



SUPREME COURT OF CANADA

CITATION: Clements v. Clements, 2012 SCC 32

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BETWEEN:

Joan Clements, by her Litigation Guardian, Donna Jardine

Appellant

and

Joseph Clements

Respondent

- and -

Attorney General of British Columbia

Intervener

CORAM: McLachlin C.J. and LeBel, Deschamps, Fish, Abella, Rothstein, Cromwell, Moldaver and Karakatsanis JJ.

REASONS FOR JUDGMENT:
(paras. 1 to 54)

McLachlin C.J. (Deschamps, Fish, Abella, Cromwell, Moldaver and Karakatsanis JJ. concurring)

DISSENTING REASONS:
(paras. 55 to 63)

LeBel J. (Rothstein J. concurring)

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CLEMENTS v. CLEMENTS

Joan Clements, by her Litigation Guardian, Donna Jardine

Appellant

v.

Joseph Clements

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Attorney General of British Columbia

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Indexed as: Clements v. Clements

2012 SCC 32

File No.: 34100.

2012: February 17; 2012: June 29.

Present: McLachlin C.J. and LeBel, Deschamps, Fish, Abella, Rothstein, Cromwell,
Moldaver and Karakatsanis JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Torts — Negligence — Causation — Motor vehicle accident — Motorcycle passenger injured in crash — Passenger alleging driver’s negligence in operation of motorcycle caused injury — Whether trial judge erred in insisting on scientific reconstruction evidence to prove causation, and in applying “material contribution” test rather than “but for” test to determine causation.

C was driving his motorcycle in wet weather, with his wife riding behind on the passenger seat. The bike was about 100 pounds overloaded. Unbeknownst to C, a nail had punctured the rear tire. Though in a 100 km/h zone, C accelerated to at least 120 km/h in order to pass a car; the nail fell out, the rear tire deflated, and the bike began to wobble. C was unable to bring the bike under control and it crashed; his wife suffered a severe traumatic brain injury. She then sued C, alleging that her injury was caused by his negligence in driving an overloaded bike too fast. The trial judge found that C’s negligence in fact contributed to the injury. However, he also found that C’s wife, through no fault of her own, was unable to prove “but for” causation, due to the limitations of scientific reconstruction evidence. The trial judge applied a material contribution test instead and found C liable on this basis. The Court of Appeal set aside the judgment and dismissed the action, on the basis that “but for” causation had not been proved and the material contribution test did not apply.

Held (LeBel and Rothstein JJ. dissenting): The appeal should be allowed, and a new trial ordered.

Per McLachlin C.J. and Deschamps, Fish, Abella, Cromwell, Moldaver and Karakatsanis JJ.: On its own, proof by an injured plaintiff that a defendant was negligent does not make that defendant liable for the loss. As a general rule, a plaintiff cannot succeed unless she shows as a matter of fact that she would not have suffered the loss “but for” the negligent act or acts of the defendant. Exceptionally, however, a plaintiff may be able to recover on the basis of material contribution to risk of injury, without showing factual “but for” causation. 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 in negligence is a wrongdoer only in respect of the damage which he actually causes to the plaintiff. Therefore, recourse to a material contribution to risk approach is justified only where it is required by fairness and conforms to the principles that ground recovery in tort. 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 with a number of tortfeasors where, “but for” the negligent act of one or more of the defendants, the plaintiff would not have been injured. 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. In these circumstances, permitting the plaintiff to succeed on a material contribution to risk basis meets the underlying goals of the law of negligence. 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 this case, the trial judge committed two errors. First, he insisted on scientific reconstruction evidence as a necessary condition of finding “but for” causation. Scientific precision is not necessary to a conclusion that “but for” causation is established on a balance of probabilities. Second, the trial judge erred in applying 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 a simple single-defendant case: the only issue was whether “but for” the defendant’s negligent conduct, the injury would have been sustained. Although the trial judge used language tantamount to finding actual “but for” causation, we cannot be certain what he would have concluded had he not made these two errors. The appropriate remedy in these circumstances is an order for a new trial.

Per LeBel and Rothstein JJ. (dissenting): There is no basis in fact and law for ordering a new trial. The key finding of fact made by the trial judge was that the plaintiff had not proven causation on the basis of the “but for” test. The trial judge’s finding that the material contribution test was satisfied cannot be reinterpreted as a finding that “but for” causation was established.

