

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Clements (Litigation Guardian of) v. Clements*,
2010 BCCA 581

Date: 20101217
Docket: CA036882

Between:

**Joan Clements,
by her litigation guardian, Donna Jardine**

Respondent
(Plaintiff)

And

Joseph Clements

Appellant
(Defendant)

Before: The Honourable Mr. Justice Frankel
The Honourable Mr. Justice Tysoe
The Honourable Madam Justice Garson

On appeal from: Supreme Court of British Columbia, February 4, 2009
(*Clements (Litigation Guardian of) v. Clements*, 2009 BCSC 112,
Prince George Registry No. 0627521)

Counsel for the Appellant: R.A. Easton and R.W. Morasiewicz

Counsel for the Respondent: D.G. Cowper, Q.C., D. Byl,
and K.V. Aimetz

Place and Date of Hearing: Vancouver, British Columbia
May 26, 2010

Place and Date of Judgment: Vancouver, British Columbia
December 17, 2010

Written Reasons by:
The Honourable Mr. Justice Frankel

Concurred in by:
The Honourable Mr. Justice Tysoe
The Honourable Madam Justice Garson

Reasons for Judgment of the Honourable Mr. Justice Frankel:

Introduction

[1] This appeal is about causation in tort law. The issue is whether the trial judge, Mr. Justice Grauer of the Supreme Court of British Columbia, was correct in finding for the plaintiff, Joan Clements, on the issue of causation on the basis of the “material-contribution” test. The judge resorted to this test after he concluded that Mrs. Clements had failed to meet the generally applicable “but-for” test for causation.

[2] Mrs. Clements was severely injured while riding as a passenger on a motorcycle driven by her husband, the defendant, Joseph Clements. As Mr. Clements pulled out to pass another vehicle, a sharp object, likely a nail, punctured the rear tire of the motorcycle causing it to rapidly deflate. This, in turn, caused the back of the motorcycle to weave from side to side. Despite his best efforts, Mr. Clements was unable to regain control of the motorcycle and it eventually capsized and flipped over. Both Mr. Clements and Mrs. Clements were thrown off the motorcycle.

[3] The trial judge found Mr. Clements negligent in two respects:

- (a) the motorcycle was being driven at an excessive speed; and
- (b) the motorcycle was overloaded.

However, the judge was not satisfied on a balance of probabilities that, but for the excessive speed and excessive weight, the motorcycle would not have capsized in any event. Being of the view that it was impossible to determine, through accident-reconstruction modeling, the combination of speed and weight at which Mr. Clements would have been able to regain control of the motorcycle and bring it to a safe stop, the trial judge turned to the material-contribution test discussed in *Resurface Corp. v. Hanke*, 2007 SCC 7, [2007] 1 S.C.R. 333. Applying that test, the judge found causation had been established and that, therefore, Mr. Clements was liable for the injuries sustained by Mrs. Clements.

[4] For the reasons that follow, I would allow this appeal. As I will explain, this is not a case in which it was appropriate to find causation on the basis of the material-contribution test.

Factual Background

[5] Mr. Clements is an experienced motorcycle rider (driver). Prior to the events in issue, he and Mrs. Clements had taken many motorcycle trips together.

[6] The Clementses live in Prince George, British Columbia. In the summer of 2004, they planned to travel to Kananaskis, Alberta, to visit their youngest daughter and then carry on to Edmonton to attend a motorcycle owners' event. They intended to leave early in the morning and arrive in Kananaskis by late evening.

[7] On August 6, 2004, Mr. Clements inspected his motorcycle, a 1998 Harley-Davidson Road Glide touring bike, including checking the tire pressure. That inspection did not disclose any problems. Mr. Clements did not inspect the tire treads because the tires were almost new.

[8] The motorcycle is fitted with two hard-case saddlebags, one mounted on each side of the rear wheel. There is also a hard-case "Tour Pak" located at the rear of the motorcycle, behind the passenger (phillion) seat.

[9] Mr. Clements started work at 3:30 p.m. on August 6, 2004, returning home at 1:00 a.m. on August 7th. Both Mr. Clements and Mrs. Clements were up the next morning by 7:30 a.m. Although Mr. Clements suggested they postpone leaving due to weather conditions, Mrs. Clements insisted that they go. At about 10:30 a.m. they left Prince George, heading east on Highway 16. It was raining lightly.

[10] The weather worsened, and it began to rain heavily. At Purden, British Columbia, the Clementses stopped to change out of their soaking-wet clothing into full rain gear. They placed the clothing they removed into a large garbage bag that was stowed on top of the Tour Pak.

[11] The weather conditions remained poor after Purden. The Clementses continued east on Highway 16, passing through five different construction zones. When they reached McBride, British Columbia, they stopped for gas and to have lunch. Mr. Clements conducted a visual inspection of the motorcycle, including the tires. Everything appeared normal. Over lunch, Mr. Clements tried unsuccessfully to persuade Mrs. Clements that they should stay overnight at a hotel in McBride.

