in the order. Although we have no power to order the appellant to attend for psychological or psychiatric treatment without his consent, the panel heartily recommends that he seek out a support group to assist him, such as A.A., A.C.O.A.P. or some such organization. The John Howard Society, Salvation Army or similar body may be able to recommend one within his own district.

[113] When he was before the sentencing judge on 20 November 1995 he was again warned to control his assaultive behaviour. The judge said to Kruska as his concluding remarks:

> Mr. Kruska, I may be placing too much emphasis upon your rehabilitation and not enough emphasis upon protection of the public and protection of Ms. Mooney, but I'm relying a great deal upon what Ms. Mooney has told me.
>
> The sentence is twenty-one days. But, Mr. Kruska, I'm also placing you on probation for a year following that sentence, and the conditions are that you are to keep the peace and be of good behaviour.
>
> Mr. Kruska, I'd like you to think about this, also: consider what effect your actions on November the 4th, 1995, have on a twelve-year-old girl who witnessed how you treated Ms. Mooney on that date.
>
> You'll have to read, sign and get a copy of the order. You'll have to go with the sheriff.

[114] The judge had asked Bonnie Mooney at the sentencing hearing if she wanted any special conditions inserted in the probation order; she demurred to this suggestion, saying Kruska was good with the family and she did not consider his assaultive behaviour likely to recur.

[115] It seems that Bonnie Mooney and Kruska had reached some arrangement in November whereby Kruska agreed he was going to cease residing at the Cluculz Lake property and transfer his interest in it over to Bonnie Mooney. However, he partially resiled from this arrangement and demanded $15,000 as compensation to transfer his share

of the title to the appellant. The appellant was not in favour of paying over any sum to Kruska, but eventually there seems to have been some sort of loose arrangement arrived at whereby the property could be sold and he would be paid $15,000 out of the proceeds. Over the winter and spring of 1996, they had telephone discussions both when Kruska was residing that winter with his parents in Prince George, and later in the spring when he was with his brother in Kelowna.

[116] Bonnie Mooney and Kruska met in person in Prince George on 11 March 1996. They first met at a McDonald's restaurant and went from there to a park to discuss what was going to happen concerning the Cluculz Lake property. At the park the appellant was sitting in Kruska's vehicle talking to him. When she noticed that he was becoming agitated, she got out of his vehicle, got into her own vehicle and drove off. He had tried to block her from leaving, but she drove around him. She said that he followed her through the streets of the city driving recklessly until she got to an area where she had friends and attracted the attention of these friends. He then drove off. She was quite frightened by this incident and went to the police station to report the matter. The receptionist on duty at the police station observed that she was quite upset, but Bonnie Mooney did not indicate to the receptionist that there had been any threat or any assault by Kruska.

[117] She was referred to Constable Andrichuk who conducted a brief interview of her. After consulting with other officers, he concluded that Kruska had done nothing that would attract a criminal charge. Kruska was already on a probation order so Constable Andrichuk did not consider proceeding under s. 810 of the ***Criminal Code***, R.S.C. 1985, c. C-46, as amended. He ascertained that Kruska had a history of violence and told the appellant that if she wished, she might want to have a lawyer apply for some type of restraining order under the ***Family Relations Act***, R.S.B.C. 1996, c. 128. He also told her to be in public places, presumably if she had future meetings with Kruska. She stayed overnight in Prince George with a friend. Later that day Kruska approached another friend and attempted to assure this friend that he was sorry for his outburst and he indicated that he wanted to apologize to the appellant for his behaviour. The appellant said he was trying to work himself back into her good opinion, but she was not persuaded of his sincerity.

[118] During the next several weeks the appellant continued to reside with her daughters at the Cluculz Lake property. There were further telephone discussions between her and Kruska about the subject of the property transfer, including telephone contact when he was staying with his brother in Kelowna. During the time that Kruska was in Kelowna the appellant made a phone call to him in which she advised him that her friend Hazel White had lost her job at a food company, and that the appellant was considering having a small cabin built on the Cluculz Lake property where White could reside. The issue she discussed at this time with Kruska was whether the property needed to be sold or not. If he was willing to sign the property over to her without asking for any money, then the cabin could be built. However, if he was going to insist on being paid $15,000, then she would be forced to sell and the cabin could not be built. The appellant said she wanted some answers from Kruska on this subject. In an interview she had with an

investigator in May of 1996, after the shooting incident, she said that she felt this telephone conversation between them was a civilized one.

[119] However, after Kruska returned to Prince George later in April, he apparently began to resent the idea that a cabin would be built on the property and that the property would not be sold. Around 8:00 a.m. on the morning of 29 April, Kruska called the appellant at her home and had a very acrimonious conversation with her. He accused her of sexual misconduct and he wanted to know where the money was coming from to build the cabin for White. This conversation ended with each telling the other to shut up and Kruska hung up the telephone. Late that evening he came to the property in possession of a gun as described above, and, after breaking into the house, he went on a murderous rampage and ultimately shot himself.

[120] After this incident, the appellant complained about a great many people. She complained that the police officers who dealt with her following the November Assault had not properly protected her, and she also asserted that the defence counsel for Kruska and the Crown prosecutor had not acted properly in connection with the prosecution of Kruska in November 1995. She also complained that the police officers, particularly Constable Andrichuk, at the Prince George detachment had not acted appropriately on 11 March 1996. None of the various complaints made by the appellant were found to have substance with the exception that, after an investigation, a superintendent at the Prince George detachment advised Constable Andrichuk that his investigation on March 11 could have been more thorough. Out of this arose the present lawsuit.

[121] Initially, the appellant had also sued the police officers who were involved in the November Assault case, but that aspect of the case was not pursued at trial. The only police officer who remained a defendant at trial was Constable Andrichuk. The appellant pleaded that Constable Andrichuk failed: to conduct an adequate investigation; to respond in an adequate manner to her 11 March complaint; and to take steps to ensure the safety and security of the appellant and her family. The trial judge concluded that the officer had failed in his duty to the appellant because he had not conducted a more complete investigation. The judge concluded: "Constable Andrichuk owed her a greater duty than was demonstrated. A careful investigation was warranted but was not undertaken".

[122] Although he found against the defendant officer on the issue of liability, the trial judge concluded that there was no causal connection between what occurred on March 11 and what occurred seven weeks later on 29 April 1996 at Cluculz Lake. After discussing ***Athey v. Leonati***, [1996] 3 S.C.R. 458, 140 D.L.R. (4th) 235, [1997] 1 W.W.R. 97, 31 C.C.L.T. (2d) 113 [***Athey***], and ***Snell v. Farrell***, [1990] 2 S.C.R. 311, 107 N.B.R. (2d) 94, 72 D.L.R. (4th) 289, 4 C.C.L.T. (2d) 229 [***Snell*** cited to S.C.R.], Collver J. went on to note that in ***Athey*** Major J. said that the causation test must be viewed as "essentially a practical question of fact which can best be answered by ordinary common sense". He then expressed his conclusion on causality as follows:

> [61] In the circumstances I have reviewed, can it be said that the negligence of Constable Andrichuk caused or materially contributed to the Cluculz Lake shootings? I think not.
>
> [62] Roland Kruska's capacity for brutish behaviour was a matter of record, and Bonnie Mooney's brief description of what preceded the four assaults suffered at his hands suggest that his violent outbursts were simply unpredictable. For that reason, nothing is to be gained by speculating about whether confronting Kruska concerning his behaviour on March 11th would have either dissuaded him from later violence or precipitated its earlier expression....
>
> . . .
>
> [65] There was no clear connection between Constable Andrichuk's failure to act on March 11, 1996 and Roland Kruska's fateful trip to Cluculz Lake seven weeks later. The officer's inaction did not materially increase the risk of harm to the extent that he must bear responsibility for Kruska's acts. Accordingly, the action is dismissed.

[123] On appeal the appellant argues that the judge erred in failing to find causality based on what was found by the trial judge to be the failure by Constable Andrichuk to conduct a fuller investigation on 11 March 1996. The appellant's submission on this point is supported by the intervener. Counsel for the appellant points to the policy of the provincial Attorney General requiring police to be active in investigating complaints of domestic violence. The respondent, however, argues that what occurred on 11 March 1996 could scarcely be said to be an incident of domestic violence because there were neither threats nor any assault.