On policy grounds, this Court and courts of appeal should be mindful of the need for finality and efficiency in the civil litigation process. In this appeal, there is no basis in the trial judge’s judgment for inferring that the overloading of the motorcycle and excessive speed could have been the “cause” of the accident as that

term is understood in the context of the “but for” test. Nor is this a case in which it would be appropriate to send the matter back for a new trial.

Cases Cited

By McLachlin C.J.

Distinguished: *Sienkiewicz v. Greif (UK) Ltd.*, [2011] UKSC 10, [2011] 2 All E.R. 857; **referred to:** *Wilsher v. Essex Area Health Authority*, [1988] A.C. 1074; *Snell v. Farrell*, [1990] 2 S.C.R. 311; *Athey v. Leonati*, [1996] 3 S.C.R. 458; *Betts v. Whittingslowe*, [1945] HCA 31, 71 C.L.R. 637; *Bennett v. Minister of Community Welfare*, [1992] HCA 27, 176 C.L.R. 408; *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; *MacDonald v. Goertz*, 2009 BCCA 358, 275 B.C.A.C. 68; *Resurface Corp. v. Hanke*, 2007 SCC 7, [2007] 1 S.C.R. 333; *Browning v. War Office*, [1962] 3 All E.R. 1089; *Mooney v. British Columbia*, 2004 BCCA 402, 202 B.C.A.C. 74; *Cook v. Lewis*, [1951] S.C.R. 830; *Walker Estate v. York Finch General Hospital*, 2001 SCC 23, [2001] 1 S.C.R. 647; *Fairchild v. Glenhaven Funeral Services Ltd.*, [2002] UKHL 22, [2002] 3 All E.R. 305; *Barker v. Corus UK Ltd.*, [2006] UKHL 20, [2006] 2 A.C. 572.

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Weinrib, Ernest J. *The Idea of Private Law*. Cambridge, Mass.: Harvard University Press, 1995.

APPEAL from a judgment of the British Columbia Court of Appeal (Frankel, Tysoe and Garson JJ.A.), 2010 BCCA 581, 12 B.C.L.R. (5th) 310, 79 C.C.L.T. (3d) 6, 4 M.V.R. (6th) 1, 327 D.L.R. (4th) 1, 298 B.C.A.C. 56, 505 W.A.C. 56, [2010] B.C.J. No. 2532 (QL), 2010 CarswellBC 3477, reversing a decision of Grauer J., 2009 BCSC 112 (CanLII), [2009] B.C.J. No. 166 (QL), 2009 CarswellBC 202. Appeal allowed, LeBel and Rothstein JJ. dissenting.

Dick Byl and Kimi Aimez, for the appellant.

Robert A. Easton, Ryan W. Morasiewicz and Greg A. Cavouras, for the respondent.

Jonathan Eades, for the intervener.

The judgment of McLachlin C.J. and Deschamps, Fish, Abella, Cromwell, Moldaver and Karakatsanis JJ. was delivered by

THE CHIEF JUSTICE —

I. Introduction

[1] The parties to this appeal, Mr. and Mrs. Clements, were motor bike enthusiasts. August 7th, 2004, found them en route from their home in Prince George, British Columbia, to visit their daughter in Kananaskis, Alberta. The weather was wet. Mr. Clements was driving the bike and Mrs. Clements was riding behind on the passenger seat. The bike was about 100 pounds overloaded. Unbeknownst to Mr. Clements, a nail had punctured the bike's rear tire. Though Mr. Clements was travelling in a 100 km/h zone, he accelerated to at least 120 km/h in order to pass a car. As he crossed the centre line to commence the passing manoeuvre, the nail fell out, the rear tire deflated, and the bike began to wobble. Mr. Clements was unable to bring the bike under control and it crashed, throwing Mrs. Clements off. Mrs. Clements suffered a severe traumatic brain injury. She now sues Mr. Clements, claiming that her injury was caused by his negligence in the operation of the bike.

[2] Mr. Clements' negligence in driving an overloaded bike too fast is not disputed. The only issue is whether his negligence *caused* Mrs. Clements' injury. Mr. Clements called an expert witness, Mr. MacInnis, who testified that the probable cause of the accident was the tire puncture and deflation, and that the accident would have happened even without the negligent acts of Mr. Clements.