[12] While in McBride, the Clementses met another motorcyclist, Hugo, who was also heading east. They decided to travel together, at least as far as Jasper, Alberta. It was raining lightly when the Clementses and Hugo left McBride. Hugo was in the lead. In this area, Highway 16 is one lane in each direction separated by a broken yellow line; the posted speed limit is 100 kilometres per hour. A few kilometres outside of McBride, Hugo passed a tractor-trailer. Mr. Clements did so as well, pulling back into the east-bound lane some distance behind Hugo.

[13] A short time later, while on a long and straight stretch of highway, Hugo passed a BMW sports car travelling at approximately 108 kilometres per hour. Mr. Clements then pulled out to pass the BMW. As he crossed the yellow centre line, Mr. Clements felt his motorcycle begin to wobble. Attributing the wobble to the yellow line being slick, Mr. Clements accelerated to straighten the motorcycle out. However, the rear end of the motorcycle began to weave back and forth and the whipping motion got progressively worse. At this point, Mr. Clements realized it was likely that the motorcycle would go down. He shouted to Mrs. Clements to wave her arms to warn the driver of the BMW, and began to slow down, looking for a safe place to bring the motorcycle down. The motorcycle became increasingly hard to control and the whip in the rear end caused it to weave across both the east-bound and west-bound lanes.

[14] There were telephone poles and a barbed-wire fence on the right side of the highway and a ditch to the left. Mr. Clements, who was fighting hard to control the motorcycle, decided that the safest place to bring it down was on the roadway. He thought that he and Mrs. Clements would come out safely if he brought the

motorcycle down on its left side while they rode high on the right side. He shouted instructions to this effect to Mrs. Clements.

[15] Mr. Clements was unable to bring the motorcycle down safely. It capsized, flipped over, and skidded. Both Mr. Clements and Mrs. Clements were thrown off. Mrs. Clements suffered a severe traumatic brain injury.

[16] The trial judge found that the motorcycle had been travelling at least 120 kilometres per hour when it passed the sports car and had slowed to 37 kilometres per hour when it capsized. He also found that it was carrying more than 100 pounds over the gross vehicle weight rating ("GVWR") in the owner's manual, i.e., the maximum allowable loaded vehicle weight.

Evidence at Trial

[17] Mrs. Clements's case consisted of the following:

- (a) a book containing numerous photographs taken by the police at the scene of the accident;
- (b) measurements taken by the police at the scene of the accident (including those of gouges made by the motorcycle as it slid down the road);
- (c) the motorcycle's owner's manual;
- (d) an admission regarding post-accident observations as to the condition of the motorcycle made by a professional engineer;
- (e) "read ins" from Mr. Clements's examination for discovery; and
- (f) the testimony of the driver of the BMW.

[18] Mr. Clements testified on his own behalf with respect to the events leading up to and including the accident. He said that he was not aware of the motorcycle's GVWR.

[19] In addition, Mr. Clements called the passenger in the BMW and Duane D. MacInnis, a professional engineer, as witnesses. With Mrs. Clements's concurrence, the trial judge found Mr. MacInnis qualified to give opinion evidence with respect to motor vehicle accident reconstruction and, in particular, motorcycle operation, control, and dynamics. Mr. MacInnis's written report was filed as an exhibit.

[20] Mr. MacInnis testified that as a result of the rear tire being punctured, the motorcycle developed what is known as a "weave instability". He said this would have occurred without warning. Based on the information he had been given, which included the photographs and measurements taken by the police, Mr. MacInnis opined that the motorcycle was travelling at 37 kilometres per hour when it capsized.

[21] Proceeding on the assumption that the motorcycle had been overloaded by 59 pounds (i.e., 5%), Mr. MacInnis expressed the following opinion in his written report under the heading "Effect of Weight on Recovery":

Any motorcycle, in the right conditions, can develop instabilities, such as wobble and weave. A heavy motorcycle with a load at the rear is inherently less stable in weave than a lightly loaded motorcycle. The weight of the fully laden motorcycle would make recovery attempts more difficult.

An overweight condition of about 5% would have an unpredictable effect on the onset of instability or the ability of the driver to recover from the instability. If the extra weight caused the center of mass to be further forward or upwards, or was contained in the mass of the rider and passenger, then the extra weight could improve the stability. If the mass caused the center of mass to be further rearward or downwards, and was contained in the fixed mass objects, then the extra weight would make the motorcycle less stable.

In either case, the 5% difference would have an unpredictable effect on stability. Because we know very little about the dynamic properties of the actual motorcycle, and less about the load distribution, it is impossible to model the behaviour of the loaded motorcycle in response to the flat tire instability. The extra weight could improve or decrease stability, depending on how the mass was distributed. There is no technically satisfactory method to predict the effect of the extra weight.

[22] Under the heading "Did Speed Contribute to the Control Loss and Recovery Failure", Mr. MacInnis expressed the following written opinion in response to a question as to whether it would make a difference if the motorcycle had been

travelling at 100 kilometres per hour as opposed to between 110 and 115 kilometres per hour:

There is some low speed at which there would be little or no instability of the motorcycle resulting from a flat rear tire. This speed cannot be predicted without tests, but would likely be very low, possibly less than 15 km/h. Below 15 km/h, a motorcycle steers like a low speed bicycle. Based on the [work of Professor Vittore Cossalter, a recognized expert on motorcycle dynamics], the instability due to flat rear tire alone increases with increasing speed. A speed of 100 km/h would be hazardous with a flat rear tire, whether the motorcycle was loaded or not.