[124] Usually, for causality to be found, the so-called "but for" test must be satisfied. That is to say, has the plaintiff established that the injury would not have occurred but for the negligence of the defendant. As observed by Major J. in ***Athey***, *supra* at para. 15, the "but for" test may be unworkable in some circumstances, and causation may be established where the negligence of a defendant has been found to be a material contribution to the occurrence of an injury. On occasion, causation has also been found where it is established that, while harm has occurred to a plaintiff from a tortious act, it is difficult if not impossible to decide as between multiple actors who caused the particular injury to the plaintiff. A striking example of such a factual situation is the case of ***Cook v. Lewis***, [1951] S.C.R. 830, [1952] 1 D.L.R. 1 [cited to S.C.R.], where an individual was shot at by two hunters. It was held that both could be found liable even though it could not be established which of the two actually shot him. Rand J. said at 833:

> ...the onus is ... shifted to the wrongdoer to exculpate himself; it becomes in fact a question of proof between him and the other and innocent member of the alternatives, the burden of which he must bear. The onus attaches to

> culpability, and if both acts bear that taint, the onus or prima facie transmission of responsibility attaches to both, and the question of the sole responsibility of one is a matter between them.

And further, at 834-35:

> .... This is a case where each hunter would know of or expect the shooting by the other and the negligent actor has culpably participated in the proof-destroying fact, the multiple shooting and its consequences. No liability will, in any event attach to an innocent act of shooting, but the culpable actor, as against innocence, must bear the burden of exculpation.

A similar American case is ***Summers v. Tice***, 199 P.2d 1 (1948).

[125] Other cases of concurrent actors being fixed with liability for all of the resultant injury they caused to a victim are ***Corey v. Havener and Adams***, 182 Mass. 250 (1902) [***Corey***], and ***Arneil v. Patterson***, [1931] A.C. 560, [1931] All E.R. Rep. 90 (H.L. (Scot.)) [***Arneil***]. In ***Corey***, two motorists who concurrently frightened the horses of the plaintiff were each found fully liable in damages for the injury caused; in ***Arneil***, the two owners of dogs that had wounded and killed several sheep were both held fully liable for all damages caused to the owner of the sheep. The defendants in ***Corey*** had asked the judge to instruct the jury that because two separate vehicles were involved the burden was on the plaintiff to show which defendant, if either, was to blame and, if such was not shown, the plaintiff could not recover. The judge refused to so instruct the jury. Both were found liable by the jury. On appeal the verdict was sustained. Lathrop J. said at 251-52:

> The verdict of the jury has established the fact that both of the defendants were wrongdoers. It makes no difference that there was no concert between them, or that it is impossible to determine what portion of the injury was caused by each. If each contributed to the injury, that is enough to bind both. Whether each contributed was a question for the jury....

[126] The rationale for liability in such instances is likely that, because the wrongful acts are so inextricably intertwined in time and space, it would be physically and legally impossible to apportion fault, and the wrongdoers are both properly found liable to the innocent plaintiff. However, the circumstances of those cases appear to me to bear little resemblance to the state of facts in the present case.

[127] In more recent times, in order to cope with often difficult problems of proof in medical cases and cases involving industrial injury or disease, courts have been prepared to adopt what has been

termed a robust and pragmatic approach to factual issues of causality: see, for example, ***Wilsher v. Essex Area Health Authority***, [1988] A.C. 1074, [1988] 2 W.L.R. 557 (H.L. (Eng.)) and ***Snell***, *supra*. A leading case exemplifying this approach is ***McGhee v. National Coal Board***, [1973] 1 W.L.R. 318, [1972] 3 All E.R. 1008 (H.L. (Scot.)) [***McGhee***]. Sopinka J. described the facts in ***McGhee*** at 322-23 of ***Snell***, *supra*:

> .... The appellant contracted dermatitis while employed as a labourer emptying pipe kilns. This work exposed him to clouds of abrasive dust. His employer provided no washing facilities with the result that the appellant would ride home on his bicycle caked with grime and sweat. He sued his employer, the respondent, for negligence. The medical evidence showed that the dermatitis was caused by the working conditions and that the longer the exposure to dust, the greater the chance of developing dermatitis. The medical evidence could not attribute the dermatitis to the additional exposure after work. The appellant's expert could not say that if washing facilities had been provided, the appellant would not have contracted the disease. A breach of duty was found with respect to the failure to provide washing facilities but not with respect to the conditions under which the kilns were operated. The Lord Ordinary dismissed the action on the ground that it had not been shown that the breach of duty caused or contributed to the injury. An appeal to the First Division of the Court of Session failed but an appeal was allowed by the House of Lords.

[128] In ***Snell***, a plaintiff lost the vision in one eye after a surgical procedure performed by the defendant doctor. There had been a finding that the defendant doctor had been negligent in continuing with the surgical procedure when what was termed retrobulbar bleeding was observed. A stroke incident that soon thereafter occurred could have resulted from two causes, one natural, and one attributable to the continuation of the surgery. The experts who testified could not definitively say which was the more likely cause of the stroke. The trial judge concluded that the plaintiff had *prima facie* proved that the harm was caused by the surgery and this conclusion was sustained by the New Brunswick Court of Appeal and the Supreme Court of Canada. Sopinka J. found that it was open to the trial judge in the circumstances of that case to draw the inference that the harm was attributable to the retrobulbar bleeding that had been observed in the course of the surgical procedure.

[129] Similar reasoning was employed by this Court in sustaining a trial finding of liability in a medical case where Melnick J. concluded that osteomyelitis resulting in amputation of a limb had been caused by a surgeon drawing an unclean pin through the injured leg. The case is ***Wintle v. Piper*** (1994), 93 B.C.L.R. (2d) 387, [1994] 9 W.W.R. 390, 46 B.C.A.C. 124 [cited to B.C.L.R.]. Hinkson J.A. said this at 392-93:

> 25 The trial judge drew an inference that the old, dried blood on the Steinmann pin was removed from the pin when it was drawn through the tibia and that the introduction of

this foreign material led to the tibia being infected with osteomyelitis. The trial judge concluded that it was a breach of duty on the part of Dr. Piper to introduce a Steinmann pin with foreign material on it into the tibia and that this caused the tibia to be infected with osteomyelitis.

26 In *Haag v. Marshall* (1989), 39 B.C.L.R. (2d) 205 [[1990] 1 W.W.R. 361] (C.A.), Lambert J.A. considered the decisions in *McGhee v. National Coal Board*, [1973] 1 W.L.R. 1, [1972] 3 All E.R. 1008 (H.L.), *Kay v. Ayrshire & Arran Health Board*, [1987] 2 All E.R. 417 (H.L.), *Hotson v. East Berkshire Area Health Authority*, [1987] 2 All E.R. 909 and *Wilsher v. Essex Area Health Authority*, [1988] 2 W.L.R. 557, [1988] 1 All E.R. 871 (H.L.).

27 Lambert J.A. then turned to consider three Canadian decisions, *Nowsco Well Service v. Canadian Propane Gas & Oil Ltd.* (1981), 16 C.C.L.T. 23, 122 D.L.R. (3d) 228, 7 Sask. R. 291 (C.A), *Letnik v. Metropolitan Toronto (Municipality)*, [1988] 2 F.C. 399, 44 C.C.L.T. 69, 49 D.L.R. (4th) 707 (C.A.) and *Dalpe v. Edmundston* (1979), 25 N.B.R. (2d) 102, 51 A.P.R. 102 (C.A.).

28 Upon the basis of these authorities Lambert J.A. stated his conclusion at p. 213 as follows:

> The "inference" principle derived from *McGhee*, and from the three Canadian cases to which I have referred, is this: Where a breach of duty has occurred, and damage is shown to have arisen within the area of risk which brought the duty into being, and where the breach of duty materially increased the risk that damage of that type would occur, and where it is impossible, in a practical sense, for either party to lead evidence which would establish either that the breach of duty caused the loss or that it did not, then it is permissible to infer, as a matter of legal, though not necessarily logical, inference, that the material increase in risk arising from the breach of duty constituted a material contributing cause of the loss and as such a foundation for a finding of liability.

