

COURT OF APPEAL

ON APPEAL FROM: The Supreme Court of British Columbia, from the order of the Honourable Mr. Justice Grauer pronounced the 4th day of February, 2009 at Prince George, British Columbia

BETWEEN:

JOAN CLEMENTS, by her Litigation Guardian, DONNA
JARDINE

RESPONDENT
(PLAINTIFF)

AND:

JOSEPH CLEMENTS

APPELLANT
(DEFENDANT)

RESPONDENT'S FACTUM

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(i)

OPENING STATEMENT

1. The Respondent (Plaintiff) suffered a severe traumatic brain injury when the Appellant (Defendant) lost control of his motorcycle while attempting to pass a BMW sports car on a wet stretch of highway. The trial judge held that the motorcycle was travelling at an excessive speed, and was overloaded. In the course of passing the BMW the motorcycle's rear tire began to deflate due to the expulsion of a foreign object, likely a nail. The Defendant was unable to control the motorcycle, which "capsized" and then flipped over. The trial judge held that the Plaintiff's injuries were the result of the Defendant driving too fast and with too heavy a load when his rear tire unexpectedly deflated. The trial judge therefore found that causation was established.

2. The Defendant's expert witness, Mr. MacInnis, agreed that speed and load were relevant to a motorcycle rider's ability to recover from a loss of control. The trial judge rejected Mr. MacInnis' opinion that the Defendant would have lost control even if he had not been driving too fast with an overloaded motorcycle. Mr. MacInnis's opinion was also based on incorrect assumptions about the motorcycle's speed and amount of overloading. As the trial judge found, what is clear from Mr. MacInnis's evidence is that although he could not "scientifically state what precise effect certain speeds or loads would have on stability, the correlation between them was not in doubt". Based on this and other evidence, including the Defendant's own impression of the factors that contributed to the accident, the trial judge found causation was established.

3. The Defendant's appeal seeks to narrow the circumstances in which "material contribution" applies in a fashion that ignores the terms of the test recently restated by the Supreme Court of Canada. The appeal also seeks to reform the law of damages by limiting recovery to the proportionate increase in risk created by the Defendant. Although both of these are legal submissions they are inconsistent with governing authority and principle. The remainder of the appeal is an attempt to re-try the facts.

PART 1
STATEMENT OF FACTS

Position with respect to Appellant's Statement of Facts

4. As explained in more detail below, the Appellant's Statement of Facts cites evidence that was not the subject of findings by the trial judge and is in some respects directly contrary to the trial judge's findings. The Plaintiff relies on the trial judge's findings of fact which were supported in the evidence set out in the following summary of the relevant facts.

Findings and evidence: speed

5. The Defendant admitted he had breached his duty of care to the Plaintiff by driving at an excessive speed.

6. The trial judge found the Defendant was travelling 120 kilometres per hour ("kph") or more when he lost control of the motorcycle on a wet mountain highway. There was evidence to support this finding. The accident occurred as the Defendant was passing a BMW sports car, which was operating with its cruise control set between 105 and 110 kph. The BMW driver estimated she was travelling at approximately 108 kph. The Defendant agreed he was travelling faster than the BMW as he passed. The posted speed limit for that section of highway was 100 kph and the trial judge concluded that "the circumstances dictated a speed below the speed limit, in the range of 90 kph". Witnesses estimated the motorcycle was going approximately 45 kph at the time it "capsized".

Reasons, paras. 23, 27, 32, 46, AR pp. 19, 20, 22, 27

Testimony of Ms. Enders, Tr. p. 20, ll. 34-40

Testimony of Defendant, Tr. p. 123, ll. 22-32; p. 142, ll. 7-16

See also "Road Sense for Riders", AB Vol. 3, p. 458

7. The Defendant accepted the following passage from the "Safe Operating Rules" section of the Harley Davidson Owner's Manual:

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.