Would the capsize have occurred at a lower speed? This is impossible to predict without tests, particularly as the potential for control loss or recovery is so dependent on operator actions. What one operator may be able to control, another may not. The operator may complicate matters by his attempts to control the instability.

[23] In cross-examination, Mr. MacInnis disagreed with a suggestion that the motorcycle could have been brought to a safe stop had it been travelling at 80 or 90 kilometres per hour when the puncture occurred. He said that had the motorcycle been travelling at 90 or 100 kilometres per hour, its capsize speed would still have been 37 kilometres per hour. Mr. MacInnis further stated that although there is a speed of travel above 37 kilometres per hour at which the puncture would not have resulted in a uncontrollable weave instability, it was impossible to determine that speed.

Trial Judge's Reasons
(2009 BCSC 112)

[24] The trial judge found that even before the Clementses changed out of their soaked clothing, the motorcycle was carrying more than 100 pounds over its GVWR. He also found that the motorcycle's instability in the event of a weave caused by a rear-tire deflation would have increased since much of the excess weight was carried aft (the passenger and the luggage) and high-centered (the garbage bag stowed on top of the Tour Pak). The judge accepted Mr. Clements's evidence that, notwithstanding the excess weight, he did not feel that that the motorcycle was unbalanced.

[25] The trial judge found that the rear tire of the motorcycle had picked up a sharp object earlier in the day, and that the object had punctured the tire as Mr. Clements pulled out and accelerated to more than 120 kilometres per hour to pass the BMW. The puncture caused the rear tire to rapidly deflate, producing the weave instability.

[26] In his review of the evidence, the trial judge referred to the fact that Mr. MacInnis had been unable to opine with any certainty how speed and excess load had affected Mr. Clements's ability to deal safely with the weave instability:

[45] Mr. MacInnis was candid in noting that it is not always possible to hang a number on things, and that in this case, he could not say at what specific speed a tire blowout could be handled safely, or what specific effect the weight carried on the motorcycle would have on stability. He estimated the excess weight to have been in the range of 5%, whereas I have found it to be approximately double that. He estimated the motorcycle's speed to be 110-115 km/h, whereas I have found it probable that the speed was 120 km/h or more.

[27] The trial judge found Mr. Clements to have been negligent in two ways: driving at an excessive rate of speed in poor weather conditions (which Mr. Clements conceded), and failing to ensure that the motorcycle was not overloaded (carrying in excess of its GVWR).

[28] The critical issue for the trial judge was causation, i.e., whether Mr. Clements's negligent acts had caused the injuries sustained by Mrs. Clements. Mr. Clements's position was that Mrs. Clements had not met the onus of establishing she would not have been injured but for his negligent acts. He submitted the evidence showed that he would have been unable to bring the motorcycle to a safe stop even if he had been travelling slower with a lighter load. Mrs. Clements's position was that she had established she would not have been injured but for Mr. Clements's negligent acts. In the alternative, she submitted that if she could not satisfy the but-for test, then there were "special circumstances" that warranted causation being decided in her favour on the basis of the material-contribution test.

[29] The trial judge began his analysis of the facts by finding that the weave instability was attributable solely to the rapid deflation of the rear tire and was not

causally connected to the motorcycle's speed or load. He then considered whether but for excessive speed and overloading, Mr. Clements would have been able to recover safely from the weave instability. In this regard, the judge asked himself the following question (at para. 59):

Would [Mr. Clements] have been able to recover from the weave instability, and thereby avoid [Mrs. Clements's] injuries, had he not been traveling at an excessive speed well above what the circumstances dictated, on an overloaded motorcycle?

[30] The evidence did not provide the answer to that question. Although the trial judge found that "increasing speed and increasing load will each result in increasing instability" he also found that it was not possible to say whether excessive speed and overloading had made a difference in this case. In this regard, the judge said:

[63] Where does that leave us? Does the evidence support the conclusion that [Mr. Clements's] inability to recover from the weave instability, leading to [Mrs. Clements's] injuries, would not have occurred "but for" a number of factors, including the two for which [Mr. Clements] is responsible? The only conclusion that can be drawn from Mr. Macinnis's expert evidence is that such a correlation is incapable of proof.

[31] Having found that causation could not be proven under the but-for test, the trial judge held that Mrs. Clements was entitled to rely on the material-contribution test and that she had established causation under that test. After observing that, as a matter of common sense, there is a relationship between excessive speed / weight and the ability to recover safely from a weave instability, the trial judge said this:

[65] In these circumstances, I find that this case gives rise to the "special circumstances" discussed by McLachlin C.J.C. in *Resurface* as justifying the application of the "material contribution" test. I have found that [Mr. Clements] breached his duty of care to [Mrs. Clements] as his passenger. His breaches gave rise to an unreasonable risk of injury from highway accident due to instability, which is the form of injury suffered by [Mrs. Clements].

[66] Notwithstanding that the science of motorcycle dynamics tells us that the nature of those breaches, excess speed and excess load, will increase the weave instability of the motorcycle in the event of a flat tire, which is what occurred, [Mrs. Clements] through no fault of her own is unable to prove that "but for" [Mr. Clements'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. At the

same time, the evidence did not establish that [Mrs. Clements] would have suffered harm in the absence of [Mr. Clements's] breaches.

