CASE COMMENT

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On June 29, 2012 the Supreme Court of Canada released *Clements v. Clements*, [2012] 7 W.W.R. 217, 2012 SCC 32, its latest in a series of judgements on causation and, in particular, the material contribution to risk test. On a pragmatic basis, the bottom line of this decision is that the material contribution test will now be limited in its application to circumstances involving two or more defendants. McLachlin J.A., writing for the majority, summarized the *ratio* of the case in her concluding comments:

> The foregoing discussion leads me to the following conclusions as to the present state of the law in Canada:
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> (1) As a general rule, a plaintiff cannot succeed unless she shows as a matter of fact that she would never have suffered the loss "but for" the negligent act or acts of the defendant. A trial judge is to take a robust and pragmatic approach to determining if a plaintiff has established that the defendant's negligence caused her loss. Scientific proof of causation is not required.
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> (2) Exceptionally, a plaintiff may succeed showing that the defendant's conduct materially contributed to risk and 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 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 the finding of causation on a balance of probabilities against anyone.

The judgement is also remarkable in that it highlights that the "but for" test of causation is a fact finding exercise, whereas the material contribution to risk test is based on policy. The policy reasons that the court will apply the material contribution to risk test include compensation for injury, fairness, deterrence, and corrective justice. This was articulated by McLachlin J. as follows at paras. 40 - 41:

> 40 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.
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> 41 In these circumstances, permitting the plaintiff to succeed on a material contribution to risk basis meets the underlying goals of the law of negligence. Compensation for injury is achieved. Fairness is satisfied; the plaintiff has suffered a loss due to negligence, so it is fair that she turns to tort law for compensation. Further, each defendant failed to act with the care necessary to avoid potentially causing the plaintiff's loss, and each may well have in fact caused the plaintiff's loss. Deterrence is also furthered; potential tortfeasors will know they cannot escape liability by pointing the finger at others. When these goals are furthered in a manner consistent with corrective justice; the deficit in the relationship between the plaintiff and the defendants viewed as a group that would exist if the plaintiff were denied recovery is corrected. The plaintiff has shown that she is in a correlative relationship of doer and sufferer of the same harm with the group of defendants as a whole, if not necessarily with each individual defendant.

In *Clements*, Mr. and Mrs. Clements were motor bike enthusiasts and were on route from their home in in Prince George, British Columbia to visit their daughter in Kananaskis, Alberta. The weather was wet. Mr. Clements was driving the motorcycle and Mrs. Clements was riding behind on the passenger seat. The motorcycle was overloaded by 100 pounds. Unknown to Mr. Clements, a nail punctured the bike's rear tire. He accelerated to pass a car to a speed of at least 120km/hr and as he accelerated, the nail fell out, the rear tire deflated, and the bike began to wobble. The motorcycle crashed, throwing Mrs. Clements off and she sustained a severe traumatic brain injury. She sued Mr. Clements, claiming that her injury was caused by his negligence in the operation of the bike in overloading the bike and driving too fast.

In defence, Mr. Clements claimed that his actions were not the cause of the accident, but rather the probable cause of the accident was the tire puncture and deflation of the tire, leading to the crash.

The trial judge found that Mrs. Clements was unable to adduce sufficient scientific reconstruction evidence as to the cause of the crash, and he therefor applied the material contribution test, and found Mr. Clements liable on this basis. The British Columbia Court of Appeal set aside the judgement against Mr. Clements on the basis that the "but for" causation had not been proved and the material contribution test did not apply as there were not multiple defendant tortfeasors.

