The Last Word on Causation From

the Supreme Court of Canada (Maybe?)

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Introduction

The Supreme Court of Canada handed down its decision in the *Clements*[1] case last June. This 63 paragraph decision is the latest in a line of cases dating back to 1996 which directly address the question of what test is to be applied in Canada to determine factual causation. The following appear to be the results of this decision:

(a) The primacy of the "but for" test in Canada has been reasserted by the Supreme Court:

(b) The material "contribution test" has been morphed into the "material increase in risk" test;

(c) The "material contribution" test referred to in the English cases was not discussed and it is unclear what its status in Canada is;

(d) The requirement for it to be "impossible" to prove causation on a "but for" analysis and thus be able to resort to the "material increase in risk" test does not mean that it is logically, factually or scientifically impossible but rather deals with situations which will now likely be referred to as "global but for" cases;

[1] *Clements v. Clements*, 2012 SCC 32

(e) A robust, pragmatic and common sense approach needs to be taken to the question of causation. Scientific proof of causation is not required.

(f) It is possible that the causation test may need to be relaxed in other cases such as toxic tort class action litigation.

I do not plan to review the previous law save and except to discuss the *Clements* decision. However, if you wish to fully understand the issues which were before the Supreme Court you might find it worthwhile to review the paper that was presented last year which is appended to this paper. You may also find it useful to review the paper that we presented in 2007 which explains the genesis of the 3 potential causation tests in some detail.

The Factual Background

The factual background to the *Clements* case is relatively straightforward. Mrs. Clements was a passenger on her husband's motorcycle when her husband lost control of the motorcycle in wet weather resulting in severe injuries to Mrs. Clements. At the time of the accident, her husband was traveling 20 km/h in excess of the speed limit on a motorcycle which was 100 pounds overloaded. The evidence was that when Mr. Clements accelerated to 120 km/h to pass another car, a nail which had been embedded in the rear tire fell out causing the rear tire to deflate. Following this the motorcycle began to wobble and Mr. Clements lost control and crashed the motorcycle. The plaintiff's theory was that the excessive speed and overloading of the motorcycle caused the accident. The plaintiff called no expert evidence to support this theory. The defense expert gave evidence that neither speed nor the overloading of the motorcycle caused the accident. This evidence was rejected by the trial judge due to the fact that the assumptions made by the defense expert with respect to speed and the overloading of the motorcycle were not consistent with the trial judge’s findings of fact. He found that it was impossible for accident reconstruction evidence to determine what combination of lower speed

and weight would have allowed Mr. Clements to recover from the wobble. The trial judge then applied the "material contribution" test[2] and held the husband liable for his wife's injuries.

The British Columbia Court of Appeal overturned the trial judge and in doing so rejected the use of the “material contribution" test and opined that it was inappropriate to use this test except in two special sets of circumstances.

The Supreme Court's Analysis

The Supreme Court of Canada, in a 7 to 2 split decision, allowed the appeal and ordered a new trial. However, the majority concluded, as did the British Columbia Court of Appeal, that the trial judge should not have used the "material contribution" test. The two dissenting judges concurred with the Chief Justice's analysis of the law of factual causation but concluded that there was no reason to send the case back to be retried. The minority would have simply dismissed the appeal.

The majority begins by discussing the basic rule of factual causation which is embodied in the "but for" test. The Court points out that the law of tort only obliges the defendant to compensate the plaintiff if the defendant has breached a duty owed to the plaintiff and caused injury to that plaintiff. The "but for" test requires 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. The Court then points out that if the plaintiff was unable to establish "but for" causation on the balance of probabilities the action against the defendant fails.

The Chief Justice then indicates that this test for causation 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. The Chief Justice then makes the following statement:

> A common sense inference of "but for" causation from proof of negligence usually flows without difficulty. Evidence connecting the breach of duty to the injury suffered may permit the judge, depending on the circumstances, to infer that the defendant's negligence probably caused the loss.

[2] As we will see this test is now to be called the material increase in risk test.

I will comment on this passage in some detail later.

The Chief Justice then notes that in some cases the plaintiff's injury results from a number of different negligent acts committed by different actors, each of which is a necessary or a "but for" cause of the injury. In such situations, each defendant is liable to the plaintiff and the judge or jury must apportion liability according to the degrees of fault.

