

**IN THE SUPREME COURT OF BRITISH COLUMBIA**

Citation: *Clements (Litigation Guardian of) v.  
Clements,*  
2009 BCSC 112

Date: 20090204  
Docket: 0627521  
Registry: Prince George

Between:

**Joan Clements, by her Litigation Guardian, Donna Jardine**

Plaintiff

And

**Joseph Clements**

Defendant

Before: The Honourable Mr. Justice Grauer

**Reasons for Judgment**

Counsel for the Plaintiff:

D. Byl  
K. Fisher

Counsel for the Defendant:

L. Dunn

Date and Place of Trial/Hearing:

December 9 – 12, 2008  
Prince George, B.C.

## INTRODUCTION

[1] This action arises out of a motorcycle accident that happened on August 7, 2004, on Highway 16, some 7 km east of McBride, B.C. The defendant was the operator of the motorcycle. The plaintiff, his wife, was riding as his passenger. The plaintiff suffered a severe traumatic brain injury, and brings this action by her litigation guardian. By consent of the parties, only liability was tried.

[2] The accident occurred after the defendant lost control of the motorcycle while passing a blue BMW Z3 sports car. The defendant's position is that the loss of control was caused by a rapid deflation of the motorcycle's rear tire resulting from the sudden expulsion of a nail that had punctured the tire. He maintains that the accident was inevitable and that he was not in any way negligent. In the alternative, he argues that if there was any failure to take reasonable care on his part, such failure was not a cause of the plaintiff's injuries in accordance with the "but for" test for causation mandated by the Supreme Court of Canada in *Hanke v. Resurface Corp.*, [2007] 1 S.C.R. 333.

[3] The plaintiff acknowledges the significant contribution of the tire deflation, but argues that there were failures on the part of the defendant in a number of respects to take reasonable care for the safety of his passenger, and that regardless of which test for causation is applied ("but for" or "material contribution"), those failures were causative of the injuries suffered by the plaintiff.

[4] In *Snell v. Farrell*, [1990] 2 S.C.R. 311, Sopinka J. stated the following at para. 27:

Causation is an expression of the relationship that must be found to exist between the tortious act of the wrongdoer and the injury to the victim in order to justify compensation of the latter out of the pocket of the former.

[5] For the reasons which follow, I have concluded that there were tortious acts on the part of the defendant that were sufficiently related to the plaintiff's injuries to justify compensation of the plaintiff out of the pocket of the defendant.

#### **EVENTS LEADING UP TO THE ACCIDENT**

[6] The defendant, Mr. Joseph Clements, is 56 years old, and has been employed for 22 years at Lakeland Mills in Prince George, B.C. I found him to be a thoroughly credible witness. He testified that he has been riding motorcycles ever since he was 16 years old, including street bikes, touring bikes and the odd chopper. He has had 12 years of experience with Harley-Davidson touring bikes, and in the fall of 1999, he purchased a 1998 Harley Davidson Road Glide touring bike with all touring options. His wife, Mrs. Joan Clements, had never owned her own motorcycle, but had been riding on touring bikes with her husband for 12 years.

[7] Mr. and Mrs. Clements planned a trip for August 7, 2004. The focus of the trip was twofold: to see their youngest daughter in Kananaskis, Alberta, and then to carry on to Edmonton for the second annual National HOG Rally (HOG being an acronym for Harley Owners Group). The plan was to leave reasonably early in the morning, arriving in Kananaskis by late evening.

[8] On August 6, 2004, Mr. Clements inspected his motorcycle. He jacked it up on a cycle stand to make it level, and went over it thoroughly. He checked all fluid

levels, checked the lights, wiped off brake dust, checked the brake pads, checked the air pressure in the tires, and washed the bike. He did not inspect the tire treads, because the tires were almost new. This inspection disclosed no problems. He also checked the Weather Channel.

[9] Mr. Clements then worked the night shift, starting at 3:30 p.m. on August 6, and ending at 12:30 a.m. on August 7. He was home by 1:00 a.m. His job is physically demanding, and he was tired. Nevertheless, he had difficulty sleeping that night, worrying about the trip. He tossed and turned.