[3] The trial judge rejected this conclusion, and found that Mr. Clements' negligence in fact *contributed to* Mrs. Clements' injury. However, he held that the

plaintiff “through no fault of her own is unable to prove that ‘but for’ the defendant’s breaches, she would not have been injured”, due to the limitations of the scientific reconstruction evidence (2009 BCSC 112 (CanLII), at para. 66). The trial judge went on to hold that in view of this impossibility of precise proof of the amount each factor contributed to the injury, “but for” causation should be dispensed with and a “material contribution” test applied. He found Mr. Clements liable on this basis.

[4] The British Columbia Court of Appeal, *per* Frankel J.A., set aside the judgment against Mr. Clements on the basis that “but for” causation had not been proved and the material contribution test did not apply (2010 BCCA 581, 12 B.C.L.R. (5th) 310).

[5] The legal issue is whether the usual “but for” test for causation in a negligence action applies, as the Court of Appeal held, or whether a material contribution approach suffices, as the trial judge held. For the reasons that follow, I conclude that a material contribution test was not applicable in this case. I would return the matter to the trial judge to be dealt with on the correct basis of “but for” causation.

II. Outline

A. *Causation in the Law of Negligence: The Basic Rule of “But For” Causation*

B. *The Material Contribution to Risk Approach*

1. The Canadian Cases
2. The United Kingdom Cases
3. When Is a Material Contribution to Risk Approach Available?

C. *Summary*

D. *Application*

III. Discussion

A. *Causation in the Law of Negligence: The Basic Rule of “But For” Causation*

[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.

[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.

[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.

[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.

[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.

[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 account of Lord Mansfield’s famous precept [that “all evidence is to be weighed according to the proof 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 apportion liability according to the degree of fault of each defendant pursuant to 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 the injury.

[14] "But for" causation and liability on the basis of material contribution to risk are two different beasts. "But for" causation is a factual inquiry into what likely happened. The material contribution to risk test removes the requirement of "but for" causation and substitutes proof of material contribution to risk. As set out by Smith J.A. in *MacDonald v. Goertz*, 2009 BCCA 358, 275 B.C.A.C. 68, at para. 17,

. . . "material contribution" does not signify a test of causation at all; rather it is a policy-driven rule of law designed to permit plaintiffs to recover in such cases despite their failure to prove causation. In such cases, plaintiffs are permitted to "jump the evidentiary gap": see "Lords a 'leaping evidentiary gaps'", (2002) *Torts Law Journal* 276, and "Cause-in-Fact and the Scope of Liability for Consequences", (2003) 119 *L.Q.R.* 388, both by Professor Jane Stapleton. That is

because to deny liability “would offend basic notions of fairness and justice”: *Hanke v. Resurface Corp.*, para. 25.

[15] While the cases and scholars have sometimes spoken of “material contribution to the injury” instead of “material contribution to risk”, the latter is the more accurate formulation. As will become clearer when we discuss the cases, “material contribution” as a substitute for the usual requirement of “but for” causation only applies where it is impossible to say that a particular defendant’s negligent act in fact caused the injury. It imposes liability not because the evidence establishes that the defendant’s act caused the injury, but because the act contributed to the risk that injury would occur. Thus this Court in *Snell and Resurface Corp. v. Hanke*, 2007 SCC 7, [2007] 1 S.C.R. 333, raised the possibility of a material contribution to risk approach. The English law takes the same approach, as discussed below.

[16] Elimination of proof 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 (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’”: *Mooney v. British Columbia*, 2004 BCCA 402, 202 B.C.A.C. 74, at para. 157, *per* Smith J.A., concurring in the result. 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.

B. *The Material Contribution to Risk Approach*

1. The Canadian Cases

[17] The possibility of material contribution as an exceptional substitute for “but for” causation has arisen in a variety of contexts involving multiple tortfeasors.