Reasons, para. 34, AR p. 22

Testimony of Defendant, Tr. p. 147, ll. 1-26

Harley Davidson Manual, AB Vol. 1, p. 143

8. The Defendant agreed that both speed and weight were factors that contributed to the accident.

Reasons, para. 33, AR p. 22

Testimony of Defendant, Tr. p. 145, l. 37 – p. 146, l. 31

Findings and evidence: overloading

9. The trial judge found the motorcycle was overloaded by "more than 100 pounds in excess of its GVWR [gross vehicle weight rating]". The GVWR is the maximum allowable loaded vehicle weight including rider, passenger and cargo. The Defendant agreed that care and control of the motorcycle were in his hands, not the Plaintiff's. The Defendant did not know what the GVWR was for his motorcycle and had never read the applicable section of the owner's manual. As noted above, the Defendant agreed that speed and weight were factors that contributed to the accident.

Reasons, para. 13, AR p. 16

Testimony of Defendant, Tr. p. 127, l. 43 - p. 129, l. 38

Harley Davidson Owner's Manual, AB Vol. 1, p. 148

10. The Harley Davidson owner's manual warns against exceeding the motorcycle's GVWR, advising that "[o]verloading, particularly at the rear of a motorcycle, can cause instability". The Defendant also agreed with the following instructions from the owner's manual:

The addition of accessories and additional weight to this motorcycle can affect the motorcycle's stability, handling characteristics, and safe operating speed....

....Overloading the motorcycle ... will cause unstable handling and reduced braking efficiency which could result in an accident and personal injury.

...

Keep cargo weight concentrated close to the motorcycle and as low as possible to minimize the change in the motorcycle's centre of gravity. Distribute weight evenly on both sides of the vehicle and do not load bulky items too far behind the rider....Do not exceed 15 pounds maximum load in each saddlebag ... or 25 pounds maximum in Tour-Pak. Improper loading can cause vehicle handling problems, leading to personal injury.

Harley Davidson owner's manual, AB Vol. 1, pp. 145, 148

Testimony of Defendant, Tr. p. 147, l. 40 – p. 148, l. 44

11. There was evidence to support the trial judge's finding that the motorcycle's GVWR was exceeded by over 100 pounds. The GVWR for the Defendant's model of motorcycle was 1179 pounds. The trial judge found this was exceeded by more than 100 pounds based on evidence about the following components:

- (a) The motorcycle itself weighed 715 pounds;
- (b) A tank of gasoline would weigh approximately 30 pounds (the Defendant had "gassed up" shortly before the accident);
- (b) The Defendant weighed approximately 210 pounds;
- (c) The Plaintiff weighed approximately 200 pounds;
- (d) The Tour-Pak, a storage bin above and slightly behind the rear axle, weighed about 15 pounds;
- (e) Cargo including items packed in two hard saddlebags mounted on each side of the rear wheel, plus wet gear stowed in a garbage bag on top of the Tour Pak. The trial judge found the additional items carried on the bike weighed approximately 100 pounds.

Reasons, paras. 11-15, 17, 41, AR pp. 15-17, 25

12. There was some dispute in the evidence concerning the cumulative weight of the additional cargo on the motorcycle, including items stowed in the hard bags and the garbage bag (which held soaking wet leather jackets, leather vests, sweatshirts, hoodies, jeans, leather chaps, socks and boots). The estimates in the evidence ranged from 83 pounds dry to 150 pounds; the trial judge concluded the cumulative weight was approximately 100 pounds. There was also evidence that the Tour Pak weighed between 10 and 16 pounds; the trial judge again selected a number within this range, 15 pounds. The evidence amply supported the trial judge's finding that the additional items carried on the motorcycle weighed approximately 100 pounds and that "the GVWR had likely been reached before including any clothing, helmets, tools or luggage".