29 Subsequently, the Supreme Court of Canada had occasion to consider this matter in the context of a medical malpractice action in *Snell v. Farrell* (1990), 72 D.L.R. (4th) 289. Sopinka J., speaking for the court, said at p. 301:

> The legal or ultimate burden remains with the plaintiff, but in the absence of evidence to the contrary adduced by the defendant, an inference of causation may be drawn, although positive or scientific proof of causation has not been adduced. If some evidence to the contrary is adduced by the

> defendant, the trial judge is entitled to take account of Lord Mansfield's famous precept. This is, I believe, what Lord Bridge had in mind in ***Wilsher*** when he referred to a "robust and pragmatic approach to the ... facts" (p. 569).
>
> It is not, therefore, essential that the medical experts provide a firm opinion supporting the plaintiff's theory of causation. Medical experts ordinarily determine causation in terms of certainties whereas a lesser standard is demanded by the law.

30 Applying this reasoning to the present case, in my opinion, it was open to the trial judge to draw an inference on the basis of the evidence of the plaintiff at trial that the defendant was in breach of his duty in drawing the Steinmann pin through the tibia and depositing foreign material in the tibia, which led to the osteomyelitis in the bone.

[130] Counsel for the appellant particularly drew our attention to a recent decision of the House of Lords, ***Fairchild v. Glenhaven Funeral Services Ltd.***, [2002] 3 All E.R. 305, [2002] 3 W.L.R. 89, [2002] I.C.R. 798, [2002] UKHL 22 [***Fairchild***]. ***Fairchild*** involved a series of cases dealing with the liability of employers for disease caused to workers by the presence of asbestos in the workplace. The issue was whether liability should be found where it could not be established whether injury was caused to a worker during the period of time he inhaled dust while working at different times at one or the other of the employers' workplaces. Applying a "but for" test, the Court of Appeal found that liability had not been established. The House of Lords reversed the Court of Appeal. In the circumstances, it was held that it would be just and in accordance with common sense to treat the conduct of both employers in exposing the employers to the risk from asbestos dust as having made a material contribution to the employee contracting the disease against which it had been the duty of the employer to protect him. Lord Bingham of Cornhill traced the expanded causality principle back to a case anterior in time to ***McGhee***, ***Bonnington Castings Ltd. v. Wardlaw***, [1956] A.C. 613, [1956] 1 All E.R. 615 (H.L. (Scot.)). That case presented a situation where, again in an industrial setting, the pursuer (plaintiff) had contracted pneumoconiosis from the inhaling of silica dust. While there was but a single employer, the dust had emanated from two sources, one of which would entail culpability of the employer, and one which would not. Lord Reid held that since it could be shown that the dust from the culpable source had been shown to have materially contributed to the disease beyond the ***de minimis*** range, liability could properly be found against the employer.

[131] Lord Nicholls of Birkenhead, in his speech in ***Fairchild***, *supra*, set out what I consider to be a helpful analysis of why and when the normal "but for" test may not be appropriate:

> [40] ...On occasions the threshold 'but for' test of causal connection may be over-exclusionary. Where justice

so requires, the threshold itself may be lowered. In this way the scope of a defendant's liability may be *extended*. The circumstances where this is appropriate will be exceptional, because of the adverse consequences which the lowering of the threshold will have for a defendant. He will be held responsible for a loss the plaintiff might have suffered even if the defendant had not been involved at all. To impose liability on a defendant in such circumstances normally runs counter to ordinary perceptions of responsibility. Normally this is unacceptable. But there are circumstances, of which the two hunters' case is an example, where this unattractiveness is outweighed by leaving the plaintiff without a remedy. [Emphasis in original.]

[41] The present appeals are another example of such circumstances, where good policy reasons exist for departing from the usual threshold 'but for' test of causal connection. Inhalation of asbestos dust carries a risk of mesothelioma. That is one of the very risks from which an employer's duty of care is intended to protect employees. Tragically, each claimant acquired this fatal disease from wrongful exposure to asbestos dust in the course of his employment. A former employee's inability to identify which particular period of wrongful exposure brought about the onset of his disease ought not, in all justice, to preclude recovery of compensation.

[42] So long as it was not insignificant, each employer's wrongful exposure of its employee to asbestos dust and, hence, to the risk of contracting mesothelioma, should be regarded by the law as a sufficient degree of causal connection. This is sufficient to justify requiring the employer to assume responsibility for causing or materially contributing to the onset of the mesothelioma when, in the present state of medical knowledge, no more exact causal connection is ever capable of being established. Given the present state of medical science, this outcome may cast responsibility on a defendant whose exposure of a claimant to the risk of contracting the disease had in fact no causative effect. But the unattractiveness of casting the net of responsibility as widely as this is far outweighed by the unattractiveness of the alternative outcome.

[43] I need hardly add that considerable restraint is called for in any relaxation of the threshold 'but for' test of causal connection. The principle applied on these appeals is emphatically not intended to lead to such a relaxation whenever a plaintiff has difficulty, perhaps understandable difficulty, in discharging the burden of proof resting on him. Unless closely confined in its application this principle could become a source of injustice to defendants. There must be good reason for departing from the normal threshold 'but for' test. The reason must be sufficiently weighty to justify depriving the defendant of the protection this test normally and rightly affords him, and it must be plain and obvious that

> this is so. Policy questions will loom large when a court has to decide whether the difficulties of proof confronting the plaintiff justify taking this exceptional course. It is impossible to be more specific.
>
> [Emphasis added.]

[132] Although ***Haag v. Marshall*** (1989), 39 B.C.L.R. (2d) 205, [1990] 1 W.W.R. 361, 61 D.L.R. (4th) 371, 1 C.C.L.T. (2d) 99 (C.A.) [***Haag*** cited to B.C.L.R.], is often referred to in cases dealing with this type of issue, that was a case where causality was not found to be established. ***Haag*** involved a suit against a solicitor who was alleged to have insufficiently protected his vendor clients in a property sale from a future loss incurred because of a deficiency in insurance coverage. Lambert J.A. noted in ***Haag***, *supra*, at 215:

> But even if we assume that Mr. Marshall's breach of duty materially increased the risk of harm to the Haags, that would only be sufficient to bring this case within the ambit of the circumstances giving rise to a shift of onus under the incorrect "onus" principle attributed, I think wrongly, to Lord Wilberforce in *McGhee*. It would not be sufficient to bring this case within the correct and more cautious "inference" principle.

[133] Locke J.A., in concurring reasons, held that it was unnecessary to consider any principle involved in ***McGhee*** because, although it appeared that proof of causality could have been made, causality was not established. On its facts, therefore, ***Haag*** is not illustrative of any expanded application of causality.

[134] The primary areas in which a more expansive approach to causality has been found appropriate in recent times appear to relate to medical malpractice and industrial disease cases. Earlier cases such as ***Cook v. Lewis***, *supra*, and ***Corey***, *supra*, present situations of concurrent tortious activity so intermingled as to not be capable of separate analysis. However, in those cases there is a clearly an immediate connection in time and space to the resultant harm. In three cases referred to by Lambert J.A. in ***Haag***, *supra*, the question of causality was nearly impossible to demonstrate because of the physical circumstances of the occurrence. Lambert J.A. noted in ***Haag***, *supra*, at 212-13:

> But *McGhee* remains a worthwhile study. And there is a somewhat more cautious principle underlying the decision in that case. However, it is not an "onus" principle but an "inference" principle. That principle is exemplified in the majority reasons of Mr. Justice Bayda in *Nowsco Well Service Ltd. v. Can. Propane Gas & Oil Ltd.* (1981), 16 C.C.L.T. 23, 122 D.L.R. (3d) 228, 7 Sask. R. 291 (C.A.); in the unanimous reasons of Mr. Justice MacGuigan in *Letnik v. Metro. Toronto (Mun.)*, [1988] 2 F.C. 399, 44 C.C.L.T. 69, 49 D.L.R. (4th) 707 (C.A.); and in the unanimous reasons of

> Chief Justice Hughes in *Dalpe v. Edmundston* (1979), 25 N.B.R. (2d) 102, 51 A.P.R. 102 (C.A.), all three of which apply *McGhee*. I will not set out all the facts in those cases. But it should be noted that in the *Nowsco* case the garage blew up and in doing so destroyed the evidence of the cause of the blow-up. In the *Letnik* case the ship sank and was uneconomical to raise. When the ship went down it took the cause of its doing so to the bottom. And in the *Dalpe* case the time of the blockage of the sewer was made impossible to determine by the covering of the manhole.