[18] One of the earliest cases on the issue is *Cook v. Lewis*, [1951] S.C.R. 830. Three men were out hunting. Two of them fired shots, virtually simultaneously. One of the shots struck a fourth hunter, Mr. Lewis, who was injured and sued both defendants in negligence. On the evidence, it could not be established which defendant’s gun had fired the shot that injured Mr. Lewis. Clearly, one of the men had caused Mr. Lewis’ injury, and one had not. But which one? The evidence shed no light on this. The defendants contended that the plaintiff’s action must be dismissed because he had not proved “but for” causation against either defendant, relying on the classic “point the finger at someone else” defence. Both defendants were found jointly and severally liable. The majority reasons in this Court spoke of reversing the onus in these circumstances, rather than material contribution to risk.

[19] The Court in *Cook* relaxed the usual “but for” test for causation on the basis that fairness required this. It was “impossible” for the plaintiff to prove on a balance of probabilities that either man had injured him on the “but for” test; both defendants could say it was just as likely the other had caused Mr. Lewis’ injury, precluding the plaintiff from discharging his burden against either. Only one of the

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

[20] *Cook* was considered in *Snell*. The plaintiff in *Snell* had undergone surgery to remove a cataract. Bleeding occurred. When the bleeding cleared up nine months later, it was found that the plaintiff’s optic nerve had atrophied, causing loss of sight in her right eye. Neither of the expert witnesses was able to state what caused the atrophy or when it had occurred. The trial judge, upheld by the Court of Appeal, did not apply the usual “but for” test, but applied a reverse onus test. This Court affirmed recovery, but on the basis of a robust and common sense application of the “but for” test. However, Sopinka J. suggested that had it been necessary and appropriate, a material contribution to risk approach might have been applicable:

I have examined the alternatives arising out of [*McGhee v. National Coal Board*, [1973] 1 W.L.R. 1 (H.L.)]. They were that the plaintiff simply prove that the defendant created a risk that the injury which occurred would occur. Or, what amounts to the same thing, that the defendant has the burden of disproving causation. If I were convinced that defendants who have a substantial connection to the injury were escaping liability because plaintiffs cannot prove causation under currently applied principles, I would not hesitate to adopt one of these alternatives. In my opinion, however, properly applied, the principles relating to causation are adequate to the task. [Emphasis added; pp. 326-27.]

[21] Sopinka J. went on to underline the importance of establishing a *substantial connection* between the injury and the defendant's negligence. The usual requirement of proof of "but for" causation should not be relaxed where the result would be to permit plaintiffs to recover in the absence of evidence connecting the defendant's fault to the plaintiff's injury. Thus Sopinka J. stated that if the injury likely was brought about by "neutral" factors, that is, it would have occurred absent any negligence, the plaintiff cannot succeed. To allow recovery where the injury was the result of neutral factors would neither further the goals of compensation, fairness and deterrence, nor comport with the theory of corrective justice that underlies the law of negligence.

[22] These ideas were again taken up in *Athey*. The plaintiff, who suffered from pre-existing back problems, suffered a herniated disc after two motor vehicle accidents. He sued the drivers of the motor vehicles in negligence for his injury. The trial judge held that although the accidents were "not the sole cause" of the disc herniation, they played "some causative role" (para. 8). She accordingly found the defendants liable for 25 percent of the plaintiff's loss. In the Court of Appeal, the plaintiff sought to uphold the result on the basis of material contribution, but that court declined to consider the issue as it had not been raised at trial.

[23] This Court, *per* Major J., discussed the limitations of the "but for" test and the propriety of exceptionally using a material contribution test. Major J. emphasized that a robust common sense approach to the "but for" test permits an

inference of “but for” causation from evidence that the defendant’s conduct was a significant factor in the injury, and concluded that “[t]he plaintiff must prove causation by meeting the ‘but for’ or material contribution test” (para. 41). Major J. concluded that the 25 percent contribution found by the trial judge was a “material contribution” sufficient to meet the “but for” test. The term “material contribution”, read in context, does not detract from the fact that the Court in the end applied a robust, common sense application of the “but for” test, in accordance with *Snell*.

[24] The problem of proof of causation where there are two or more possible tortfeasors arose in a slightly different manner in *Walker Estate v. York Finch General Hospital*, 2001 SCC 23, [2001] 1 S.C.R. 647. Ms. Walker contracted HIV from tainted blood. Her estate sued the supplier of the blood for negligence in failing to screen out donors with a high risk of HIV by warning them not to give blood. In defence, the suppliers argued that “but for” causation was not established, because even if they had taken the required steps to screen, persons with HIV who did not know of their condition or who did not wish to disclose it might have donated blood in any event. The Court rejected this defence and found the supplier liable.

