THE SUPREME COURT OF CANADA NARROWS THE "MATERIAL CONTRIBUTION" CAUSATION TEST

By Ryan W. Morasiewicz

BACKGROUND AND CONTEXT

Negligence of a defendant does not, of itself, make that defendant liable for a plaintiff's injury. For there to be recovery, a plaintiff must also establish that the defendant's negligence actually caused the injury. The standard "but for" test is stated as follows in a majority judgment delivered by Chief Justice McLachlin in the recent case of *Clements v. Clements*:

> The test for showing causation is the "but for" test. The plaintiff must show on a balance of probabilities that "but for" the defendant's negligent act, the injury would not have occurred. Inherent in the phrase "but for" is the requirement that the defendant's negligence was necessary to bring about the injury—in other words that the injury would not have occurred without the defendant's negligence. This is a factual inquiry. If the plaintiff does not establish this on a balance of probabilities, having regard to all the evidence, her action against the defendant fails. The "but for" causation test must be applied in a robust common sense fashion. There is no need for scientific evidence of the precise contribution the defendant's negligence made to the injury. See *Wilsher v. Essex Area Health Authority*, [1988] A.C. 1074 at p. 1090, per Lord Bridge; *Snell v. Farrell*, [1990] 2 S.C.R. 311.[1]

In rare cases, the court will depart from the standard "but for" test and instead use the "material contribution" test.

Prior to *Clements*, the leading commentary on "but for" causation was the Supreme Court of Canada's decision in *Resurface v. Hanke*, where the court said:

> First, the basic test for determining causation remains the "but for" test. This applies to multi-cause injuries. The plaintiff bears the burden of showing that "but for" the negligent act or omission of each defendant, the injury would not have occurred. Having done this, contributory negligence may be apportioned, as permitted by statute.
>
> This fundamental rule has never been displaced and remains the primary test for causation in negligence actions. As stated in *Athey v. Leonati*, at para. 14, per Major J., "[t]he general, but not conclusive, test for causation is the 'but for' test, which requires the plaintiff to show that the injury would not have occurred but for the negligence of the defendant". Similarly, as I noted in *Blackwater v. Plint* at para. 78, "[t]he rules of causation consider generally whether 'but for' the defen-

and a witness in the vehicle that the Clementses were passing (this witness just happened to be the general manager of a motorcycle shop who had 35 years of motorcycling experience).

THE DECISIONS BELOW

The trial judge did not infer that the capsize was caused by excess speed/weight in the sense that the capsize probably would not have happened but for the excess speed/weight. However, he ruled that the plaintiff, through no fault of her own, was unable to prove that the capsize would not have happened without the excess speed/weight. As a result, he found Mr. Clements's breaches of duty "materially contributed" to the injuries suffered by the plaintiff as a result of the accident. He held that causation was thereby established.

The Court of Appeal overturned the trial judgment on the basis that the factual circumstances did not justify abandoning the "but for" test. The court said:

> In summary, having regard to the over-arching policy that the material-contribution test is available only when a denial of liability under the but-for test would offend basic notions of fairness and justice, I agree with the following statement made by Professor Knutsen in setting out his conclusions (at 187):
>
> g) The "but for" test rarely fails, and currently only in situations involving circular causation and dependency causation:
>
> 1) Circular causation involves factual situations where it is impossible for the plaintiff to prove which one of two or more possible tortious causes are the cause of the plaintiff's harm;
>
> 2) Dependency causation involves factual situations where it is impossible for the plaintiff to prove if a third party would have taken some action in the face of a defendant's negligence and such third party's action would have facilitated harm to the plaintiff;
>
> h) If the "but for" test fails, the plaintiff must meet two pre-conditions to utilize the material contribution test for causation:
>
> 1) It must be impossible for the plaintiff to prove causation (either due to circular or dependency causation); and,
>
> 2) The plaintiff must be able to prove that the defendant breached the standard of care, exposed the plaintiff to an unreasonable risk of injury, and the plaintiff must have suffered that type of injury.[7]

The plaintiff sought and was granted leave to appeal to the Supreme Court of Canada.