[67] I conclude on all of the evidence that [Mr. Clements's] breaches of duty materially contributed to the injuries suffered by [Mrs. Clements] 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*. [Mr. Clements] is accordingly liable.

[32] The trial judge went on to find that Mrs. Clements had not been contributorily negligent. As a result, he found Mr. Clements 100% liable for the accident.

Analysis

[33] In Part 2 of his factum, Mr. Clements sets out but one ground of appeal: "The trial judge erred in stating and applying the laws of causation". However, he contends in both his written and oral submissions that the trial judge not only erred in law, but also erred in fact in relation to Mr. MacInnis's evidence. I will discuss each alleged error in turn. However, as will become evident, I do not consider that an in-depth discussion of Mr. Clements's arguments with respect to Mr. MacInnis's evidence is necessary to the resolution of this appeal and, for that reason, I will only touch on them briefly.

Misapprehension of Mr. MacInnis's Evidence

[34] Mr. Clements contends that the trial judge erred in failing to positively find, on the basis of Mr. MacInnis's evidence, that excessive speed and overloading played no role in his inability to bring the motorcycle to a safe stop. In short, Mr. Clements says that a full and proper consideration of that evidence can lead to only one factual conclusion: the unexpected puncture of the rear tire would have caused the motorcycle to capsize even if it had been travelling at a safe speed and been loaded within its GVWR. Mr. Clements says that the trial judge misapprehended Mr. MacInnis's evidence, particularly as it relates to how the motorcycle's stability would have been affected by the placement of the excess weight, i.e., high / low,

forward / aft. He also relies on the fact that Mrs. Clements did not tender any expert evidence that contradicted that of Mr. MacInnis.

[35] In their submissions to this Court, both parties spent some time discussing the details of Mr. MacInnis's written report and oral testimony. For her part, Mrs. Clements submitted that the trial judge did not misapprehend that evidence, and committed no palpable and overriding error in assessing it.

[36] The trial judge was clearly not obliged to accept Mr. MacInnis's evidence. It is axiomatic that a trial judge is entitled to accept all, none, or part of a witness's evidence. That a witness has been qualified as an expert does not change this: *Fox v. Danis*, 2006 BCCA 324, 228 B.C.A.C. 164 at para. 26.

[37] Having reviewed the trial record, my initial impression is that the trial judge may well have misapprehended aspects of Mr. MacInnis's evidence. However, I need not reach a definitive conclusion in this regard because, as I will now discuss, the facts the judge did find—which Mrs. Clements supports—do not permit the material-contribution test to be used to find Mr. Clements liable.

The Material-Contribution Test

[38] The trial judge found that even though Mrs. Clements had not established causation under the but-for test, she had done so under the material-contribution test because:

- (a) the science of motorcycle dynamics is such that, through no fault of her own, it was not possible for Mrs. Clements to prove that but for Mr. Clements's breaches she would not have been injured;
- (b) Mr. Clements had breached his duty of care to her; and
- (b) his breaches increased the risk that Mrs. Clements would be injured if the motorcycle became unstable.

[39] In my view, once the trial judge found that Mrs. Clements had failed to prove causation under the but-for test, he should have dismissed her action. This is not a case that permits causation being decided on another basis.

[40] Causation is a fundamental element of liability for negligence. A person who suffers harm is entitled to compensation from those who caused that harm. The but-for test is the method by which factual causation is established. The way the test works is described in Linden and Feldthusen, *Canadian Tort Law*, 8th ed. (Markham, Ont.: LexisNexis Butterworths, 2006) at 116:

[I]f the accident would not have occurred but for the defendant's negligence, this conduct is a cause of the injury. Put another way, if the accident would have occurred just the same, whether or not the defendant acted, this conduct is not a cause of the loss. Thus the act of the defendant must have made a difference. If the conduct had nothing to do with the loss, the actor escapes liability.

[Emphasis added.]

[41] In *Cork v. Kirby McLean, Ltd.*, [1952] 2 All E.R. 402 at 407 (C.A.), Lord Denning (as he then was) stated the test as follows:

Subject to the question of remoteness, causation is, I think, a question of fact. If you can say that the damage would not have happened but for a particular fault, then that fault is in fact a cause of the damage; but if you can say that the damage would have happened just the same, fault or no fault, then the fault is not a cause of the damage. It often happens that each of the parties at fault can truly say to the other: "But for your fault, it would not have happened." In such a case both faults are in fact causes of the damage.

[Emphasis added.]

See also: *Barker v. Corus (UK) Plc*, [2006] UKHL 20, [2006] 2 A.C. 572 at para. 1.

[42] In *Resurfice Corp.*, the Supreme Court of Canada re-affirmed the but-for test as the primary (i.e., default) test for determining causation. In that case, Chief Justice McLachlin, in stating the general principles that apply to the determination of causation, said:

21 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.

22 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 defendant’s acts, the plaintiff’s damages would have been incurred on a balance of probabilities.”

23 The “but for” test recognizes that compensation for negligent conduct should only be made “where a substantial connection between the injury and the defendant’s conduct” is present. It ensures that a defendant will not be held liable for the plaintiff’s injuries where they “may very well be due to factors unconnected to the defendant and not the fault of anyone”: *Snell v. Farrell*, at p. 327, *per* Sopinka J.