[135] The present case in my opinion differs factually from any of the above situations. It involves a situation where the third party Kruska intentionally acted, causing harm to the plaintiff and her dependants. The appellant alleges liability ought to be found because the defendant police officer did not act to prevent Kruska from perpetrating the harm.

[136] The previous police liability cases of ***O'Rourke v. Schacht*** (1974), [1976] 1 S.C.R. 53, 55 D.L.R. (3d) 96, 3 N.R. 453 [***O'Rourke***], and ***Doe v. Metro. Toronto Commissioners of Police*** (1990), 74 O.R. (2d) 225, 72 D.L.R. (4th) 580, 40 O.A.C. 161, 5 C.C.L.T. (2d) 77 (Div. Ct.), and (1998), 39 O.R. (3d) 487, 160 D.L.R. (4th) 697, 126 C.C.C. (3d) 12, 43 C.C.L.T. (2d) 123 (Gen. Div.) [***Doe***], present situations where liability was found against an officer or police department based on a failure to warn. That is analogous to the sort of liability found to exist in ***Rivtow Marine Ltd. v. Washington IronWorks***, [1974] S.C.R. 1189, 40 D.L.R. (3d) 530, [1973] 6 W.W.R. 692. In ***O'Rourke***, *supra*, liability accrued to the police because an officer investigating an accident at the scene of a gap in a road failed to take the necessary steps to have warning signs replaced in a timely fashion. In ***Doe***, *supra*, the Toronto police failed to warn potential victims about the presence of a serial rapist resulting in harm to an individual plaintiff who was assaulted by the criminal. No such allegation is made in this case.

[137] The respondent, relying on cases like ***Hill v. Chief Constable of West Yorkshire***, [1989] A.C. 53, [1988] 2 W.L.R. 1049, [1988] 2 All E.R. 238 (H.L. (Eng.)), argues that the trial judge erred by imposing a duty of care in this case on police officers to investigate any particular allegation made by a complainant. He says this at para. 69 of his written argument:

> Reasons for not imposing a private law duty of care on police officers to investigate an individual's complaint include the following:
>
> a. Courts would be invited to second guess policy decisions related to the investigation, administration, and the approach to enforcement of the law generally. Such issues are not justiciable.
>
> b. A police department's (officer's) discretion with respect to the setting of priorities in connection

with the investigation and suppression of crime would be fettered;

c. Victims would unduly control what complaints should be investigated and the extent of the investigation.

d. The financial impact on the community of providing increased police and legal services at the expense of other valuable services such as health care and education would be substantial;

e. The rights of the majority would not be served by the imposition of a duty of care to investigate in that important initiatives related to the investigation and suppression of crime would be obstructed by the diversion of resources to defend discretionary decisions exercised by law enforcement professionals.

f. The chilling effect of imposing a private law duty of care and the threat of litigation following therefrom would invariably result in police officers carrying out their duties in a defensive frame of mind to the detriment of law enforcement generally.

g. There is statutory authority to discipline police officers who breach their duty. Imposing a duty of care to investigate would not improve the delivery of police services to the community.

h. A private law duty to investigate could lead to an overzealous arrest policy that would infringe upon the rights of potential suspects.

[138] Counsel also referred to the case of ***Cooper v. Hobart***, [2001] 3 S.C.R. 537, 206 D.L.R. (4th) 193, [2002] 1 W.W.R. 221, 2001 SCC 79, wherein the Supreme Court of Canada addressed the issue of the scope of the duty to be imposed on a regulator. In any consideration of this issue of the scope of the police duty to investigate or to lay charges in any particular case, the reasoning in the case of ***Swanson Estate v. R.*** (1991), [1992] 1 F.C. 408, 80 D.L.R. (4th) 741, 124 N.R. 218, 7 C.C.L.T. (2d) 186 (C.A.), might fall to be considered. However, I do not propose to address these interesting issues because in my view the present case can be more appropriately decided on a causation analysis.

[139] The trial judge concluded there was no causal connection between any lapse on the part of Constable Andrichuk on 11 March and the harm that occurred on 26 April. He noted, *inter alia*, that there was a considerable temporal separation between the events:

> [61] In the circumstances I have reviewed, can it be said that the negligence of Constable Andrichuk caused or materially contributed to the Cluculz Lake shootings? I think not.

> [62] Roland Kruska's capacity for brutish behaviour was a matter of record, and Bonnie Mooney's brief description of what preceded the four assaults suffered at his hands suggest that his violent outbursts were simply unpredictable. For that reason, nothing is to be gained by speculating about whether confronting Kruska concerning his behaviour on March 11th would have either dissuaded him from later violence or precipitated its earlier expression....
>
> . . .
>
> [65] There was no clear connection between Constable Andrichuk's failure to act on March 11, 1996 and Roland Kruska's fateful trip to Cluculz Lake seven weeks later. The officer's inaction did not materially increase the risk of harm to the extent that he must bear responsibility for Kruska's acts. Accordingly, the action is dismissed.

[140] Causality has about it a significant factual component. This factual finding by the trial judge is entitled to a fair measure of deference: ***Housen v. Nikolaisen***, [2002] 2 S.C.R. 235, 211 D.L.R. (4th) 577, [2002] 7 W.W.R. 1, 2002 SCC 33; ***Stein v. The Ship "Kathy K"***, [1976] 2 S.C.R. 802, 62 D.L.R. (3d) 1, 6 N.R. 359; ***Smith v. Arndt***, [1997] 2 S.C.R. 539, 148 D.L.R. (4th) 48, [1997] 8 W.W.R. 303, 35 B.C.L.R. (3d) 187; ***Rothwell v. Raes*** (1990), 2 O.R. 332, 76 D.L.R. (4th) 280 (C.A.). In the recent case of ***St. Jean v. Mercier***, [2002] 1 S.C.R. 491, 209 D.L.R. (4th) 513, 282 N.R. 310, 2002 SCC 15, Gonthier J. said this at para. 104:

> In the determination of fault one applies norms of behaviour required by law to a set of facts. This obviously makes the question one of mixed law and fact. In contrast, in the determination of causation one is inquiring into whether something happened between the fault and the damage suffered so as to link the two. That link must be legally significant in an evidentiary sense, but it is rendered no less a question of fact.

[141] In this case, not only do I consider that deference to the factual decision on causality made by the trial judge should result in the dismissal of this appeal, but I also am of the opinion that he was correct in his conclusion that no causality ought to be found to be established on the evidence in this case.

[142] As narrated above, Kruska had been warned by an immigration panel that he was in jeopardy of deportation if he should in future offend against the law. This occurred in 1991. In November 1995, when he was before the Provincial Court judge on the assault matter, he was again admonished to eschew violence; he was given a short jail term and placed on probation requiring him to keep the peace and be of good behaviour for one year. If he breached this he again would face imprisonment. Kruska had all of these considerations and restraints hanging over him in April of 1996. Kruska, as the judge observed, was

often unpredictable in his behaviour. Notwithstanding the risk to him of deportation or of imprisonment, he again became involved in criminal activity in April 1996 when he committed the assaults of 29 April. Absent deportation from Canada or permanent incarceration, it appears he posed a continuing risk to do harm to persons with whom he had contact.

[143] The events of 29 April 1996 occurred at a considerable remove in time from 11 March. During that interval there had been telephone contact, generally of a civil nature, between Kruska and the appellant. In late April he appears to have fallen into a murderous rage over the plan of the appellant to have constructed a cabin for Ms. White on the Cluculz Lake property. Notwithstanding the extant legal hazards and restraints that were applicable to Kruska, he embarked on a course of violent conduct. This event seems to have been triggered by his anger over the proposed use to be made of the property.

[144] In my respectful opinion, the causality conclusion of the trial judge regarding the events of March and April 1996 was a factual conclusion that was soundly based on the evidence in this case. I have perhaps expanded somewhat on the Reasons of Collver J. to explain why I do not believe any action of Constable Andrichuk had any causal relation to the harm that occurred to the appellant and her daughters, but I agree with his conclusion. I would dismiss this appeal.