In the next section of the judgment the Court notes that there are situations where it is clear that the actions of several defendants caused the plaintiff's injury on a "but for" basis, but it is impossible to determine which of those multiple actors' actions, in fact, caused the injury. In such circumstances, the goals of tort law and the underlying theory of corrective justice require that the defendant not be permitted to escape liability by pointing the finger at another wrongdoer. The courts have therefore held the defendant liable on the basis that he materially contributed to the risk of the injury.

The Court stated that some commentators spoke of "material contribution to the injury" instead of "material contribution to risk" and concludes that the latter is the more accurate formulation. The Court continued and stated that imposing liability on a "material contribution to risk" basis is not the imposition of liability on the basis that factual causation has been proven but is based on a policy-driven rule of law designed to permit plaintiffs to recover in such cases despite their failure to prove causation. It also notes that the elimination of proof of causation as an element of negligence is a "radical step that goes against the fundamental principle… [that a] defendant in an action for negligence is not a wrongdoer at large; he is a wrongdoer only in respect of the damage which he actually causes to the plaintiff". The Court finds that the imposition of liability on such a basis is necessarily rare, and only justified where it is required by fairness and conforms to the principles that ground recovery in tort.

In the next section of the decision the Chief Justice discusses the Canadian cases. She notes that in *Cook v. Lewis*[3] the court did not refer to the "material contribution to risk" test but rather spoke of reversing the onus in the circumstances.

[3] [1951] S.C.R. 830. The famous case where two defendants negligently shot in the direction of the plaintiff but only one of them struck him but it was unclear which one.

The Court then considered its earlier decision in *Snell* and again commented on the robust and common sense application of the "but for" test. The Chief Justice also quoted Sopinka J.s comments in that case that if His Honour had been convinced that the defendants had a substantial connection to the injury but were escaping liability because the plaintiff could not prove causation under currently applied principles he would have had no hesitation to adopt one of the alternatives. The Chief Justice also noted that the requirement of proof on a "but for" basis should not normally be relaxed for the result would be to permit plaintiffs to recover in the absence of evidence connecting the defendant's fault to the plaintiff's injury.

The Chief Justice then turned to the Court's 1996 decision in *Athey*[4]. The Chief Justice notes that while the "material contribution" test was referred to by the Court, it should not be forgotten that the case was decided by applying a robust, common sense application of the "but for" test.

The Chief Justice then referred to the Supreme Court of Canada's decision in *Walker Estate*[5]. In this case, the Court found the supplier of HIV tainted blood liable for failing to screen donors with high risk of HIV infection by warning them not to give blood. The supplier contended that causation could not be proven on a "but for" basis because the person screened may not have known of his or her condition or may not have wished to disclose and as a result may have donated blood in any event. This defence was rejected by the Supreme Court. Again, the majority decision alluded to the fact that in an appropriate case the classic principles which are applied to the factual causation test might need to be modified to ensure fairness.

That takes us to the Court's discussion of its decision in *Resurface.*[6] The Court noted that it had endorsed the trial judge's conclusion that the plaintiff had failed to establish causation on the "but for" test. It further held that the “material contribution” approach could be used instead of the “but for” test in "special circumstances". It noted that this may occur where it is "impossible" for the plaintiff to prove causation using the "but for" test and where it is clear that the defendant breached his duty of care in a way to expose the plaintiff to an unreasonable risk of injury.

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[4] [1996] 3 S.C.R. 458

[5] 2001, SCC 23, [2001] 1 S.C.R. 647

[6] 2007 SCC 7, [2007] 1 S.C.R. 333

Finally, it noted that the basis for such an exception would be that requiring "but for" causation "would offend the basic notions of fairness and justice".

The majority summarized this section of its reasons by noting that the Supreme Court of Canada jurisprudence has accepted the possibility of utilizing a "material contribution to risk" test for causation in "special circumstances". However, the Court has never, in fact, applied a material contribution to risk test in any of its decided cases.

In the next section of the reasons the Chief Justice discusses the United Kingdom cases. I will not reiterate that discussion here. However, I would commend that discussion to you as it provides the backdrop for the Supreme Court's approach to the "material increase in risk" test.