ANALYSIS OF THE SUPREME COURT OF CANADA'S DECISION

Further Restricting the Already Restricted Material Contribution Test

The Supreme Court in *Clements* narrowed the scope of the material contribution test. In *Resurfice*, the material contribution test was worded to apply to

any injury allegedly caused by *a single defendant's* breach of duty of care if it was impossible for the plaintiff to prove her case due to factors outside of her control ("It must be impossible for the plaintiff to prove *the defendant's* negligence caused the plaintiff's injury...").

That is no longer the law. The material contribution test now applies only to *multiple defendants* who have breached duties of care to the plaintiff but blame the others ("finger point") for a plaintiff's injuries which one or other of them must have caused. This is highlighted at paras. 39–40:

> What then are the cases referring to when they say that it must be "impossible" to prove "but for" causation as a precondition to a material contribution to risk approach? The answer emerges from the facts of the cases that have adopted such an approach. Typically, there are a number of tortfeasors. All are at fault, and one or more has in fact caused the plaintiff's injury. The plaintiff would not have been injured "but for" their negligence, viewed globally. However, because each can point the finger at the other, it is impossible for the plaintiff to show on a balance of probabilities that any one of them in fact caused her injury. This is the impossibility of which *Cook* and the multiple employer mesothelioma cases speak...
>
> The cases that have dispensed with the usual requirement of "but for" causation in favour of a less onerous material contribution to risk approach are generally cases where, "but for" the negligent act of one or more of the defendants, the plaintiff would not have been injured. This excludes recovery where the injury "may very well be due to factors unconnected to the defendant and not the fault of anyone": *Snell, per* Sopinka J., at p. 327. The plaintiff effectively has established that the "but for" test, viewed globally, has been met. It is only when it is applied separately to each defendant that the "but for" test breaks down because it cannot be shown which of several negligent defendants actually launched the event that led to the injury. The plaintiff thus has shown negligence and a relationship of duty owed by each defendant, but faces failure on the "but for" test because it is "impossible", in the sense just discussed, to show which act or acts were injurious. In such cases, each defendant who has contributed to the risk of the injury that occurred can be faulted.

The Supreme Court of Canada specifically stated it would not apply the material contribution test to a single tortfeasor as the U.K. Supreme Court had done in *Sienkiewicz v. Greif (U.K.) Ltd.*[8]

The "but for" test is the usual test applied to multiple defendants. The material contribution test is applicable only in rare cases where causation cannot be proven against multiple negligent defendants only because they point the finger at their co-defendants. This is made plain at para. 43:

> It is important to reaffirm that in the usual case of multiple agents or actors, the traditional "but for" test still applies. The question, as discussed earlier, is whether the plaintiff has shown that one or more of the defendants' negligence was a necessary cause of the injury. Degrees of fault are reflected in calculations made under contributory negligence legislation. By contrast, the material contribution to risk approach applies where "but for" causation cannot be proven

against any of multiple defendants, all negligent in a manner that might have in fact caused the plaintiff's injury, because each can use a "point the finger" strategy to preclude a finding of causation on a balance of probabilities.

At para. 46, the Supreme Court of Canada stated the new form of the material contribution test as follows:

> Exceptionally, a plaintiff may succeed by showing that the defendant's conduct materially contributed to risk of the plaintiff's injury, where (a) the plaintiff has established that her loss would not have occurred "but for" the negligence of two or more tortfeasors, each possibly in fact responsible for the loss; and (b) the plaintiff, through no fault of her own, is unable to show that any one of the possible tortfeasors in fact was the necessary or "but for" cause of her injury, because each can point to one another as the possible "but for" cause of the injury, defeating a finding of causation on a balance of probabilities against anyone.

Clements involved only one defendant. Because of this, the material contribution test could not apply. The court explained this at para. 50:

> The trial judge's second error was to apply a material contribution to risk test. The special conditions that permit resort to a material contribution approach were not present in this case. This is not a case where we know that the loss would not have occurred "but for" the negligence of two or more possible tortfeasors, but the plaintiff cannot establish on a balance of probabilities which negligent actor or actors caused the injury. This is a simple single-defendant case: the only issue was whether "but for" the defendant's negligent conduct, the injury would have been sustained.