[145] Because I agree with the decision of the trial judge concerning liability I do not need to consider the damages issues raised in the cross-appeal of the respondent. I consider that in these circumstances the proper disposition of the cross-appeal would be to dismiss it. I would therefore order the dismissal of both the appeal and the cross-appeal.

“The Honourable Mr. Justice Hall”

Reasons for Judgment of the Honourable Mr. Justice Smith

[146] I have had the privilege of reading the reasons for judgment of each of my colleagues in draft form. I agree with Mr. Justice Hall that this appeal must be dismissed on the basis that no causal link was established between Constable Andrichuk's inaction and the appellants' harm. In my view, the trial judge applied correct principles and made no error that would justify our intervention either in his findings of fact or in his application of legal principle to those facts.

[147] The appellants advance two grounds of appeal, which, though framed as alternative submissions, raise essentially the same issue: whether a material increase in risk is sufficient to establish causation. They submit first that the learned trial judge applied "an unduly onerous standard for the determination of causal connectivity". They say they were required to demonstrate only that Constable Andrichuk's inaction made a material contribution, beyond ***de minimis***, to the risk of harm. They contend that their evidence met this burden and that the trial judge erroneously required proof of a more substantial causal connection. Alternatively, they submit that, because it was difficult or impossible for them to prove causation on the traditional but-for test, the trial judge ought to have drawn an inference of causation founded on the alleged material increase in risk.

[148] Cause-in-fact relates to the history behind the plaintiff's harm. The traditional test of causation requires a plaintiff to establish that the defendant's wrongful conduct was a necessary antecedent of his or her injury. This is the familiar "but-for" analysis, which poses the hypothetical question: but for the defendant's wrongful conduct, would the injury have occurred? If the injury would have occurred in any event, the defendant's conduct will not be found to be the cause. The standard of proof is the balance of probabilities: ***Snell v. Farrell***, *supra* at 319-20 and ***Athey v. Leonati***, *supra* at paras. 13-14.

[149] Because there is often not a single cause sufficient by itself to produce the plaintiff's harm, it is not necessary for the plaintiff to prove that the defendant's carelessness was the only cause of the injury. It is enough if the defendant's conduct was part of a combination of causal factors that produced the plaintiff's injury. In ***Athey v. Leonati***, the plaintiff, whose history of back problems predisposed him to further injury, was injured in two separate motor vehicle collisions, and then, while recovering from those injuries, he suffered a herniated disc. Major J. said, at para. 17:

> As long as a defendant is <u>part</u> of the cause of an injury, the defendant is liable, even though his act alone was not enough to create the injury. There is no basis for a reduction of liability because of the existence of other preconditions: defendants remain liable for all injuries caused or contributed to by their negligence.

The plaintiff had to prove on a balance of probabilities using the but-for test that the impugned conduct was a contributing cause of the

injury (para. 41). The defendants were held liable because, "[a]lthough the accidents played a lesser role than the pre-existing problems, the accidents were nevertheless a necessary ingredient in bringing about the herniation" (para. 43). Since the contribution of the accidents was more than *de minimis*, it was a material contribution (para. 44).

[150] The decision of the House of Lords in ***Bonnington Castings Ltd. v. Wardlaw***, [1956] A.C. 613 is often cited as the seminal authority for this proposition. In that case, the pursuer developed pneumoconiosis through the inhalation of silica dust emanating from two sources at his place of work, one tortious and the other non-tortious: swing grinders, which the employer operated near the pursuer in breach of a safety regulation, and the pneumatic hammer the pursuer himself operated. The House of Lords held that the employer was liable insofar as the dust from the swing grinders materially contributed to the "whole of the noxious material inhaled" and thus to the disease. Because the dust that caused the disease could not be wholly attributed to one source or the other, it was improper to ask which was the most probable cause, the swing grinders or the pneumatic hammers. Lord Reid concluded, at 623:

> In my opinion, it is proved not only that the swing grinders may well have contributed but that they did in fact contribute a quota of silica dust which was not negligible to the pursuer's lungs and therefore did help to produce the disease. That is sufficient to establish liability against the appellants...

[151] Although they involve multiple independent causes, cases such as ***Bonnington Castings*** are straightforward in the sense that the link between the risk of harm created by the defendant's careless conduct and the eventuation of that risk in damage to the plaintiff is capable of proof on the traditional but-for test. Though only a sufficient cause in combination with the dust from the pneumatic hammer, the dust from the swing grinders was a necessary historical antecedent because it helped to create the cloud the pursuer inhaled. Implicit is the finding that the dust produced by the pneumatic hammer alone would not have been sufficient, either.

[152] The appellants contend, however, that they are not required in this case to go so far as to prove facts to support an inference of causation on the traditional analysis. Rather, in their submission, they can establish the requisite causal connection merely by proving that Constable Andrichuk's neglect materially increased the risk of further violence by Mr. Kruska, since "there is no practical difference between materially contributing to the risk of harm and materially contributing to the harm itself". They refer in support of this submission to ***Snell v. Farrell***, *supra* at 323, and ***McGhee v. National Coal Board***, *supra*, *per* Lord Reid at 1011. They submit that, in Canada, as a result of the decision in ***Snell v. Farrell***, this principle is expressed as the drawing of an inference of causation from the creation of the risk. They rely primarily on ***Haag v. Marshall***, *supra*, for this point and they submit that the trial judge erred in failing to draw such an inference here.

[153] In my view, the ***McGhee*** risk principle and the inference principle, which is also derived from ***McGhee*** (as Mr. Justice Donald explains beginning above at para. 70), are the same principle stated differently. It is my view, as well, that the principle is restricted to rare cases where it is clear that the defendant(s) controlled all possible physical agents of harm and it is impossible to identify scientifically the pathogenesis of the harm and, therefore, to attribute precise responsibility for the harm as between the tortious acts of several defendants or as between one defendant's tortious and non-tortious acts.

[154] This is not such a case. Proof of causation is not precluded by the limits of scientific knowledge, and there was an independent risk that Mr. Kruska would choose to harm the appellants despite anything Constable Andrichuk might do.

[155] In ***Wilsher v. Essex Area Health Authority***, *supra*, the House of Lords retreated from the ***McGhee*** view that a material increase in risk will be sufficient to establish causation if the injury is a materialization of the risk. However, the principle has since resurfaced in ***Fairchild v. Glenhaven Funeral Services***, *supra*.

[156] The effect of the risk principle is, in the circumstances where it applies, to dispense as a matter of law with proof of causation. As Professor Klar points out in ***Tort Law***, 3rd ed. (Toronto: Thomson Carswell, 2003) at 398:

> Since, by definition, all negligent conduct involves the creation of an unreasonable risk of injury, the assumption that an injury which occurs within that risk will be deemed to have been caused by the unreasonable conduct effectively eliminates proof of causation from the negligence action.

[157] The elimination of causation as an element of negligence is a radical step that goes against the fundamental principle stated by Diplock L.J. in ***Browning v. War Office***, [1962] 3 All E.R. 1089 at 1094-95 (C.A.):

> A person who acts without reasonable care does no wrong in law; he commits no tort. He only does wrong, he only commits a tort, if his lack of care causes damage to the plaintiff. A defendant in an action in negligence is not a wrongdoer at large: he is a wrongdoer only in respect of the damage which he actually causes to the plaintiff.

[158] This is why the causal connection between the defendant's breach of duty and the plaintiff's damage is the linchpin of liability in negligence, and why it must be the rare case where liability will be imposed as a matter of law without proof of a causal connection. The care with which the Law Lords in ***Fairchild*** drew out the unusual features of that case, discussed below, so as to confine future application of the risk principle, speaks to the centrality of causation in negligence: see, for example, Lord Bingham at para. 2,

Lord Nicholls at para. 43 and Lord Rodger at para. 170. A review of ***Fairchild*** and the decisions leading up to it will demonstrate the inapplicability of the principle to this case.

[159] In ***McGhee***, the pursuer developed dermatitis from exposure to brick dust at his place of work. Because his employer had breached its duty to provide showers to enable employees to remove the dust from their bodies, the pursuer cycled home after work with brick dust still on his skin. Medical opinion evidence proved that the brick dust caused the dermatitis and that the longer the exposure to the dust the greater the chance that dermatitis would develop. However, the medical experts could not say that the dermatitis would not have developed had the employer provided adequate washing facilities since it was impossible to determine whether the cause was the pursuer's exposure at work or the exposure while he was cycling home. Nevertheless, although they were not unanimous in their approach, the House of Lords found liability against the employer.