[10] Mr. and Mrs. Clements were up and about by 7:30 a.m. The skies were blue, but when Mr. Clements checked the Weather Channel, he learned that a large storm was moving in. He suggested to his wife that they hold off on the trip. He said he was tired, had had a rough shift, and had not slept well. He pointed out that the weather was changing, and he would rather not travel in the rain. He tried to persuade his wife to phone their daughter and say that they would come the next day. His wife would have none of it. They argued, but he was unable to convince her. Mr. Clements gave in, and they left Prince George at about 10:30 a.m. in light rain, heading east on Highway 16.

[11] Between Tabor Mountain and Purden, the storm hit, and the rain pounded down. They pulled off at Purden to change out of their soaking-wet clothing into full rain gear. This meant removing their leather jackets, leather vests, sweatshirts, hoodies, jeans, leather chaps, socks and boots, all of which were soaked. These

were wrapped up in a garbage bag and stowed on top of the rear storage bin, called a "Tour Pak".

[12] For cargo, the Harley-Davidson Road Glide was equipped with two hard bags, one mounted on each side of the rear wheel, and the Tour-Pak mounted above the rear wheel, slightly behind the axle, rather like an automobile trunk. While Mr. Clements was at work on August 6, Mrs. Clements packed their gear in these receptacles.

[13] The weight carried on the motorcycle was an issue in this case.

Mr. Clements weighed about 210 lbs, and his wife about 200 lbs. The bike itself weighed 715 lbs as shipped dry from the factory (without any fluids or gas), and had a gross vehicle weight rating (GVWR) of 1179 lbs. This constituted the maximum allowable loaded vehicle weight. The Tour Pak, an add-on, weighed about 15 lbs. From this, it is apparent that when one takes into account the weight of the motorcycle, the weight of the gasoline (30 lbs), all the other fluids including oil and transmission fluid, and the weight of Mr. and Mrs. Clements, the GVWR had likely been reached before including any clothing, helmets, tools or luggage.

Mr. Clements testified that he was unaware of the vehicle's GVWR, and was not familiar with that part of the manual.

[14] When asked on discovery to estimate the weight of the clothing and other items carried on the bike that day, Mr. Clements suggested 150 lbs. After discovery, nearly four years after the accident, his counsel arranged for him to assemble all of the items that he could recall having with them that day, and weigh them on his

bathroom scale at home. This process proved to be somewhat awkward, but the result was 137 lbs. Still not satisfied, defence counsel arranged for a re-weighing of the items on the considerably larger scale at Allen's Scrap & Salvage Ltd. in Prince George, yielding a weight of 87 lbs (dry).

[15] Considering Mr. Clements' description of what was carried on the bike, I find that even before their clothes were soaked, the bike's GVWR had been exceeded by an amount in the range of 100 lbs. I also accept Mr. Clements' evidence that, notwithstanding this excess weight, the bike did not feel unbalanced prior to the accident.

[16] After Purden, the weather conditions remained very bad. It was pouring like crazy, the rain bouncing off the road. They passed through five different construction zones, and Mr. Clements could not keep the dirt and muck off his visor and windshield. They finally pulled in to McBride.

[17] There, they stopped at the Chevron station and Mr. Clements gassed up. He carried out a visual inspection of his motorcycle, and cleaned off the windshield and the lights. On visual inspection, everything looked normal, including the tires. He did not test the air pressure in the tires. Mr. and Mrs. Clements decided to go in for lunch.

[18] Over lunch, Mr. Clements tried once more to get his wife to agree to stop. He told her that he needed to rest up. Driving through the different construction zones had been very tiring, and he pointed out that the passenger does not have to go through what the operator goes through. His wife was unimpressed. He noted that

the Sandman Inn was right there, and they could get a room. Mrs. Clements refused. Mr. Clements gave in once again.

[19] Mr. Clements was at least able to stall over lunch long enough to feel somewhat rested when they set out again. They met another cyclist, Hugo, who was also heading east, on his way to Edmonton. They decided to travel together, at least as far as Jasper. Hugo was also able to lend Mr. Clements a better visor for his helmet. In these circumstances, Mr. Clements felt better about carrying on.

[20] When they left McBride, Hugo was ahead. Mr. Clements had to hold back due to traffic, and they fell in behind a big tractor-trailer rig pulling out onto Highway 16 from the other side. A few kilometres out of McBride, Hugo "blew past the semi". Mr. Clements moved his bike to the yellow centreline, waiting for his chance to pass. After he did so, he pulled back into the eastbound lane in front of the semi-trailer, and Hugo was some distance ahead.