[Emphasis added.]

[43] The Chief Justice went on to state that in “special circumstances” it will be appropriate to depart from the but-for test and make the causation determination under what she refers to as “a material contribution test”. As this portion of her reasons is central to the resolution of this appeal, I set them out in full:

24 However, in special circumstances, the law has recognized exceptions to the basic “but for” test, and applied a “material contribution” test. Broadly speaking, the cases in which the “material contribution” test is properly applied involve two requirements.

25 First, it must be impossible for the plaintiff to prove that the defendant’s negligence caused the plaintiff’s injury using the “but for” test. The impossibility must be due to factors that are outside of the plaintiff’s control; for example, current limits of scientific knowledge. Second, it must be clear that the defendant breached a duty of care owed to the plaintiff, thereby exposing the plaintiff to an unreasonable risk of injury, and the plaintiff must have suffered that form of injury. In other words, the plaintiff’s injury must fall within the ambit of the risk created by the defendant’s breach. In those exceptional cases where these two requirements are satisfied, liability may be imposed, even though the “but for” test is not satisfied, because it would offend basic notions of fairness and justice to deny liability by applying a “but for” approach.

26 These two requirements are helpful in defining the situations in which an exception to the “but for” approach ought to be permitted. Without dealing exhaustively with the jurisprudence, a few examples may assist in demonstrating the twin principles just asserted.

27 One situation requiring an exception to the “but for” test is the situation where it is impossible to say which of two tortious sources caused

the injury, as where two shots are carelessly fired at the victim, but it is impossible to say which shot injured him: *Cook v. Lewis*, [1951] S.C.R. 830. Provided that it is established that each of the defendants carelessly or negligently created an unreasonable risk of that type of injury that the plaintiff in fact suffered (i.e. carelessly or negligently fired a shot that could have caused the injury), a material contribution test may be appropriately applied.

28 A second situation requiring an exception to the “but for” test may be where it is impossible to prove what a particular person in the causal chain would have done had the defendant not committed a negligent act or omission, thus breaking the “but for” chain of causation. For example, although there was no need to rely on the “material contribution” test in *Walker Estate v. York Finch General Hospital*, this Court indicated that it could be used where it was impossible to prove that the donor whose tainted blood infected the plaintiff would not have given blood if the defendant had properly warned him against donating blood. Once again, the impossibility of establishing causation and the element of injury-related risk created by the defendant are central.

See also: *Fallowka v. Pinkerton’s of Canada Ltd.*, 2010 SCC 5, [2010] 1 S.C.R. 132 at para 93: “[*Resurface Corp.*] clarified the law of causation, holding that absent special circumstances, the plaintiff must establish on a balance of probabilities that the injury would not have occurred but for the negligence of the defendant”.

[44] Mrs. Clements submits that her case involves “special circumstances” as contemplated in *Resurface Corp.* because it meets the two criteria set out in paragraph 25 of that decision. First, she says that due to factors outside of her control—the limits of the science of motorcycle dynamics—it is impossible to determine the combination of lower speed and lower weight at which the motorcycle could have been brought to a safe stop. Second, Mrs. Clements says that Mr. Clements’s breaches of the duty of care he owed to her—driving an overloaded motorcycle at excessive speed—exposed her to an unreasonable risk of the very types of injuries she suffered. Because of these factors, Mrs. Clements submits that it would offend basic notions of fairness and justice not to find Mr. Clements liable.

[45] It is important to keep in mind that the material-contribution test discussed in *Resurface Corp.* is not a test for determining factual causation. It does not provide a framework for determining whether a plaintiff has proven on a balance of probabilities that a defendant’s negligence has in fact caused harm. Rather, it

provides a basis for finding legal causation when there is a possibility that the defendant's negligent actions could have been a factual cause.

[46] In *Chambers v. Goertz*, 2009 BCCA 358, 96 B.C.L.R. (4th) 236, Mr. Justice K. Smith discussed the fact that the use of the material-contribution test leads to the finding of a legal, as opposed to a factual, connection between a defendant's negligence and the harm suffered by a plaintiff:

[17] In the passages from *Resurface Corp. v. Hanke*, to which Mr. Ahmad refers, Chief Justice McLachlin, writing for the Court, used the phrase in connection with cases in which it is impossible for the plaintiff to prove a causal link between the breach of duty and the harm, such as where the explication of the causal link is beyond the limits of current scientific knowledge (*Fairchild v. Glenhaven Funeral Services Ltd.*, [2002] UKHL 22, [2002] 3 All E.R. 305; *Barker v. Corus (UK) Plc.*, [2006] UKHL 20, [2006] 2 A.C. 572 – cases in which the defendants' breach of duty materially increased the risk of harm but it was not possible to prove a causal connection to the harm itself); where it is impossible to prove which of two simultaneous acts by two negligent actors caused the loss (*Cook v. Lewis*, [1951] S.C.R. 830, [1952] 1 D.L.R. 1); and where it may be impossible to prove what a third party, whose conduct was a "but for" cause of the loss, would have done absent the defendant's careless conduct (*Walker Estate v. York Finch General Hospital*, 2001 SCC 23, [2001] 1 S.C.R. 647, 198 D.L.R. (4th) 193). As this Court noted in *Sam v. Wilson*, 2007 BCCA 622, 78 B.C.L.R. (4th) 199 at para. 109, 249 B.C.A.C. 228, **this use of "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": *Resurface Corp. v. Hanke*, para. 25.**

[Underlining in original; bold added.]