[160] Lord Wilberforce would have found liability on the basis that the evidence established a presumption of causation, shifting the burden to the employer to show that its wrongful conduct was not causally related to the harm. Lord Kilbrandon concluded that the circumstantial evidence supported an inference of probable causation on the traditional but-for test. It is the opinions of Lords Reid, Simon, and Salmon, however, that are more significant for present purposes. They concluded that negligent conduct that materially increases a risk of injury may be seen as a cause of an injury that occurs within that risk.

[161] Fifteen years later, Lord Bridge, speaking for a unanimous House in ***Wilsher***, *supra*, interpreted ***McGhee*** as espousing no new principle; rather, he expressed the view, at 569, that it exemplified a "robust and pragmatic" approach to the facts that enabled a common-sense inference of causation despite the inability of the experts to express a scientific opinion of causal connection. In ***Wilsher***, the prematurely-born plaintiff developed an incurable eye condition. One of the possible causes was excessive oxygen negligently administered by the defendants, although there were a number of other non-tortious factors that, alone or in combination, could have caused the injury. Medical experts were unable to identify the process of causation scientifically. Lord Bridge held that the lower courts had erred in finding liability on the basis of the risk principle set out in ***McGhee*** and, because the trial judge had made no finding as to whether the exposure to oxygen was more likely than not a cause of the injury, remitted the action for a new trial.

[162] One year after ***Wilsher***, this Court decided ***Haag v. Marshall***, *supra*, upon which my colleague Mr. Justice Donald has relied for the inference principle, which he would apply in this appeal. In ***Haag v. Marshall***, the plaintiffs failed because their evidence did not satisfy the but-for test of causation: this was not a case where it was impossible for the plaintiffs to prove causation on the traditional test. In reaching that conclusion, Mr. Justice Lambert considered the scope of the principle in ***McGhee*** and rejected Lord Wilberforce's reversal of onus in favour of "a more cautious inference principle". As Mr. Justice Lambert described this principle in the passage my

colleague has quoted in para. 70 above, impossibility of proof of causation in the ordinary way is an essential element. Indeed, impossibility was central to ***McGhee***. As Lord Reid said, at 1010: "In the present case the evidence does not shew – perhaps no one knows – just how dermatitis of this type begins." As it is expressed in ***Haag v. Marshall***, the inference of causation in these circumstances is a "legal, though not necessarily logical, inference". However, the use of inference terminology to characterize the decision in ***McGhee*** was expressly rejected as a fiction by the House of Lords in ***Fairchild***.

[163] ***Fairchild*** was another industrial disease case where proof of causation on traditional principles was impossible. Although each employee had worked at different times and for varying periods for more than one of the defendant employers and had inhaled asbestos dust throughout those periods, the limits of scientific knowledge were such that they were unable to prove on the but-for test of causation that inhaling asbestos dust at the premises of any particular defendant employer(s) had caused their mesothelioma. It was accepted that all relevant exposures to the asbestos dust occurred in one or other of the plaintiffs' places of work. The Law Lords concluded that, although the risk principle is not ordinarily applicable, in the exceptional circumstances prevailing the conduct of the employers should, as a matter of law and policy, be treated as having causally contributed to the disease contracted by the employees upon proof that the employers had materially increased the risk (or failed to materially reduce the risk) and that the injury materialized within the scope of the risk: see Lord Bingham at paras. 34-35, Lord Nicholls at paras. 44-45, Lord Hoffman at paras. 64-66, and Lord Rodger at para. 168.

[164] Although the Law Lords concluded in ***Fairchild*** that ***Wilsher*** had been correctly decided on its facts, all but Lord Hutton disagreed with Lord Bridge's view that ***McGhee*** created no new principle. The critical distinction was that, in ***Wilsher***, the evidence disclosed other possible causal agents of the injury whereas, in ***McGhee***, all possible causes of the pursuer's dermatitis other than exposure to brick dust at his employer's place of business could be ruled out: see Lord Bingham at para. 22, Lord Hoffman at para. 67, Lord Hutton at para. 87, and Lord Rodger at paras. 146, 149. Lord Bingham expressed the distinction this way:

> [22] ... It is one thing to treat an increase of risk as equivalent to the making of a material contribution where a single noxious agent is involved, but quite another where any one of a number of noxious agents may equally probably have caused the damage...

Thus, it was for the trial judge in ***Wilsher*** to decide whether the defendants' negligence was a probable cause of the injury according to the traditional but-for test of causation.

[165] The majority in ***Fairchild*** imposed liability on the basis of policy. Lord Bingham's speech is representative of this view. After acknowledging that it may properly be said to be unjust to impose liability on a party who has not been shown to have caused the damage, he said:

> [33] ...On the other hand, there is a strong policy argument in favour of compensating those who have suffered grave harm, at the expense of their employers who owed them a duty to protect them against that very harm and failed to do so, when the harm can only have been caused by breach of that duty and when science does not permit the victim accurately to attribute, as between several employers, the precise responsibility for the harm he has suffered.
>
> [Emphasis added]

[166] In imposing liability as a matter of law, the majority expressly rejected the notion that the basis of the finding was a factual or legal inference of causation. Again, I refer to Lord Bingham, who said:

> [35] For reasons given above, I cannot accept the view... that the decision in *McGhee*'s case was based on the drawing of a factual inference. Nor, in my opinion, was the decision based on the drawing of a legal inference. Whether, in certain limited and specific circumstances, a legal inference is drawn or a different legal approach is taken to the proof of causation, may not make very much practical difference. But Lord Wilberforce, in one of the passages of his opinion in *McGhee*'s case quoted in [20], above, wisely deprecated resort to fictions and it seems to me preferable, in the interests of transparency, that the courts' response to the special problem presented by cases such as these should be stated explicitly. I prefer to recognise that the ordinary approach to proof of causation is varied than to resort to the drawing of legal inferences inconsistent with the proven facts.

[167] The instant case differs in critical ways from ***McGhee*** and ***Fairchild***, and it is my view that the risk principle the appellants have invoked, whether it be expressed in terms of materially increasing the risk of harm or in terms of the inference principle described in ***Haag v. Marshall***, has no application.

[168] Here, the harm was the result of a discrete traumatic event, not a course of exposure to a potentially pathogenic agent in relation to which science is unable to offer any causal opinion. We know what caused the harm: it was Mr. Kruska's violent actions. The question is whether Constable Andrichuk's inaction played any legally significant historical causal role in Mr. Kruska's acting as he did. Proof that it did is not an impossibility in the sense that scientific knowledge cannot provide a causal connection and an inference of causation cannot be drawn on circumstantial evidence. Causation is not susceptible of direct proof; rather, it is always a matter of inference from probative facts established by the evidence. Here, there was evidence of Mr. Kruska's character and violent history and his previous responses to sanctions imposed by the police and the courts. There was evidence of police and ministerial policies respecting the effect of police action

on domestic violence. As well, there were the circumstances of the event itself, including the temporal relationship between Constable Andrichuk's inaction and Mr. Kruska's criminal actions. This is the stuff of which factual inferences based on common sense and experience are made.

[169] Further, and by contrast with the circumstances in ***McGhee*** and ***Fairchild***, not all risk factors were within the control of Constable Andrichuk. His conduct alone was incapable of causing the harm: his nonfeasance could have causal effect only in its interaction with those features of Mr. Kruska's psychological makeup that impelled him to act as he did. There was a pre-existing risk, independent of Constable Andrichuk, that Mr. Kruska would harm the plaintiffs. In ***McGhee*** and ***Fairchild***, on the other hand, possible causes of the claimants' dermatitis and mesothelioma other than exposure in the course of their employment to brick dust and asbestos, respectively, could be discounted.

[170] Although the reasoning of the House of Lords in ***Fairchild*** has not yet received the attention of the Supreme Court of Canada, ***Snell v. Farrell***, decided two years after ***Wilsher***, did give the court occasion to consider whether the risk principle announced in ***McGhee*** should apply to alleviate inherent difficulties of proof in the area of medical malpractice. As in ***Wilsher***, there were possible alternative causes of the injury other than the defendant's breach of duty and outside the control of the defendant. Sopinka J., writing for a unanimous court, reiterated that the traditional but-for test of causation applies in these ordinary cases, including cases where, although no opinion of causation can be expressed to a scientific standard of proof, a common-sense inference that satisfies the legal standard of proof on a balance of probabilities may nevertheless be drawn on the totality of the evidence.