[21] Mr. Clements believes that there were two vehicles ahead of him at that point, a Ford or Chevy SUV, and the blue BMW Z3. There was a bit of a curve in the road, then they crossed a bridge and came to a long straight stretch. The rain was now fairly light, and there was no oncoming traffic. Mr. Clements pulled out to pass.

## **THE ACCIDENT**

### **1. Direct Evidence**

[22] Three witnesses gave evidence about how the accident happened – Mr. Clements, and the two occupants of the blue BMW: its driver, Suzanne Enders,

and her husband, Garry Enders. While in most material respects their evidence was generally consistent, no two versions were quite the same. I am nevertheless satisfied that they were all doing their best to be truthful. Such are the frailties of human recollection.

[23] Mrs. Enders, who testified for the plaintiff, left the McBride Chevron Station just ahead of the two motorcycles. After leaving McBride and passing the semi-trailer, she activated her cruise control, setting it between the speedometer marks for 105 km/h and 110 km/h, closer to 110. She would estimate her cruising speed at 108 km/h. It was still raining, although lightly. The road was wet and there were puddles in the traffic-worn ruts in the road.

[24] As she drove eastbound on Highway 16 with her cruise control on, Mrs. Enders was passed by a single motorcyclist. She was expecting the second motorcycle, which had two riders on it, to pass as well, but it did not. She glanced out her window, to her left, and saw the second motorcycle beside her. It began wobbling, particularly its handlebars. She said something to her husband and touched her brakes. Her husband, who had been sleeping, woke up. The motorcycle was now ahead of her, still in the oncoming lane. Her husband told her to give the motorcycle some room, and so she continued to slow down. The motorcycle also slowed, and began wobbling even more. Mrs. Enders described it as wobbling in its front end, making bigger and bigger movements left and right, but not weaving from side to side across the lane.

[25] Mr. Enders told his wife to give the motorcycle lots of room because "they're going down". She slowed even more, and saw the motorcycle fall down onto its left side, then flip forcibly over onto its right side, throwing off the two riders. At the time, there was no other traffic around her. She pulled over, and her husband waved down the next vehicle following behind, which was the semi-trailer.

[26] Mr. Enders, who was a witness for the defendant, is the general manager of a motorcycle shop in Prince George. He has been riding motorcycles of all types for 35 years. He testified that he woke up when his wife stepped on the brakes, to see a motorcycle to the left of the car and slightly in front, at the 10 o'clock position. The whole bike was wiggling, especially its back end. It looked as though it was in one of the ruts. Everything happened quickly. He told his wife to back off and give the bike more space. The bike moved ahead, and then crossed back over the yellow centreline. As it slowed down, it began to wiggle even more. Mr. Enders thought that perhaps the yellow line was what had caused the problem, because it is more slippery than the pavement. The handles were moving back and forth in a radical manner, known as "tank slappers".

[27] From experience, Mr. Enders knew that once a bike starts going side to side like that, it is just a matter of time until it goes down. The bike indeed went down, on its left side, but then hooked and flipped over to its other side. He would estimate that it was going approximately 45 km/h when it capsized.

[28] Mr. Clements testified that he passed the SUV and the BMW, and then headed back across the centre line into the eastbound lane. All of the other

evidence suggests that there was only the BMW to be passed, and I find that to be the case. The photographs clearly show that the next vehicle on the scene heading eastbound was the semi-trailer. There was no other vehicle between it and the BMW.

[29] As he crossed the yellow centre line, Mr. Clements felt a bit of a wobble. He attributed this to the yellow line being slick, and so gave a bit of gas to straighten the bike out. He then noticed a more serious wobble from the back end and began to slow down, but as he geared down the whipping motion kept getting worse. He told his wife to warn the car behind them by waving her arms, and he began to check out the sides of the road. He reckoned that they were going down, and wanted to find as safe a place to lay the bike down as possible. The back end kept getting harder to control and he was weaving between the centre line and the white line on the right side.

[30] Mr. Clements saw that along the right side of the road there were telephone poles and a barbed wire fence, while on the left side was a ditch. Neither side was inviting, and he realized he would have to lay the bike down on the road. He was fighting like he had never fought before. He decided to put the bike down on its left side, concluding that he and his wife should come out okay if they rode the high (right) side. He told her to bail on the right, and he would put it down in the middle of the highway. His next recollection was getting up after regaining consciousness and looking around for his wife, who was lying directly beside the bike.