[25] In *Walker Estate*, as in *Athey*, Major J. once again alluded to the inadequacy of the “but for” test in some situations, in particular in cases where multiple independent causes may bring about a single harm (para. 87). He found that causation in the usual sense could be established on the trial judge’s findings (paras. 89-98). In *obiter*, however, Major J. adopted the reasoning of Sopinka J. in *Snell* to

the effect that, in an appropriate case, where the ordinary principles of causation are inadequate to the task and result in unfairness and inconsistency with the underlying principles of negligence, it might be possible to dispense with factual proof of “but for” causation and apply a less onerous “material contribution” test (para. 99).

[26] This brings us to *Resurfice*. The plaintiff, whose job was to maintain ice surfaces, mistakenly poured water into the gas tank of the machine used for that purpose. Gasoline vapour was sparked, causing an explosion and fire, and the plaintiff was badly burned. He sued the manufacturer and distributor of the machine, alleging negligence in not arranging or marking the machine in a way that would have avoided confusion between the water tank and the gas tank. The trial judge found that the plaintiff had not proved that the accident had been caused by the manufacturer or the distributor and dismissed the action. The Court of Appeal ordered a new trial on the basis that the trial judge had erred in his treatment of foreseeability and causation.

[27] This Court endorsed the trial judge’s conclusion that the plaintiff had failed to establish causation on the “but for” test, and held that a material contribution approach was inapplicable. The decision affirmed that in “special circumstances”, the law has recognized that the “but for” test for causation should be replaced by a material contribution approach (para. 24). This may occur where it is “impossible” for the plaintiff to prove causation on the “but for” test, and where it is clear that the defendant breached his duty of care in a way that exposed the plaintiff to an

unreasonable risk of injury. The basis for the exception in these circumstances is that requiring “but for” causation “would offend basic notions of fairness and justice” (para. 25).

[28] To recap, the Canadian Supreme Court jurisprudence on a material contribution approach to date may be summarized as follows. First, while accepting that it might be appropriate in “special circumstances”, the Court has never in fact applied a material contribution to risk test. *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. Nevertheless, the Court has acknowledged the difficulties of proof that multi-tortfeasor cases may pose — difficulties which in some cases may justify relaxing the requirement of “but for” causation and finding liability on a material contribution to risk approach.

2. The United Kingdom Cases

[29] The courts of the United Kingdom have adopted a material contribution to risk approach to the problem of toxic agent cases involving negligence by more than one employer: *Fairchild v. Glenhaven Funeral Services Ltd.*, [2002] UKHL 22, [2002] 3 All E.R. 305; and *Barker v. Corus UK Ltd.*, [2006] UKHL 20, [2006] 2 A.C. 572. Recently, the United Kingdom Supreme Court decided that a material contribution to risk approach can apply as well when a single negligent employer has exposed a plaintiff to asbestos: see *Sienkiewicz v. Greif (UK) Ltd.*, [2011] UKSC 10, [2011] 2 All E.R. 857. I will return to this case later in these reasons.

[30] The plaintiffs in *Fairchild* and *Barker* had developed diseases related to toxic workplace agents, but were unable to prove which of several possible sources of the agents had caused their disease. In both cases, the plaintiffs had been exposed to asbestos at different times when working for different employers. A single fibre of asbestos could have caused the disease. As all the employers had exposed the employee to the same risk, it was impossible to say which employer's negligence in fact led to the disease. In each case, the defendants pointed the finger at the negligence of others. And in each case, the court rejected this defence and found liability on the basis of material contribution.

[31] The U.K. toxic agent cases debated whether the defendants in these circumstances were held liable because they materially contributed to the *injury*, or to the *risk* of the injury. Lord Hoffmann, in *Barker*, stated that the purpose of the *Fairchild* exception was "to provide a cause of action against a defendant who has materially increased the risk that the claimant will suffer damage and may have caused that damage, but cannot be proved to have done so because it is impossible to show, on a balance of probability, that some other exposure to the same risk may not have caused it instead" (para. 17).