[171] It was proven in ***Snell v. Farrell*** that the plaintiff suffered blindness as a result of atrophy or death of the optic nerve caused by a stroke, that a stroke is the destruction of a blood vessel due to interruption of the blood supply, and that the defendant's decision to continue an operation to remove a cataract from the plaintiff's eye in the face of obvious retrobulbar bleeding was a possible cause of the stroke. There were multiple possible causes, but no evidence to implicate any of them other than the defendant's negligent conduct.

[172] On one view of the trial judge's reasons, he concluded that by continuing the operation after the bleeding became apparent the defendant increased the risk of a stroke and that, since the plaintiff suffered a stroke, the defendant was liable on the ***McGhee*** risk principle. Sopinka J. concluded that this was the wrong approach in the circumstances. Quoting extensively from Lord Bridge's speech in ***Wilsher***, he observed, at 324-25, that Lord Bridge interpreted ***McGhee*** as permitting an inference of causation even though expert evidence cannot provide a definitive scientific causal connection. In Sopinka J.'s opinion, the trial judge ought to have adopted that approach. The plaintiff's evidence *prima facie* established that the defendant's breach of duty caused her injury and, in the absence of any evidence to the contrary, justified the inference as a matter of fact that his wrongful conduct was the cause of the injury. The trial judge's error

was in requiring proof of causation on a scientific standard. He noted, at 331, the distinction between expert medical opinion of scientific cause and a jury's determination of factual cause based on all of the evidence, including expert medical opinion, and said, at 331-32:

> In *Wilsher*, *supra*, Lord Bridge gave effect to this difference when he explained *McGhee* at p. 567:
>
> > ... where the layman is told by the doctors that the longer the brick dust remains on the body, the greater the risk of dermatitis, although the doctors cannot identify the process of causation scientifically, there seems to be nothing irrational in drawing the inference, as a matter of common sense, that the consecutive periods when brick dust remained on the body contributed cumulatively to the causation of the dermatitis. I believe that a process of inferential reasoning on these general lines underlies the decision of the majority in *McGhee*'s case. [Emphasis added.]
>
> The issue, then, in this case is whether the trial judge drew an inference that the appellant's negligence caused or contributed to the respondent's injury, or whether, applying the above principles, he would or ought to have drawn such an inference.

[173] I do not read Sopinka J.'s reasons as adopting Lord Bridge's view that inferential reasoning underpinned the decision in ***McGhee***, the proposition that was later rejected in ***Fairchild***. Rather, the gist of the quoted passage, read in its context, is that a common-sense factual inference of causation may be possible despite the absence of a definitive scientific opinion of causation.

[174] Applying the traditional test, the cause of the injury was disclosed: it was Dr. Farrell's negligent conduct. This was not a case where the precise cause was unattributable, nor was it one where science was unable to explain how the injury could have occurred. It follows that the ***McGhee*** risk principle was not engaged.

[175] Accordingly, I cannot accede to the appellants' submission that ***Snell v. Farrell*** adopted the ***McGhee*** risk principle or that it should apply in this case.

[176] On a variation of this submission, the intervener submitted, by reference to ***K.L.B. v. British Columbia***, [2003] 2 S.C.R. 403, that an inference of causation should be drawn on the basis that it was reasonably foreseeable to Constable Andrichuk that his inaction would expose the appellants to Mr. Kruska's violence, that he was obliged to take steps to lessen that likelihood, and that his failure to take affirmative action was sufficiently causally linked to the harm to establish causation. The intervener characterizes this approach as a

"less stringent test of causation" that will be satisfied on proof to a standard less than a balance of probabilities. A modified test is justified, the intervener says, because the "traditional test of causation would impose a virtually impossible burden of proof" in cases such as this as a result of the difficulty in hypothesizing how persons such as Mr. Kruska would react to affirmative police action.

[177] I cannot accede to that submission. The but-for test of causation has traditionally been applicable even in cases where the hypothetical question requires prediction of human reaction. For example, in ***Qualcast (Wolverhampton) Ltd. v. Haynes***, [1959] A.C. 743 (H.L.), it was held that whether a foundry worker who was injured by a spill of molten metal would have worn available protective clothing had his employer urged him to do so was a question of fact, and, implicitly, that the question was to be decided according to traditional principles of proof of causation. Similarly, causation in cases of negligent misrepresentation turns on how the plaintiff would have acted hypothetically but for the defendant's negligent conduct.

[178] Further, ***K.L.B.*** does not approve a standard of proof of causation on less than a balance of probabilities. In that case, the government was sued in negligence for placing children in foster homes where they were subjected to psychological, physical, and sexual abuse by members of their foster families. The court noted that the government had a duty to place children in adequate homes and to supervise their stay, the requisite standard of care being that of a prudent parent, solicitous for his or her child's welfare. McLachlin C.J.C., writing for the majority, articulated the standard of proof of causation in this way:

> [13] ...it is worth noting that the private nature of the abuse may heighten the difficulty of proving the abuse and its connection to the government's conduct in placement and supervision. As in other areas of negligence law, judges should assess causation using what Sopinka J., citing Lord Bridge in *Wilsher v. Essex Area Health Authority*, [1988] 2 W.L.R. 557 (H.L.), at p. 569, referred to as a "robust and pragmatic approach" (*Snell v. Farrell*, [1990] 2 S.C.R. 311, at p. 330). As Sopinka J. emphasized, "[c]ausation need not be determined [with] scientific precision" (*Snell*, at p. 328). A common sense approach sensitive to the realities of the situation suffices.

[179] This passage does not advocate a departure from the traditional standard of proof on a balance of probabilities. Rather, it affirms that causation is to be determined in accordance with ***Snell v. Farrell***; that is, by way of common-sense factual inference on the civil standard of proof.

[180] Counsel for the intervener referred, as well, to ***Walker Estate v. York Finch General Hospital***, [2001] 1 S.C.R. 647 in the context of her argument for a "less stringent standard of causation", and although she did not develop from it any discrete submission, the decision merits separate consideration. Like the instant case, it required the court to consider whether the defendant's alleged wrongful conduct affected

the decision of the person who was the physical agent of the plaintiff's harm to embark on a particular course of action.

[181] Ms. Walker contracted HIV, with fatal consequences, from a transfusion of blood collected by the Canadian Red Cross Society (the "CRCS") at a donors' clinic in 1983. The screening brochure the CRCS used at the time did not list the signs and symptoms of AIDS or identify the categories of donors who, though apparently healthy, were at high risk of carrying HIV. The issue was whether a brochure containing this information, which represented the appropriate standard of care, would have deterred the HIV-positive donor whose blood infected Ms. Walker from donating.

[182] Major J., writing for the court, would have found the but-for test of causation to be satisfied since the donor had testified that, had he received information on AIDS and the high-risk categories, he would have self-identified as falling into one of those groups: homosexual males with multiple partners (para. 97). As well, he said:

> [88] ...The proper test for causation in cases of negligent donor screening is whether the defendant's negligence "materially contributed" to the occurrence of the injury... "A contributing factor is material if it falls outside the *de minimis* range" (see *Athey v. Leonati*, [1996] 3 S.C.R. 458, at para. 15).

He went on, at para. 99, to quote from ***Snell v. Farrell***, *supra* at 326-27, emphasizing that traditional principles of causation, which require proof of "a substantial connection between the injury and the defendant's conduct", were applicable.

[183] Earlier, however, at paras. 87-88, Major J. introduced his discussion of material contribution by suggesting that the but-for test may prove unworkable in circumstances "where multiple independent causes may bring about a single harm", and that the "added element of donor conduct" creates "unique difficulties in proving causation" in cases of blood donor screening. The appropriate question, he said at para. 88, should "not be whether the CRCS's conduct was a necessary condition for the plaintiffs' injuries using the but-for test, but whether that conduct was a sufficient condition". This suggestion that there is a test based on material contribution constituting a less onerous alternative to the but-for test where there are multiple independent causes of an indivisible harm, which echoes a similar comment that he made in ***Athey v. Leonati*** at para. 15, has been criticized by some academic commentators as a doctrinal anomaly.[1] However, it does not appear that ***Walker Estate*** was one of the atypical cases where Major J. contemplated that such a test might apply, since, following his prefatory remarks, he stated the material contribution test in orthodox terms and, in conclusion, expressly adopted the principles of proof of causation set out in ***Snell v. Farrell***.