[31] Mr. Clements had never experienced anything like that before. He also had never experienced a rear tire deflation before.

[32] Mr. Clements conceded that he would have accelerated to pass the BMW and therefore was going comfortably faster than the BMW's 108 km/h. The speed limit was 100 km/h. Given the relative speed at which one could reasonably expect to be traveling while passing another vehicle, I am satisfied that Mr. Clements' speed was 120 km/h or more as he passed the BMW.

[33] On examination for discovery, Mr. Clements agreed that the speed at which he was traveling, and the weight he was carrying, were "factors that materially contributed to this motor vehicle accident". Under cross-examination at trial, he explained that he did not really understand that question, but conceded that he did understand it once the word "material" was deleted. He agreed that his speed and the weight were "factors that contributed to this motor vehicle accident". He also thought that the weather and the slipperiness of the yellow line were contributing factors. He did not feel that fatigue was a contributing factor, as he felt rested after the stop in McBride.

[34] As an experienced motorcycle rider, Mr. Clements accepted the validity of the following passage contained in the Harley Davidson Owner's Manual under the heading SAFE OPERATING RULES:

Do not exceed the legal speed limit or drive too fast for existing conditions. Always reduce speed when poor driving conditions exist. High speed increases the influence of any other condition affecting stability and possibility of loss of control.

2. Expert Evidence

[35] The motorcycle was inspected by William Cliff P. Eng., whose observations and materials were supplied to Duane MacInnis P. Eng. Mr. MacInnis gave evidence at trial and his report was entered into evidence. He was qualified as an expert in accident reconstruction and motorcycle dynamics.

[36] It was clear that the motorcycle's rear tire, which was relatively new, had been punctured right through the tread. Mr. MacInnis thought it most likely that a nail had been picked up by the tire at some point earlier that day, and then was ejected due to a combination of forces that arose when the motorcycle pulled out to pass the BMW. Those forces would have consisted of increased torque on the rear tire and faster rotation due to throttle application and the effect of lane changing. The expulsion of the nail would have then led to a rapid deflation of the tire, but not a blowout. On a balance of probabilities, taking into account not only Mr. MacInnis's opinion, but the evidence of Mr. Clements and Mr. and Mrs. Enders, I accept this scenario as being correct.

[37] Mr. MacInnis then expressed the opinion that this rapid deflation caused a loss of control leading to the weaving of the motorcycle and its eventual capsized. He was quite clear, and I accept, that the deflation would have caused the weaving, and not vice versa.

[38] Mr. MacInnis was unable to say how fast the tire would have deflated, as the calculation could not be made with scientific certainty. He estimated on a provisional

basis that the time to half pressure would be in the range of 40 seconds. The rate of air evacuation would decrease as the pressure decreased.

[39] On the question of the effect of weight on recovery, Mr. MacInnis stated the following in his report at page 9:

*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.* [Emphasis added.]

An overweight condition of about 5% [which Mr. MacInnis assumed to exist here] 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.

[40] Under cross-examination, Mr. MacInnis indicated that he was unable to provide any defensible numeric value concerning the effect of weight. It was his view that more important than the overall weight was the placement of the weight. Motorcycles are inherently unstable in the sense that they will fall over if left on their own, and riding them is a matter of controlling their instability. If the weight is aft and high-centered, then it will likely add to the instability.

[41] As noted, I have found that this motorcycle was overloaded to the extent of more than 100 pounds in excess of its GVWR, and that much of the weight was aft (the passenger and the luggage) and high-centered (piled on top of the Tour-Pak behind the passenger). I find that this would have increased the instability of the motorcycle in the event of a weave caused by tire deflation.

[42] With respect to the effect of speed on the loss of control and recovery failure, Mr. MacInnis had this to say in his report at page 9:

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 Cossalter work [the celebrated studies in motorcycle dynamics carried out by Professor Cossalter of the University of Padua], *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. [Emphasis added.]

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.

[43] At page 10 of his report, Mr. MacInnis reviewed various tactics recommended by authorities for the rider confronted with a flat tire, and then commented as follows:

These tactics may successfully restore control for a lightly loaded motorcycle traveling on a straight dry portion of road at non-highway speeds, without any urgent need to brake or steer. There is no safe training or exercise that can prepare a rider to deal with a rear tire deflation at highway speeds.