[47] Although the discussion of the material-contribution test in *Resurface Corp.* is *obiter dicta*—the appeal was allowed on the basis that the Court of Appeal should not have interfered with the finding of the trial judge that the manner in which the plaintiff was injured was not reasonably foreseeable—the Supreme Court of Canada clearly intended to provide guidance with respect to the issue of causation. Accordingly, what it said must be accepted as authoritative in that regard: *Reilly v.*

Canada (Attorney General), 2008 BCCA 167, 77 B.C.L.R. 230 at paras. 69, 70, applying *R. v. Henry*, 2005 SCC 76, [2005] 3 S.C.R. 609.

[48] However, I do not read *Resurface Corp.* as supporting resort to the material-contribution test whenever a defendant's negligence has materially increased a plaintiff's risk of injury and it is impossible for the plaintiff to prove that that negligence was a factual cause of the injury. To do so would substantially alter the existing law and would have the effect of displacing but-for as the primary test for determining causation. It is only in exceptional circumstances that resort to the material-contribution test will, as a matter of policy, be appropriate.

[49] It is important to keep in mind that in *Resurface Corp.*, the Court was not purporting to change the law but, rather, was reaffirming existing principles. This is evinced by the fact that McLachlin C.J. referred to two of the Court's previous decisions as examples of when the material-contribution test could properly be used to find causation.

[50] The first of those cases is *Cook v. Lewis*, [1951] S.C.R. 830, which involved a hunter, Mr. Cook, who was injured as a result of being shot by one of two other hunters, Mr. Lewis and Mr. Aikenhead. Mr. Cook's action for damages against both Mr. Cook and Mr. Aikenhead was dismissed by a jury. That verdict was set aside on appeal as being perverse and a new trial was ordered. In confirming that order, the Supreme Court of Canada discussed how the law should be applied if the jury at the new trial found that both Mr. Cook and Mr. Aikenhead had negligently fired in Mr. Lewis's direction but could not determine, on a balance of probabilities, whose gun had caused the injuries. In that event, the but-for test would result in neither Mr. Cook nor Mr. Aikenhead being held liable.

[51] Being of the view that it would not be just to leave Mr. Lewis without redress, Mr. Justice Cartwright (as he then was) opined that, in the circumstances, both Mr. Cook and Mr. Aikenhead should be held liable. In this regard he stated, in part (at 842):

The judgment in *Summers v. Tice* [(1948), 5 A.L.R. (2d) 91 (Calif. S.C.)] reads in part as follows:

... When we consider the relative position of the parties and the results that would flow if plaintiff was required to pin the injury on one of the defendants only, a requirement that the burden of proof on that subject be shifted to defendants becomes manifest. They are both wrongdoers – both negligent toward plaintiff. They brought about a situation where the negligence of one of them injured the plaintiff, hence, it should rest with them each to absolve himself if he can. The injured party has been placed by defendants in the unfair position of pointing to which defendant caused the harm. If one can escape the other may also and plaintiff is remediless. Ordinarily defendants are in a far better position to offer evidence to determine which one caused the injury. This reasoning has recently found favour in this Court.

I do not think it necessary to decide whether all that was said in *Summers v. Tice* should be accepted as stating the law of British Columbia, but I am of opinion, for the reasons given in that case, that if under the circumstances of the case at bar the jury, having decided that the plaintiff was shot by either Cook or Akenhead, found themselves unable to decide which of the two shot him because in their opinion both shot negligently in his direction, both defendants should have been found liable. I think that the learned trial judge should have sent the jury back to consider the matter further with a direction to the above effect, in view of their answer to question 3 [i.e., “No” to the question, “If the Plaintiff was shot by one of the Defendants are you able to decide which one?”].

[Emphasis added.]

[52] Mr. Justice Dickson (as he then was) later described *Cook* as a case in which liability could be brought home to two negligent defendants who, by their respective actions, had “removed the opportunity of the plaintiff to show which one of them in fact injured him”: *Dahberg v. Naydiuk* (1969), 10 D.L.R. (3d) 319 at 326 (Man. C.A.).

[53] The other case cited by the Chief Justice as an example of when it would be appropriate to use the material-contribution test is *Walker Estate v. York Finch General Hospital*, 2001 SCC 23, [2001] 1 S.C.R. 647. In that case, Mr. Walker contracted HIV from blood supplied by the Canadian Red Cross Society (the “CRCS”). The issue was whether the CRCS should be held liable because of its negligence in screening donors. In discussing the issue of causation, Mr. Justice Major expressed the view that in situations where it is impossible to prove what an infected donor would have done had he or she been properly warned, the but-for

test would unfairly result in the plaintiff being unable to prove factual causation. In such circumstances the material-contribution test can be used. As Major J. stated:

87 With respect to negligent donor screening, the plaintiffs must establish the duty of care and the standard of care owed to them by the CRCS. The plaintiffs must also prove that the CRCS caused their injuries. The unique difficulties in proving causation make this area of negligence atypical. The general test for causation in cases where a single cause can be attributed to a harm is the "but-for" test. However, the but-for test is unworkable in some situations, particularly where multiple independent causes may bring about a single harm.