McLachlan J. commenced her judgement by reviewing the "but for" test at paras. 6 - 13 as follows:

> 6 On its own, proof by an injured plaintiff that a defendant was negligent does not make that defendant liable for the loss. The plaintiff must also establish that the defendant's negligence (breach of the standard of care) caused the injury. That link is causation.
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> 7 Recovery in negligence presupposes a relationship between the plaintiff and defendant based on the existence of a duty of care – a defendant who is at fault and a plaintiff who has been injured by that fault. If the defendant breaches this duty and thereby causes injury to the plaintiff, the law "corrects" the deficiency in the relationship by requiring the defendant to compensate the plaintiff for the injury suffered. This basis for recovery, sometimes referred to as "corrective justice", assigns liability when the plaintiff and defendant are linked in a correlative relationship of doer and sufferer of the same harm: E.J. Weinrib, *The Idea of Private Law* (1995), at p. 156.
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> 8 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.
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> 9 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.
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> 10 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. See *Snell* and *Athey v. Leonati*, [1996] 3 S.C.R. 458. See also the discussion on this issue by the Australian courts: *Betts v. Whittingslowe*, [1945] HCA 31, 71 C.L.R. 637, at p. 649; *Bennett v. Minister of Community Welfare*, [1992] HCA 27, 176 C.L.R. 408, at pp. 415-16; *Flounders v Millar*, [2007] NSWCA 238, 49 M.V.R. 53; *Roads and Traffic Authority v. Royal*, [2008] HCA 19, 245 A.L.R. 653, at paras. 137-44.
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> 11 Where "but for" causation is established by inference only, it is open to the defendant to argue or call evidence that the accident would have happened without the defendant's negligence, i.e. that the negligence was not a necessary cause of the injury, which was, in any event, inevitable. As Sopinka J. put it in *Snell*, at p. 330:

> 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 into account of Lord Mansfield's famous precept [that "all evidence is to be weighed according to the proof of which it was in the power of one side to have produced, and in the power of the other to have contradicted" (*Blatch v. Archer* (1774), 1 Cowp. 63, 98 E.R. 969, at p. 970]. 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). [Emphasis added.]

> 12 In some cases, an injury – the loss for which the plaintiff claims compensation – may flow from a number of different negligent acts committed by different actors, each of which is a necessary or "but for" cause of the injury. In such cases, the defendants are said to be jointly and severally liable. The judge or jury then apportions liability according to the degree of fault of each defendant pursuant to the contributory negligence legislation.

> 13 To recap, the basic rule of recovery for negligence is that the plaintiff must establish on a balance of probabilities that the defendant caused the plaintiff's injury on the "but for" test. This is a factual determination. Exceptionally, however, courts have accepted that a plaintiff may be able to recover on the basis of "material contribution to risk of injury", without showing factual "but for" causation. As will be discussed in more detail below, this can occur in cases where it is impossible to determine which of a number of negligent acts by multiple actors in fact caused the injury, but it is established that one or more of them did in fact cause it. In these cases, 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. Courts have therefore held the defendant liable on the basis that he materially contributed to the risk of injury.

McLachlan J. then turned to a discussion of the material contribution to risk test, and reviewed the leading proceeding authorities on this matter. She cautioned at para. 16:

> Elimination of proof of the 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 (C.A.), at pp. 1094-95: "… [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…

> For that reason, recourse to a material contribution to risk approach is necessarily rare, and justified only where it is required by fairness and conforms to the principles that ground recovery in tort.

McLachlan J. then found that the trial judge had made two errors of law; he had held that scientific precision was necessary to apply the “but for” test and he had applied the material contribution to risk test, as there was only one defendant in the case. She therefore sent the matter back for a new trial.

The decision of the two judge minority is of interest in that it amplifies the comments of McLachlan J.A. as to how the “but for” test and the material contribution to risk test are “two different beasts”.

LeBel J., concurred with by Rothstein J.J., stated at para. 60: “For the reasons given by the Chief Justice, the application of the material contribution test by the trial judge was inappropriate. Further, as the Chief Justice states, at para. 14, the “but for” and material contribution tests are “two different beasts”. The material contribution test does not require a factual inquiry into what likely happened, but imposes liability as a matter of policy…”

Thus the recent SCC decision of *Clements* is helpful in that it has clarified in what circumstances a material contribution to risk test will be applied, i.e. only with two or more defendants, and has further put flesh on this “different beast”.

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