[32] Viewed generally, the toxic agent cases up to *Sienkiewicz* hold that resort may be had to the concept of material contribution to the risk of injury where it is plain that any or all of a number of tortfeasors could have caused the plaintiff's injury, but it is impossible to say that any particular one in fact did so. In this situation,

fairness and policy support relaxation of the “but for” test. In each case, the plaintiff would not have contracted the disease, “but for” the negligence of the defendants as a group. As I will discuss further below, to allow the defendants to each escape liability by pointing the finger at one another would have been at odds with the fairness, deterrence, and corrective justice objectives of the law of negligence.

3. When Is a Material Contribution to Risk Approach Available?

[33] We have seen that the jurisprudence establishes that while tort liability must generally be founded on proof that “but for” the defendant’s negligence the injury would not have occurred, exceptionally proof of factual causation can be replaced by proof of a material contribution to the risk that gave rise to the injury.

[34] In *Resurfice*, this Court summarized the cases as holding that a material contribution approach may be appropriate where it is “impossible” for the plaintiff to prove causation on the “but for” test and where it is clear that the defendant breached its duty of care (acted negligently) in a way that exposed the plaintiff to an unreasonable risk of injury. As a summary of the jurisprudence, this is accurate. However, as a test it is incomplete. A clear picture of when “but for” causation can be replaced by material contribution to risk requires further exploration of what is meant by “impossible to prove” (*Resurfice*, at para. 28) and what substratum of negligence must be shown. I will discuss each of these related concepts in turn.

(a) *“Impossibility”*

[35] The idea running through the jurisprudence that to apply the material contribution approach it must be “impossible” for the plaintiff to prove that the defendant’s negligence caused the plaintiff’s injury using the “but for” test has produced uncertainty in this case and elsewhere.

[36] Some have suggested that “but for” proof must be logically or conceptually impossible before material contribution to risk is available, arguing that *Cook* and the toxic agent cases show impossibility in this sense. But it is difficult to know what this means. As a matter of pure logic, it is conceivable that ballistics tests could have revealed which shotgun fired the shot that injured Mr. Lewis. It is also conceivable that with further understanding, medical science may someday be able to say which employer supplied the particle of asbestos that caused the plaintiffs in *Barker* to develop mesothelioma. Clearly the impossibility in those examples was related to difficulties with factual proof, not to logical problems inherent in the peculiarities of the case.

[37] However, the option of finding that a material contribution to risk approach is available whenever proof of “but for” causation cannot be made on the facts is equally problematic. First, how does one distinguish between a case of true impossibility of factual proof and a situation where the plaintiff simply fails to meet her burden of establishing “but for” causation on the evidence? Unless one can make a clear distinction, one effectively undermines the requirement that the plaintiff bears the burden of showing that, “but for” the defendant’s negligence, she would not have

been injured. In any difficult case, the plaintiff would be able to claim impossibility of proof of causation. Such a result 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.

[38] “Scientific impossibility”, relied on by the trial judge in this case, is merely a variant of factual impossibility and attracts the same objections. In many cases of causal uncertainty, it is conceivable that with better scientific evidence, causation could be clarified. Scientific uncertainty was referred to in *Resurface* in the course of explaining the difficulties that have arisen in the cases. However, this should not be read as ousting the “but for” test for causation in negligence actions. The law of negligence has never required scientific proof of causation; to repeat yet again, common sense inferences from the facts may suffice. If scientific evidence of causation is not required, as *Snell* makes plain, it is difficult to see how its absence can be raised as a basis for ousting the usual “but for” test.

[39] 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.

(b) *Substratum of Negligence Involving Multiple Possible Tortfeasors*

[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.

[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 that they cannot escape liability by pointing the finger at others. And 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.

[42] The only case to apply a material contribution to risk approach to a single tortfeasor is *Sienkiewicz*. A plaintiff suffering from mesothelioma had only been exposed to asbestos from a *single* negligent source and on the trial judge's findings, "but for" causation could not be inferred. The United Kingdom Supreme Court took the view that it was bound by precedent to apply a material contribution to risk approach in all mesothelioma cases. Several members of the court in *Sienkiewicz* noted the difficulty with such a result. Lady Hale observed (at para. 167) that she found it hard to believe that a defendant "whose wrongful exposure might or might not have led to the disease would be liable in full for the consequences even if it was more likely than not that some other cause was to blame (let alone that it was not more likely than not that he was to blame)". In my view, nothing compels a similar result in Canada, and thus far, although Sopinka J.'s remarks in *Snell* (quoted above at para. 20) do not preclude it, courts in Canada have not applied a material contribution to risk test in a case with a single tortfeasor.