[184] Indeed, in ***Derksen v. 539938 Ontario Ltd.***, [2001] 3 S.C.R. 398, Major J., writing for the court, referred to ***Walker Estate*** as an illustration of circumstances where a quiescent breach of duty attracted liability as a materially contributing cause though its

potential to cause harm required release by a subsequent independent act (paras. 32-34). In ***Derksen***, a worker, whose duty it was to clean up a construction site, negligently left a heavy plate on the cross-member of a tow bar attached to a truck. The truck operator, without ensuring that it was safe to do so, drove the truck away. The plate flew off the tow bar and through the window of an oncoming school bus, killing one child and seriously injuring others. The question was whether the cause of the harm was the negligence of the clean-up worker or that of the truck driver. Major J. concluded that both acts of negligence were necessary in the but-for sense. He observed, at para. 31, that the act of driving with an insecure load "was the result of the two independent and concurrent acts of negligence" and concluded:

> [32] ...In this appeal there were two acts creating two distinct duties, the duty to safely clean up the work site and the duty to ensure the automobile could be operated safely. These two separate acts of negligence, in combination, contributed to the accident.

Thus, the causation issue in ***Derksen*** was resolved by way of the orthodox material contribution analysis.

[185] The negligent clean-up and the act of driving in ***Derksen*** parallel the negligent screening and the act of donating blood in ***Walker Estate***. The reference to ***Walker Estate*** in ***Derksen*** suggests therefore that the former decision also represents a straightforward application of the material contribution test of causation as it was set out in ***Bonnington Castings*** and applied in ***Athey v. Leonati***. The parallelism extends, as well, to the instant case: the negligent screening and the act of donating blood in ***Walker Estate*** mirror, for analytical purposes, Constable Andrichuk's inaction and Mr. Kruska's violence.

[186] On a reading of the decision in ***Walker Estate*** as a whole, and in light of its subsequent treatment in ***Derksen***, I am satisfied that Major J.'s prefatory comments should not be interpreted as espousing some lower threshold of causation in every case where the element of human behaviour introduces difficulties of proof. Such an interpretation would be inconsistent with ***K.L.B***.

[187] Accordingly, the question in this case, which is to be answered by way of robust factual inference based upon all of the evidence, is simply whether Constable Andrichuk's alleged nonfeasance materially contributed to the harm in the conventional sense that it was a necessary causal antecedent and contributed beyond *de minimis*.

[188] It is necessary to consider then, as a final matter, whether the trial judge erred in his statement of the applicable legal standard or made any palpable and overriding error in his findings of fact or in his application of legal principle to the facts as he found them: ***Housen v. Nikolaisen***, [2002] 2 S.C.R. 235 at para. 36. The appellants say that the trial judge failed to appreciate the minimal burden to which Major J. referred in ***Athey v. Leonati***, at para. 15: "A contributing factor is material if it falls outside the *de minimis* range...."

[189] The trial judge's reasons indicate that he had in mind exactly this standard of proof. He began his analysis by asking rhetorically, "Did Constable Andrichuk's negligence materially contribute to the harm caused by Roland Kruska?" He referred to ***Snell v. Farrell*** and ***Athey v. Leonati***, and again asked, at para. 61: "In the circumstances I have reviewed, can it be said that the negligence of Constable Andrichuk caused or materially contributed to the Cluculz Lake shootings?"

[190] He reviewed the relevant facts, using the words "speculating" and "tenuous" in relation to the alleged causal connection. He concluded that the officer's nonfeasance was "of little if any significance" as a causal link to the harm. In the penultimate sentence of his reasons, he answered his rhetorical question, saying: "The officer's inaction did not materially increase the risk of harm to the extent that he must bear responsibility for Kruska's acts." Although the answer does not precisely reflect the wording of the question, I am satisfied that the trial judge had the correct approach clearly in view and that the shift in phraseology was semantic, not substantive. In particular, the phrase "did not materially contribute to the harm beyond *de minimis*" would have expressed the finding more specifically than the trial judge's paraphrase "to the extent that he must bear responsibility for Kruska's acts". However, it was not necessary for the trial judge to state expressly the definition of materiality.

[191] Further, I agree with Mr. Justice Hall's comments, at para. 144 above, that the trial judge's findings were soundly based in the evidence. In my view, the trial judge did not err in concluding that a causal contribution "of little if any significance" did not meet the *de minimis* material contribution test of causation.

[192] The appellants' statement of claim was vague as to what positive acts Constable Andrichuk unreasonably failed to perform that likely would have prevented Mr. Kruska's acting as he did. They alleged the particulars of the officer's failure to take reasonable care as follows:

> Failing to adequately inform himself on Kruska's background and upon his propensity for violence;
>
> Failing to conduct an adequate investigation of the background circumstances and of the complaints of violence and threats against the Plaintiff Bonnie Mooney on or about March 11, 1996;
>
> Failing to respond in a timely and adequate manner, or at all, to the information provided and to the complaints of violence and threats of Kruska against the Plaintiff Bonnie Mooney;
>
> Failing to take reasonable steps in all the circumstances to ensure the safety and security of Bonnie Mooney and members of her family after the assault [on] or about March 11, 1996.

[193] In their factum, the appellants noted Superintendent Hall's description of police policy in Prince George with respect to relationship violence - "We charge, and we charge, and we charge" – as evidence that a proper investigation would have resulted in criminal charges and, possibly, incarceration for a period of time.

[194] That Constable Andrichuk's investigation fell short of the relevant investigatory standard does not, however, provide an evidentiary basis for concluding that a properly conducted investigation would have prevented the events of 29 April 1996. As Mr. Justice Hall notes at para. 142 of his reasons, Mr. Kruska's previous exposure to the criminal process had not deterred him. Short of deportation or substantial time in custody, which were remote outcomes, it is difficult to imagine a sanction with realistic potential to forestall further violence by Mr. Kruska.

[195] On the question of causal connection, the appellants relied largely on the Attorney General's policies. These conclusory statements were offered as probative of the general propositions underlying them. However, the mere assertion of a proposition as the basis of a policy is not the same as proof of that proposition.

[196] The closest thing to empirical support for the proposition that some sort of positive action by Constable Andrichuk would have deterred Mr. Kruska was a videotape played at trial that was required viewing for R.C.M.P. officers in British Columbia. It contained the following statement made by a superintendent of the Vancouver Police Department:

> In past history, the police have often treated incidences of violence against women in relationships as a domestic problem and asked the women and the men involved to solve it themselves without police intervention. Recent history has shown that a proactive approach to arrest and prosecution helps to break the cycle of violence against women in relationships. In London, Ontario, a study there showed that this type of proactive arrest and prosecution approach helped to cut the occurrences by half.

However, the appellants did not provide the trial judge with any further information on the "recent history" or on the London study mentioned on the videotape that would have allowed him to assess its validity or its reliability or to identify particular affirmative actions that achieved the reported result. His failure to mention this evidence again in his discussion of causation after he had earlier referred to it in his duty analysis indicates that he gave it no or very little weight on the question of causation. In my view, he did not err in so treating it.

[197] For those reasons, I would dismiss the appeal. Further, I agree with Mr. Justice Hall that it is therefore not necessary to consider the cross-appeal and I would dismiss it, as well.

“The Honourable Mr. Justice Smith”

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[1] See, for example, V. Black, G. Demeyere, and D. Klimchuk, Annotation to ***Green v. Surchin*** (1999), 44 C.C.L.T. (2d) 68; G. Demeyere, ”The ‘Material Contribution’ Test: An Immaterial Contribution to Tort Law: A Comment on ***Briglio v. Faulkner***” (2000), 34 U.B.C. L. Rev. 317; V. Black, ”A Farewell to Cause: ***Canadian Red Cross Society v. Walker Estate***” (2001), 24 Advocates’ Quarterly 478; J. Stapleton, ”Cause-in-Fact and the Scope of Liability for Consequences” (2003), 119 Law Q. Rev. 388 at 404.