In this incident the rider was confronted with the rear tire deflation in heavy rain with water covered road surfaces, as he was operating a fully loaded motorcycle while traveling at highway speed and steering

in a lane change maneuver. These factors would make an unrecoverable weave instability almost certain.

Recovery may have been more difficult because the rider was facing increased risk while driving in the oncoming lane during the passing maneuver. His attempts to control the weave may have had the added urgency of steering to the right to escape the fear [of] oncoming traffic.

[44] Mr. MacInnis's summary at the end of this report included the following opinions:

11. The unrecoverable weave instability was likely caused by the flat rear tire.
12. Any motorcycle traveling at highway speeds loaded or not, would be hazardous to control with a suddenly flat rear tire.
13. A fully loaded motorcycle with a pillion passenger would be particularly difficult to control when it began to weave while being steered.
14. Until an instability developed, the rider would likely be unaware of the presence of the nail in the rear tire.
15. A rapid deflation of a rear tire while maneuvering at highway speed is not a situation that is provided as an exercise in training.
16. There is no practical way to be prepared for a rapid deflation of a rear tire while maneuvering a loaded motorcycle at highway speed.
17. A rapid tire deflation at 100 instead of 110 – 115 km/h would likely make little practical difference to controllability.
18. The timing of the tire failure coupled with the loaded condition of the motorcycle would likely create an unrecoverable loss of control.
20. The effect of the 5% overload condition is mathematically unpredictable. The overload condition of a few percent would likely have no significant role in the onset of the instability, or the operator's attempts to recover control.

[45] Mr. McInnis 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.

#### **BREACH OF DUTY OF CARE**

[46] At trial, it was conceded on behalf of the defendant that he breached the duty of care that he owed to the plaintiff as his passenger by driving at an excessive speed. I have found his speed at the relevant time to have been in the range of 120 km/h in poor weather conditions with a heavily loaded bike on a highway where the speed limit (for favourable road conditions) was 100 km/h. In my view, the circumstances dictated a speed below the speed limit, in the range of 90 km/h. I have no difficulty in concluding that the defendant fell below an acceptable standard of care in this regard.

[47] The plaintiff alleged that the defendant further fell below acceptable standards of care by not inspecting his tires before he left the gas station at McBride, and by driving when he was too fatigued. On the evidence, I am unable to find either that applicable standards of care required the defendant to carry out any inspection beyond what he did in Prince George before starting the trip, or that he was too fatigued to drive safely.

[48] With respect to what happened after the tire began to deflate, and the motorcycle started to weave, I am satisfied that the defendant's efforts to control and recover from the resulting instability were exemplary.

[49] I do find, however, that the defendant further fell below an acceptable standard of care in his failure to understand the gross vehicle weight rating of his motorcycle, and to ensure that it was not overloaded.

### CAUSATION

[50] We now come to the principal issue in this case.

[51] I have found that the defendant breached his duty of care to the plaintiff in two respects, one of which (driving at a speed that was excessive in the circumstances) was conceded. The defendant argues, however, that neither of those breaches can be considered in law to have caused the plaintiff's injuries in the sense discussed by the Supreme Court of Canada in the *Resurfice* case, *supra*.

[52] In *Resurfice, supra*, at paras. 20 through 25, the Chief Justice of Canada, for the Court, said this:

20 Much judicial and academic ink has been spilled over the proper test for causation in cases of negligence. It is neither necessary nor helpful to catalogue the various debates. It suffices at this juncture to simply assert the general principles that emerge from the cases.

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.

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.

[53] The defendant argues that the plaintiff has not met the onus upon her of establishing that "but for" the negligent acts of the defendant, she would not have sustained her injuries. According to the defendant, based upon the expert evidence of Mr. MacInnis, the accident was inevitable once the rear tire deflated, and would

have happened even if Mr. Clements had been traveling at the speed limit with a lighter load.

[54] The plaintiff argues that causation is established on either test discussed in *Resurfice*. The plaintiff submits that the special circumstances discussed by McLachlin C.J.C. in para. 24 of *Resurfice* exist here, so that the "material contribution" test should be applied. In the alternative, the plaintiff submits that even applying the "but for" test, the evidence establishes that it was a combination of the tire deflation, high speed and excess load that led to the unrecoverable weave and the plaintiff's injuries.