In the next section of the decision the Chief Justice poses the question "When is a material contribution to risk approach available?" It was noted that in the *Resurface* case the Court indicated that the "but for" causation test could be replaced where it is "impossible" for the plaintiff to prove causation utilizing the "but for" test. It rejected the suggestion that "impossible" referred to logical or conceptual impossibility. It also rejected the suggestion that "impossible" referred to factual or scientific impossibility. If factual or scientific impossibility was sufficient, then, in any difficult case, the plaintiff would be able to claim impossibility of proof of causation. This would fundamentally change the law of negligence and sever it from its anchor in corrective justice that makes the defendant liable for the consequences, but only the consequences, of his negligent act.

It then concluded that "impossible" as used in the *Resurface* case could be judged from cases already decided. It noted that such cases typically included a number of tortfeasors whose combined or global negligence caused the plaintiff's injury in a "but for" sense. In other words, we are looking at a situation where the defendants have collectively committed independent acts of negligence and the combined effects of their acts have caused the plaintiff's injury on a "but for" basis. However, the evidence does not point to any single act of negligence that satisfies the "but for" test. The Court concluded that this was the impossibility of which *Cook* and the United Kingdom multiple employer toxic tort cases speak to.

The Court, after finally explaining what the "material contribution to risk" test is, then goes on to discuss the rationale for adopting this approach to causation. The essential requirements for applying this "material contribution to risk" or "global but for" test are:

1. That the collective negligence of the defendants can be said to have caused the plaintiff's injury on a "but for" basis;
2. It is impossible to demonstrate that the negligence of any one of these defendants caused the plaintiff's injuries on a "but for" basis;
3. That the reason it is impossible to do so is because each can use a "point the finger" strategy to preclude a finding of causation on a balance of probabilities.

The Court left open the possibility that situations would arise in the future where a different approach to causation might be necessary. It was suggested that mass toxic tort litigation involving multiple plaintiffs might be such a situation.

The Court then went on to discuss how the British Columbia Court of Appeal handled this issue and concluded that the adoption of the so-called "circular causation" and "dependency causation" analysis that was discussed by that court may complicate the matter rather than simplify it. It concluded that in broad terms the Court of Appeal had correctly identified the circumstances where a “material contribution to risk” approach may "exceptionally be imposed".

Finally, before dealing with the merits of the specific case under appeal, it outlined the following conclusions:

1. The "but for" test is the general rule for factual causation in Canada but trial judges should take a robust and pragmatic approach to determining if a plaintiff has established that the defendant's negligence caused her loss. It noted that scientific proof of causation was not required.
2. Exceptionally a plaintiff may succeed by showing that the defendant's conduct materially contributed to the risk of the plaintiff's injury where (a) the plaintiff has established that a 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.

The Court then applied this analysis to the facts of the instant case. It concluded that the Court of Appeal had been correct in overturning the lower court decision because the trial judge should have applied the "but for" rather than the "material contribution to risk" test. It also noted that the trial judge had incorrectly insisted on scientific precision in the evidence as a condition of finding "but for" causation. Because of this combination of errors it was impossible to know how the court would have decided the case if it had properly directed itself on these two issues. Accordingly, a new trial was ordered.

The dissent concurred with the Chief Justice's reasons with respect to the law on factual causation. However, the two dissenting judges would simply have dismissed the appeal. They were of the view that given that there was no evidence that speed or the overloading of the motorcycle caused the accident, it would be exceedingly difficult to draw a common sense inference that those breaches by the defendant caused the accident. It noted that such inferences cannot be pulled out of the air at the whim of the trier fact. They must have a reliable factual foundation. The dissenting judges also felt that it was not sound judicial policy to order a new trial and that the court should be mindful of the need for finality and efficiency in the civil litigation process.

Comments on the Decision

There can be little doubt that this decision has gone some distance in reinforcing the primacy of the "but for" test for factual causation in Canada. In addition, it has provided considerable assistance in understanding what the status and meaning of the "material increase in risk" test is in this country.

In doing so, it has finally given some meaning to the word "impossible" used by the Supreme Court of Canada in the *Resurface* decision. The court has left open the possibility that the classic "but for" and the newly defined "material increase in risk" tests may need to be modified in special circumstances in the future. Nevertheless, for all intents and purposes any fear that was

harboured by the defence bar that the "material increase in risk" test was going to seriously undermine the "but for" test has been put to rest.