88 In cases of negligent donor screening, it may be difficult or impossible to prove hypothetically what the donor would have done had he or she been properly screened by the CRCS. The added element of donor conduct in these cases means that the but-for test could operate unfairly, highlighting the possibility of leaving legitimate plaintiffs uncompensated. Thus, the question in cases of negligent donor screening should not be whether the CRCS's conduct was a necessary condition for the plaintiffs' injuries using the "but-for" test, but whether that conduct was a sufficient condition. The proper test for causation in cases of negligent donor screening is whether the defendant's negligence "materially contributed" to the occurrence of the injury. In the present case, it is clear that it did. "A contributing factor is material if it falls outside the *de minimis* range" (see *Athey v. Leonati*, [1996] 3 S.C.R. 458, at para. 15). As such, the plaintiff retains the burden of proving that the failure of the CRCS to screen donors with tainted blood materially contributed to Walker contracting HIV from the tainted blood.

[Emphasis added.]

[54] The question of when it will be appropriate to resort to the material-contribution test discussed in *Resurface Corp.* has been the subject of some appellate consideration and considerable academic writing. In my view, the answer to this question is fully and articulately set out in a paper by Professor Erik S. Knutsen entitled "Clarifying Causation in Tort", found at (2010), 33 Dal. L.J. 153. Professor Knutsen's view, with which I agree, is that a judge can resort to the material-contribution test in only two situations: what he refers to as ones involving circular causation and dependency causation. In all other cases, causation must be determined on the but-for test.

[55] *Cook* is an example of circular causation. The but-for test makes it impossible to determine which of two negligent parties caused the damage suffered by the plaintiff: as it is just as likely to have been A, it is impossible to show, on a

balance of probabilities that it was B, and *vice-versa*. As Professor Knutsen said (at 164):

The Supreme Court's words in *Hanke* are likely trying to express that, in instances where there is complete circular logic which makes the "but for" test unanswerable, like in cases where it is impossible to prove which one of two or more tortious sources caused the plaintiff's injury, one can reach for the material contribution test to find causation. It is a question not of "how much" but of "which one." The Supreme Court is not saying, however, that the material contribution test applies to any case where there is more than one tortfeasor. That was the mistake previous courts kept committing. Rare is the case where a fact scenario with multiple tortfeasors requires the material contribution test. McLachlin C.J.C.'s example of *Cook v. Lewis* is likely trying to communicate that, in instances of "circular causation," where the "but for" test produces an endless circular answer that is unsatisfactory because one potential causal source is certainly a cause of harm, one can use the material contribution test as long as both pre-conditions are met.

[Emphasis added.]

[56] *Walker Estate* is an example of dependency causation, where proof of factual causation depends on establishing what one party would have done if another party had not acted in a negligent manner, something which may be impossible to prove. In this regard, Professor Knutsen states (at 164):

The second example in *Hanke* where the material contribution test is suitable to use involves a chain of multi-party actions, each depending on the other, in a situation of "dependency causation." The "but for" test may be impossible to prove when one must determine what a party would have done had the defendant not been negligent, and thus how that party's decision affects the plaintiff's resulting injury. The example the Court gives is *Walker v. York Finch Hospital*, a case where it may have been impossible to prove "but for" causation. In that case, it may have been impossible to prove that, but for the negligent screening of blood donors by the defendant blood collection service, a person with HIV-infected blood may not have donated the infected blood which eventually injured the plaintiff. The causal link between the at-fault defendant and the injured plaintiff is thus mediated by the action of a third party. This "dependency causation" necessarily relies on evidence of causation beyond the relationship between the at-fault defendant and the injured plaintiff, and is potentially very difficult to obtain.

[Footnotes omitted, emphasis added.]

[57] There are two further passages from Professor Knutsen's paper to which I wish to refer, as I consider them to be particularly important regarding the limited use of the material-contribution test. The first is a reminder that in the vast majority of

cases, the but-for test yields logical and reasonable answers, regardless of the result. In other words, there is generally nothing unfair about the fact that a plaintiff is unable to prove that the negligence of a particular defendant was a cause of his or her injuries. This is because, as Lord Diplock stated in *Browning v. War Office*, [1962] 3 All E.R. 1089 at 1094 (C.A.):

A person who acts without reasonable care does no wrong in law; he commits no tort. He only does wrong, he only commits a tort, if his lack of care causes damage to the plaintiff.

[58] In explaining why the material-contribution test should be reserved for rare cases involving logical impossibilities, Professor Knutsen said (at 167):

“But for” works when there is enough evidence to prove, on a balance of probabilities, that the defendant’s breach of the standard of care was a cause of the plaintiff’s injury. The reverse is also true. “But for” works when there is insufficient evidence to prove, on a balance of probabilities, that the defendant’s breach of the standard of care was not a cause of the plaintiff’s injury. The logical answer, whether in favour of the plaintiff or defendant, is usually the result. The material contribution test is not a solution for evidentiary insufficiency. Plaintiffs must still prove causation on a balance of probabilities. The only instances “but for” does not work are in instances where there is insufficient evidence to prove “but for” causation *and* there is either circular or dependency causation.