[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.

[44] This is not to say that new situations will not raise new considerations. I leave for another day, for example, the scenario that might arise in mass toxic tort litigation with multiple plaintiffs, where it is established statistically that the defendant’s acts induced an injury on some members of the group, but it is impossible to know which ones.

[45] The Court of Appeal reached a similar view of the law to that here proposed. It pointed out that the material contribution to risk exception to “but for” causation is not a test for proving factual causation, but a basis for finding “legal” causation where fairness and justice demand deviation from the “but for” test. It correctly identified the critical element for application of a material contribution to risk approach — the impossibility of proving which of two or more possible tortious causes is in fact the cause of the injury. And it correctly suggested that the approach

could apply to situations where, as in *Walker Estate*, a defendant attempts to defeat “but for” causation by pointing the finger at the hypothetical negligence of a third party that might have caused the loss in any event. It was unnecessary, in my view, to hang the analysis on “circular causation”, and “dependency causation”, which may complicate the matter rather than simplify it. However, in broad terms, the Court of Appeal correctly identified the circumstances where a material contribution to risk approach may exceptionally be imposed.

C. *Summary*

[46] The foregoing discussion leads me to the following conclusions as to the present state of the law in Canada:

- (1) As a general rule, a plaintiff cannot succeed unless she shows as a matter of fact that she would not 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.
- (2) 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.

D. *Application*

[47] The trial judge made two errors.

[48] The first error was to insist on scientific reconstruction evidence as a necessary condition of finding “but for” causation. The trial judge stated, at para. 66 that

. . . the plaintiff through no fault of her own is unable to prove that “but for” the defendant’s breaches, she would not have been injured. This is because after the fact, it is not possible through accident reconstruction modeling to determine at what combination of lower speed and lesser weight recovery from the weave instability would have been practicable.

[49] As discussed above, the cases consistently hold that scientific precision is not necessary to a conclusion that “but for” causation is established on a balance of probabilities. It follows that the trial judge erred in insisting on scientific precision in the evidence as a condition of finding “but for” causation.

[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.

[51] The judge accepted evidence to the effect that overloading would have increased instability in the event of a weave caused by tire deflation (para. 41). He also noted expert evidence to the effect that instability due to tire deflation increases with speed and that it was impossible to predict without tests whether the capsizing would have occurred at a lower speed (para. 42). However, the trial judge rejected the evidence of the expert witness, Mr. MacInnis, that the accident would have happened even if the defendant had not negligently overloaded his bike and driven too fast (para. 62). He gave a number of reasons for rejecting this evidence. The judge noted that his own findings of fact on the issues of speed and weight were markedly different than the facts assumed by the expert in formulating his opinion. The judge found as a fact that the motorcycle was overloaded to the extent of more than 100 pounds, in other words by a factor of nearly 10 percent, while the expert assumed considerably less overloading — no more than 5 percent. The judge found as a fact that the defendant had exceeded a proper speed by at least 30 km/h (based on

a safe traveling speed of approximately 90 km/h in all of the circumstances, as found by the trial judge), whereas the expert assumed an excess speed of about 12.5 km/h (para. 60). The judge further noted that the expert had “readily conceded” that his opinion that the excess speed and weight were non-contributing factors was “largely conjectural” because it “could not be supported scientifically” (para. 60 (emphasis added)).