My most serious concerns with respect to the decision arise from the multiple comments about using a robust, pragmatic and common sense approach to the issue of causation and the Courts' repeated admonishment that causation need not be proved with scientific precision. This could be taken as an open invitation by the Supreme Court of Canada for trial judges to decide complex scientific cases by applying their own common sense and pragmatism. This could easily lead to situations where liability is found against the defendant notwithstanding that no scientific evidence exists to demonstrate that the alleged negligence of the defendant could have caused the plaintiff's injury. This could be particularly problematic in medical malpractice cases. This could lead to situations where the courts will find causation where the science is simply not advanced enough, at this point in time, to do so. In my opinion, the court should not be ahead of the scientists on questions of causation. I have no difficulty with using a pragmatic, common sense and robust approach to causation where the experts are being difficult and such an inference is not a real stretch. This is precisely what the court did in the *Ball v. Imperial Oil*[7] case. This decision is discussed in more detail in the attached paper delivered last year.

If you review our earlier papers, you will note that we distinguished between the "but for", "material contribution" and "material increase in risk" tests. In those papers, we suggest that the Supreme Court of Canada had conflated the last two tests. It now appears, however, that the Supreme Court of Canada has completely skipped over the second test and has only discussed the third test. The Court has suggested that the cases have referred to this (3rd) test as both a "material contribution" and a "material increase in risk". It prefers the latter characterization. However, there is a "material contribution" test recognized in the United Kingdom cases and the status of that test has been left completely up in the air in Canada. It is unclear whether this was intentional or not.

Before turning to the case study, I wanted to spend a couple of minutes discussing the implications of the new "material increase in risk" test. At first blush, this test appears to be the

[7] [2009] A.W.L.D. 1336

answer to the prayers of all plaintiffs' medical malpractice lawyers. However, I suspect that the test may only be useful in very limited circumstances. Resort to it in inappropriate circumstances could well be a trap for plaintiffs' counsel.

If you are facing a situation where multiple tortfeasors have contributed to a plaintiff's loss, but you are unable to demonstrate that any single tortfeasor's negligence caused the plaintiff's injury on a "but for" basis, then you may find the new "global but for" approach to causation enticing.

Let us assume, that you are able to establish that the plaintiff's injury was caused by one of three defendants but you are unable to establish that any of their actions would satisfy the "but for" causation test. You now will be very tempted to resort to the new "global but for" test. If you do, you must establish that each of these three defendants owed a duty of care to the plaintiff and breached the standard of care (that is that each defendant acted negligently). If you fail to prove that all three defendants were "negligent", then it logically follows that you have failed to prove causation on a "global but for" basis. That is, if you were unable to prove that any one of these three defendants actions caused the plaintiff's injury on a "but for" basis but could establish that their collective actions satisfied a "but for" causation test, then your failure to prove negligence against one of these three defendants logically robs you of the ability to demonstrate "global but for" causation.

Therefore, adopting the "global but for" approach to causation has tripled your risks at trial. If you could demonstrate "but for" causation against each of these defendants, then you would only need to succeed in establishing negligence against one of them. However, with the "global but for" approach, your failure to establish negligent conduct against any of the three defendants is fatal to your claim.

Additionally, if you adopt [and are seen by the defense to adopt] a new "global but for" approach to causation, the defense may be encouraged to identify other potential causes for the plaintiff's injury including non-tortious causes. The defence may even raise other potential tortious causes which it is convinced they can be defended successfully on the question of a breach of the standard of care. If the defense is able to convince the trial judge that one of these other potential

causes for the plaintiff's injury has merit, then you may be at risk of being unable to demonstrate "global but for" causation.

If you do adopt this approach in a case where you have a reasonable chance of demonstrating causation on a "but for" basis against a single defendant, then arguing the "global but for" approach may tend to undermine your classic "but for" argument.

For those defendants who are found liable under this newly defined doctrine it will be a bitter pill to swallow. They will always suspect that they are being held liable to pay damages for someone else's negligence. Collectively such a group of defendants may be proven to have caused the plaintiff's injuries on a "but for" analysis. However, not one of the individual will not have been found to have caused such injuries. There may be situations where it would be in the interests of one defendant, who has a weak negligence defence, to attempt to demonstrate that "but for" causation cannot be proven against any of the defendants. This way the defendant with the weakest liability defence may be able to spread the pain.

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