[55] The issue of causation was also discussed by the Supreme Court of Canada in *Athey v. Leonati*, [1996] 3 S.C.R. 458, where Major J., for the Court, said the following at paras. 13 through 19:

13 Causation is established where the plaintiff proves to the civil standard on a balance of probabilities that the defendant caused or contributed to the injury: *Snell v. Farrell*, [1990] 2 S.C.R. 311; *McGhee v. National Coal Board*, [1972] 3 All E.R. 1008 (H.L.).

14 The 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: *Horsley v. MacLaren*, [1972] S.C.R. 441.

15 The "but for" test is unworkable in some circumstances, so the courts have recognized that causation is established where the defendant's negligence "materially contributed" to the occurrence of the injury: *Myers v. Peel County Board of Education*; [1981] 2 S.C.R. 21, *Bonnington Castings, Ltd. v. Wardlaw*, [1956] 1 All E.R. 615 (H.L.); *McGhee v. National Coal Board*, *supra*. A contributing factor is material if it falls outside the *de minimis* range: *Bonnington Castings, Ltd. v. Wardlaw*, *supra*; see also *R. v. Pinsky* (1988), 30 B.C.L.R. (2d) 114 (B.C.C.A.), *aff'd* [1989] 2 S.C.R. 979.

16 In *Snell v. Farrell, supra*, this Court recently confirmed that the plaintiff must prove that the defendant's tortious conduct caused or contributed to the plaintiff's injury. The causation test is not to be applied too rigidly. Causation need not be determined by scientific precision; as Lord Salmon stated in *Alphacell Ltd. v. Woodward*, [1972] 2 All E.R. 475, at p. 490, and as was quoted by Sopinka J. at p. 328, it is "essentially a practical question of fact which can best be answered by ordinary common sense". Although the burden of proof remains with the plaintiff, in some circumstances an inference of causation may be drawn from the evidence without positive scientific proof.

17 It is not now necessary, nor has it ever been, for the plaintiff to establish that the defendant's negligence was the sole cause of the injury. There will frequently be a myriad of other background events which were necessary preconditions to the injury occurring. To borrow an example from Professor Fleming (*The Law of Torts* (8th ed. 1992) at p. 193), a "fire ignited in a wastepaper basket is . . . caused not only by the dropping of a lighted match, but also by the presence of combustible material and oxygen, a failure of the cleaner to empty the basket and so forth". As long as a defendant is part of the cause of an injury, the defendant is liable, even though his act alone was not enough to create the injury. There is no basis for a reduction of liability because of the existence of other preconditions: defendants remain liable for all injuries caused or contributed to by their negligence.

[56] As *Athey* was cited with approval in *Resurfice*, any seeming inconsistency between them must be considered to be more apparent than real. What is clear is that just because there were other events that were a necessary precondition to the injury occurring does not excuse a defendant from liability if his carelessness can be shown also to be a cause. If the plaintiff through no fault of her own cannot prove that causal connection, but can establish that the defendant's want of care exposed her to an unreasonable risk of injury of the very sort that occurred, then that will be sufficient. Altogether, the matter is "essentially a practical question of fact which can best be answered by ordinary common sense" (*Athey* and *Snell, supra*).

[57] In the present case, I have found that, as opined by Mr. MacInnis, the accidental rapid deflation of the motorcycle's rear tire during the process of acceleration in the course of a lane change and passing manoeuvre induced a weave instability from which the defendant was unable to recover, leading to the capsizing of the motorcycle and the injuries sustained by the plaintiff.

[58] On the evidence, I have no hesitation in concluding that the defendant's want of care was not causally connected to the creation of the weave instability. That, I am satisfied, was bound to occur as a result of the rapid deflation of the rear tire at highway speeds.

[59] But can the same be said with respect to the inability of the defendant, with his considerable experience, to recover from that weave instability? That is the question I must answer. Would the defendant have been able to recover from the weave instability, and thereby avoid the plaintiff's injuries, had he not been traveling at an excessive speed well above what the circumstances dictated, on an overloaded motorcycle?

[60] Mr. MacInnis thought it probable that the defendant would not have been able to recover even going the speed limit without excess load. But Mr. MacInnis readily conceded that this was largely conjectural on his part because that opinion could not be supported scientifically. No tests, studies or calculations were available to assist. Not even Professor Cossalter could provide an answer. Moreover, Mr. MacInnis assumed excess weight of no more than 5%, and excess speed in the range of 12.5 km/h, whereas I have found excess weight closer to 10% and excess speed of

at least 30 km/h (based on a safe traveling speed of approximately 90 km/h in all of the circumstances).