[52] Having rejected the defendant’s expert evidence that the accident would have happened regardless of the excess speed and excess weight, the judge was left with the fact that while there was no scientific proof one way or the other, “[o]rdinary common sense” supported the causal relationship between the injury and the excessive speed and weight (paras. 63-64). He noted, at para. 64, that the motorcycle’s manual itself stated that “[h]igh speed increases the influence of any other condition affecting stability and possibility of loss of control”, and that the defendant agreed the speed he was travelling and the load he was carrying were factors that contributed to the accident (para. 33). Finally, the trial judge used language tantamount to finding actual “but for” causation, stating (at para. 67):

I conclude on all of the evidence that the defendant’s breaches of duty materially contributed to the injuries suffered by the plaintiff as a result of the accident. In short, her injuries were the result of her husband driving too fast with too heavy a load when his rear tire unexpectedly deflated. Causation is therefore established within the parameters discussed by the Supreme Court of Canada in *Athey* and *Resurfice*. [Emphasis added.]

[53] We cannot be certain what the trial judge would have concluded had he not made the errors I earlier described. All that can be said is that the parties did not receive a trial based on correct legal principles. In my view, the appropriate remedy in these circumstances is an order for a new trial.

[54] I would allow the appeal and order a new trial. The appellant will have her costs in this Court. The orders for costs below are set aside.

The reasons of LeBel and Rothstein JJ. were delivered by

LEBEL J. —

[55] I have read the Chief Justice’s reasons. I agree with the substance of her analysis of the law of causation and the nature of the “but for” test. But, in my respectful opinion, there is no basis in fact and law for ordering a new trial. I would uphold the judgment of the Court of Appeal and dismiss the appeal.

[56] The key finding of fact made by the trial judge was that the plaintiff had not proven causation on the basis of the “but for” test. The trial judge specifically stated, at para. 66, that the plaintiff had been “unable to prove that ‘but for’ the defendant’s breaches, she would not have been injured” (2009 BCSC 112 (Can LII)). Given this finding, it would be exceedingly difficult to draw a common sense inference that those breaches caused the accident. Such inferences cannot be pulled

out of thin air at the whim of the trier of fact. They must have a reliable factual foundation.

[57] In this case, a factual foundation that would support an inference that the overloading of the motorcycle and excessive speed caused the accident is quite simply lacking. The only evidence directly related to the issue came from the respondent's expert, Mr. MacInnis. According to his evidence, the accident would have happened even if the motorcycle had been travelling at a lower, legal speed and without a pound of excess baggage. The trial judge evidently rejected this opinion. 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.

[58] The Chief Justice takes a different view. She states, at para. 52, that the trial judge "used language tantamount to finding actual 'but for' causation". She quotes the following passage from para. 67 of the trial judge's reasons:

I conclude on all of the evidence that the defendant's breaches of duty materially contributed to the injuries suffered by the plaintiff as a result of the accident. In short, her injuries were the result of her husband driving too fast with too heavy a load when his rear tire unexpectedly deflated. Causation is therefore established within the parameters discussed by the Supreme Court of Canada in *Athey* [*v. Leonati*, [1996] 3 S.C.R. 458] and *Resurfice* [*Corp. v. Hanke*, 2007 SCC 7, [2007] 1 S.C.R. 333].

[59] The trial judge's comments must be read in the context of his decision as a whole. He had determined that, in view of the impossibility of proving how, or whether, each factor had contributed to the accident, "but for" causation should be dispensed with and a "material contribution" test applied. The quoted comments were made in the context of his application of the latter test. They constituted his conclusion that the material contribution test had been satisfied.

[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. The trial judge's finding that the material contribution test was satisfied cannot be reinterpreted as a finding that "but for" causation was established without seriously undermining the important distinction between the two tests and the clarity of the analysis pertaining to causation.

[61] Moreover, I wonder whether the order for a new trial itself represents sound judicial policy. I am not arguing that this Court lacks jurisdiction to issue this order and that the order is therefore illegal. But, on policy grounds related to the administration of justice and the conduct of civil appeals, this Court and courts of appeal should be mindful of the need for finality and efficiency in the civil litigation process. Where it is appropriate to do so, an attempt should be made to resolve the

issues and thereby avoid sending the matter back for a new trial, which might itself trigger a new round of appeals.

[62] In this appeal, I am unable to find any basis in the trial judge’s judgment for inferring that the overloading of the motorcycle and excessive speed could have been the “cause” of the accident as that term is understood in the context of the “but for” test. Nor is this a case in which it would be appropriate to send the matter back for a new trial.

[63] For those reasons, I would dismiss the appeal with costs.

Appeal allowed, LEBEL and ROTHSTEIN JJ. dissenting.

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