[Emphasis in original.]

[59] Perhaps of more importance in the context of the case at bar is Professor Knutsen’s discussion of the impossibility requirement and the reference in *Resurface Corp.* to the “current limits of scientific knowledge”. As he points out, our knowledge of science is ever-increasing. What is provable today may not have been provable last year; what cannot be proven today may be provable next year. That forensic science is not always able to provide an answer to a causation question is not a reason for doing away with causation as an essential element of a plaintiff’s case. In this regard, Professor Knutsen said this (at 171):

“Current limits of scientific knowledge” should not be read out of context to mean that the material contribution test is appropriate in any case where the science involved is difficult, complex, or “just not there yet.” Frankly, that is just about any case where personal injury is involved. The science of medicine as it relates to the interaction of disease, medication, and trauma on the body is more of an art than a science. It is constantly evolving.

Indeed, one might argue it will always have current limits that soon get eclipsed by future, unknowable limits. But the Supreme Court's statement is nothing more than an example of one reason why there may be a logical impossibility in proving causation with the "but for" test. It is an explanatory reason, so to speak, for the existence of circular causation. It is not a reason to turn to the material contribution test. It is certainly not a gatekeeper for the material contribution test. The gatekeeping function is met by the two pre-conditions which must be satisfied in instances of circular or dependency causation.

[60] The approach taken by the former House of Lords in recognizing that there will be exceptional circumstances that justify, as a matter of policy, departing from the but-for test is instructive. In *Fairchild v. Glenhaven Funeral Services Ltd.*, [2002] UKHL 22, [2003] 1 A.C. 32, the House dealt with the case of an employee who had contracted mesothelioma as a result of being negligently exposed to asbestos dust at different times while working for different employers. It was impossible for the employee to prove which employer's negligence was the but-for cause of his condition since that disease can be caused by the inhalation of a single asbestos fibre. Given that all of the employers had exposed the employee to the same risk, the House held that all should be liable. However, the question of how liability should be apportioned was not decided until *Barker*. In that case, not only had the employers been negligent in exposing an employee to asbestos dust, but the employee himself had also been negligent in that regard. The House concluded that liability should be several, not joint and several, and proportionate to the exposure. As an aside, it should be mentioned that following this decision, Parliament statutorily imposed joint and several liability in mesothelioma cases: *Compensation Act 2006* (c. 29), s. 3(2).

[61] *Fairchild* and *Barker* are cases of circular causation. This is evinced by the following statement by Lord Hoffmann in *Barker* (at para. 17):

The purpose of the *Fairchild* exception is 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.

[62] Also pertinent is Lord Hoffmann's discussion of the distinction between the situation in *Fairchild* and that in *Wilsher v. Essex Area Health Authority*, [1988] A.C. 1074 (H.L.). In *Wilsher*, a premature baby who had been subjected to a number of medical procedures developed retrolental fibroplasia ("RLF"), an eye condition that results in blindness. One of those procedures involved the negligent administration of an excessive amount of oxygen that increased the likelihood of the baby developing RLF and may well have caused it. However, there were a number of other possible causes of the RLF and it was scientifically impossible to determine whether excess oxygen caused or contributed to the baby becoming blind. In those circumstances, the House held that the health authority was not liable. In concluding his discussion of *Wilsher* in *Barker*, Lord Hoffmann said:

24 If the distinction between *Fairchild* and *Wilsher* does not lie in the fact that in the latter case a number of very different causative agents were in play, I think it would be hard to tell from my *Fairchild* opinion what I thought the distinction was. In my opinion it is an essential condition for the operation of the exception that the impossibility of proving that the defendant caused the damage arises out of the existence of another potential causative agent which operated in the same way. It may have been different in some causally irrelevant respect, as in Lord Rodger's example of the different kinds of dust, but the mechanism by which it caused the damage, whatever it was, must have been the same. So, for example, I do not think that the exception applies when the claimant suffers lung cancer which may have been caused by exposure to asbestos or some other carcinogenic matter but may also have been caused by smoking and it cannot be proved which is more likely to have been the causative agent.

[63] 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.

[64] What does this mean for the present case? It means that once the trial judge determined that Mrs. Clements had failed to establish that the motorcycle would not have capsized but for Mr. Clements's negligence, he should have found that causation had not been proven. This is not a case involving either circular or dependency causation. Rather, it is a case like many others in which, given the current state of knowledge, it is not possible to prove whether the negligent actions of a defendant caused harm. I do not consider it either unfair or unjust, or, to use the words of Professor Knutsen (at 172), "just plain wrong" not to fix Mr. Clements with liability when Mrs. Clements has been unable to show factually that his negligence was a cause of her damages.

Conclusion

[65] I would allow this appeal, set aside the trial judge's formal order dated February 4, 2009 (entered October 6, 2009), and dismiss the action.

"The Honourable Mr. Justice Frankel"

I agree:

"The Honourable Mr. Justice Tysoe"

I agree:

"The Honourable Madam Justice Garson"