[61] What is clear from Mr. MacInnis's report as noted above, and I find, is that increasing speed and increasing load will each result in increasing instability, and both were present here beyond reasonably acceptable limits. Although Mr. MacInnis could not scientifically state what precise effect certain speeds or loads would have on stability, the correlation between them was not in doubt.

[62] In these circumstances, I am unable to accept Mr. MacInnis's opinion that the excess speed and the excess weight were non-contributing factors.

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

[64] Ordinary common sense, however, supports such a relationship. As the motorcycle manual itself stated, "High speed increases the influence of any other condition affecting stability and possibility of loss of control". All of this is consistent with the defendant's own impression of the factors that contributed to his accident.

[65] In these circumstances, I find that this case gives rise to the "special circumstances" discussed by McLachlin C.J.C. in *Resurfice* as justifying the application of the "material contribution" test. I have found that the defendant

breached his duty of care to the plaintiff 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 the plaintiff.

[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, 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. At the same time, the evidence did not establish that the plaintiff would have suffered harm in the absence of the defendant's breaches.

[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*. The defendant is accordingly liable.

[68] I should add that a number of cases were referred to me by the defendant where factors such as speed allegedly in excess of what was appropriate in the circumstances were considered not to be causally linked to the injury. In those instances, however, the conclusion was that the alleged negligent acts were not in

fact departures from the applicable standard of care. The cases were therefore not particularly helpful. I refer, for instance, to *Nason v. Nunes*, 2007 BCSC 266, 2008 BCCA 203, *Anderson v. British Columbia*, 2008 BCSC 41, and *Beecroft v. Ravenek Greenhouses Ltd.* (1997), 46 B.C.L.R. (3d) 324 (S.C.).

### CONTRIBUTORY NEGLIGENCE

[69] The defendant argued that in the event I found negligence on his part that was causally linked to the plaintiff's injuries, then I should find that the plaintiff was contributorily negligent. The particulars upon which the defendant relied focused in the main on the plaintiff's insistence that they proceed with their journey over the defendant's protests based on the combination of his fatigue and the weather conditions.

[70] It is tragically ironic that the plaintiff suffered such severe injuries in the wake of her own stubborn insistence on proceeding. In the circumstances, I accept the submission of counsel for the defendant that in dismissing the concerns of her husband, an experienced motorcycle operator, the plaintiff failed to take reasonable care for her own safety. I search in vain, however, for any causal link between her stubbornness and her injury.

[71] As I understand the law, it is not enough to say that if she had accepted her husband's advice, then they would have either stayed home or stayed at the motel in McBride, and the accident would have been avoided. They would have had to leave at some point, and the tire could well have deflated then with the same result.

[72] I have found that several factors materially contributed to this accident. The material factors were the rapid deflation of the rear tire at highway speed, giving rise to a weave instability from which the defendant could not recover due at least in part to his excessive speed and the overloaded state of the motorcycle.

[73] None of these factors was connected to the plaintiff's stubborn insistence on proceeding. She did not tell her husband to speed. Although she helped load the motorcycle, it was not her job to be aware of the GVWR and to load accordingly. She had nothing to do, of course, with the rapid deflation of the rear tire. It was Mr. Clements, not Mrs. Clements, who was responsible for the condition of the motorcycle and for the speed at which they were traveling.

[74] I have found that fatigue was not a contributing factor, and there was no evidence to support the contention that it was unreasonable to be driving a motorcycle on the highway in rainy conditions. These were the matters that gave rise to the concerns Mr. Clements expressed to his wife.

[75] In short, setting out in poor weather when the operator had not had enough sleep was not what caused the plaintiff's injuries. The plaintiff was injured because, when the rear tire deflated through no one's fault, the defendant was driving too fast with too heavy a load. That cannot be attributed to any fault on the part of the plaintiff.

## **CONCLUSION**

[76] In conclusion, I find the defendant 100% liable for the plaintiff's injuries.

[77] The plaintiff is entitled to her costs on Scale B, unless there are factors which would give rise to the application of Rule 37B. In that event, I ask that the parties provide their submissions in writing within 30 days.

"GRAUER J."