The SCC directed that, in future, the material contribution test should not be used to decide causation when only a single defendant's negligence is in issue. The court made it plain that this test should only be used in MVA cases where two or more defendants were shown to have breached their duties to the plaintiff, one of them caused that plaintiff's injury, and it is impossible for the court to decide which negligent defendant caused the injury.

This further restricts what was already a very restricted material contribution test. It is worth noting that the Supreme Court of Canada has never applied the material contribution to risk test[9] and, at the time the SCC appeal was heard, 67 appellate level cases across Canada since *Resurfice* mentioned *Resurfice*. Not a single one of these cases imposed or upheld liability based on material contribution.

Scientific Precision

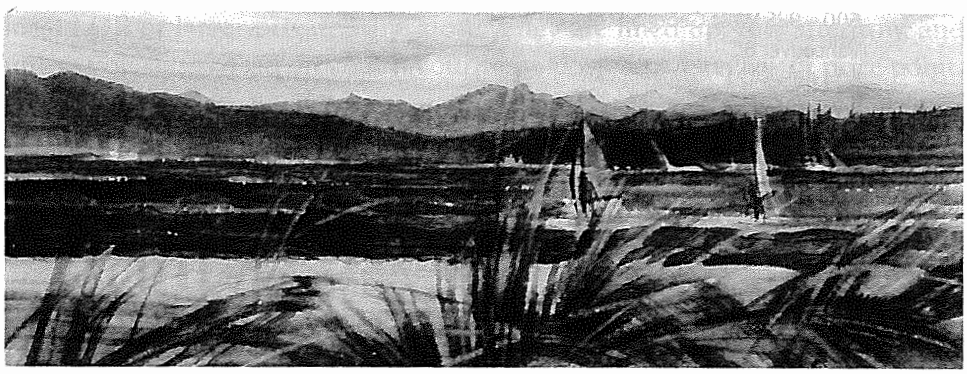
The majority of the court found the trial judge made a second error by insisting on scientific precision in the evidence as a condition for finding "but for" causation: para. 49. The majority found it was uncertain what the trial judge would have decided had he applied the correct test. As a result, a new trial was ordered.

The trial judge used language reflecting confusion about the law. The Court of Appeal was only half-heartedly asked by counsel for the plaintiff to find that the trial judge should have decided the case on a "but for" basis or that the trial judge made an error of law when applying the "but for" test. In these circumstances, the Court of Appeal did not analyze that issue and treated the trial judge's statement that the plaintiff had not proved her case on a "but for" basis as a conclusion of fact.

The minority in the SCC were of the view the trial judge was right in finding that the plaintiff's case had not been proved on a "but for" basis, referring to the paucity of evidence presented on the issue of speed and weight at para. 57:

> The fact remains, however, that no evidence was adduced regarding the exact (or even approximate) speed and weight at which the respondent would have been able to regain control of his motorcycle. The state of the evidence therefore leaves precious little room for speculating about robust common sense inferences as to the cause of the accident.

The majority, however, concluded that the confusion in the trial judge's reasoning about causation resulted in the parties not having the case tried on correct legal principles and so remitted the matter for a new trial.

ENDNOTES

1. *Clements v Clements*, 2012 SCC 32 at paras 8–9.
2. 2007 SCC 7 at paras 21–23.
3. *Ibid* at paras 24–25.
4. *Clements v Clements*, 2009 BCSC 112 at paras 69–71.
5. *Ibid* at para 48.
6. The trial judge found that Mr. Clements had been travelling at 120 km/h (the posted speed limit was 100 km/h, and the trial judge found that the conditions dictated he should have been going, at most, 90 km/h) and that the motorcycle was overloaded by about 10 per cent.
7. *Clements v Clements*, 2010 BCCA 581 at para 63.
8. [2011] UKSC 10: see para 42 of *Clements*.
9. *Cook* was analyzed on a reverse onus basis. *Snell, Athey, Walker Estate* and *Resurfice* were all resolved on a robust and common sense application of the "but for" test of causation. See *Clements v Clements, supra* note 1 at para 28.