Reasons, paras. 11-15, 41, AR pp. 15-17, 25

Testimony of Mr. MacInnis, Tr. p. 61, ll. 13-36

Testimony of Defendant, Tr. p. 123, l. 1 – p. 126, l. 47; p. 129, l. 44 – p. 130, l. 20; p. 149, ll. 9-22; p. 155, l. 4

13. The Defendant correctly notes that the trial judge assumed the motorcycle's shipped weight of 715 pounds would not include gasoline and fluids (para. 13 of Reasons). There was some evidence motorcycles are shipped from the factory with all fluids except gasoline. At the same time, the owner's manual identifies 715 pounds as the "dry weight". The trial judge did not attribute a specific weight to fluids other than gasoline and even without assigning any weight to additional fluids the evidence confirmed the motorcycle was overloaded by more than 100 pounds.

Reasons, para. 13, AR p. 16

Harley Davidson Owner's Manual, AR Vol. 1, p. 85

MacInnis report, AB Vol. 2, pp. 353-354

Trial judge's assessment of expert evidence

14. Mr. MacInnis, an engineer qualified as an expert in accident reconstruction and motorcycle dynamics, prepared a report and testified for the Defendant. The trial

judge accepted Mr. MacInnis's opinion that the expulsion of a nail from the rear tire as the motorcycle pulled out to pass the BMW "led to a rapid deflation of the tire, but not a blowout". Mr. MacInnis explained that a "rapid deflation" occurs more slowly than a "blow-out". He estimated that with a "rapid deflation", the "time to half pressure would be in the range of 40 seconds", although he could not make this calculation with "scientific certainty". Mr. MacInnis also explained that "[t]he rate of air evacuation would decrease as the pressure decreased". Mr. MacInnis's report said that "the net effect of a sudden deflation of a rear tire while steering would be similar to the initial movement when encountering an exceptionally slippery portion of road surface (oil, hot loose tar, ice, wet leaves, sand or gravel) that allows the rear of the motorcycle to slide sideways while steering".

Reasons, paras. 36-38, AR pp. 23-24

MacInnis Report, AB Vol. 2, pp. 355, 359

Testimony of Mr. MacInnis, Tr. p. 66, ll. 35-41; p. 72, l. 34 – p. 76, l. 6; p. 86, ll. 16-37

15. Mr. MacInnis opined, and the trial judge accepted, that "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."

Reasons, paras. 37, 57, AR pp. 23, 32

16. The "Summary" section of Mr. MacInnis's report included the following:

17. A rapid tire deflation at 100 instead of 110-115 km/h would likely make little practical difference to controllability.

20. The net 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.

MacInnis report, AB Vol. 2, p. 358

17. These summary points were elaborated on and qualified in other sections of the report and in Mr. MacInnis's testimony at trial. With respect to the effect of the motorcycle's speed on the ability to recover from a loss of control, Mr. MacInnis agreed that "instability due to flat rear tire alone increases with increasing speed". Mr. MacInnis assumed the motorcycle was travelling at approximately 112.5 kph as it passed the BMW. As stated earlier, however, the trial judge found the motorcycle was travelling 120 kph or more at the time. Mr. MacInnis agreed in cross-examination there was "probably" some speed at which the motorcycle could be operated safely with a deflated rear tire, but was unable to provide a number with any scientific certainty. Mr. MacInnis did not consider whether a lower speed such as 80 or 90 kph would be hazardous with a flat rear tire. As the trial judge put it, Mr. MacInnis "could not say at what specific speed a tire blowout could be handled safely".

Reasons, para. 45, AR p. 27

MacInnis report, AB Vol. 4, pp. 351, 357

Testimony of Mr. MacInnis, Tr. p. 72, l. 34 – p. 78, l. 35; p. 84, l. 38 – p. 85, l. 23

18. Mr. MacInnis's opinion concerning the effect of overloading was based on the assumption the motorcycle's GVWR was exceeded by approximately 59 pounds or 5%. As noted above, the trial judge found as a fact that the GVWR was exceeded by more than 100 pounds or 10%. According to Mr. MacInnis's report, it was scientifically impossible to calculate the precise effect of overloading of 5% above GVWR (emphasis added):

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.

...

The effect of the 5% overload condition is mathematically unpredictable.

Mr. MacInnis repeated in his testimony at trial that in estimating the effect of additional weight on the stability of the motorcycle, he was "simply unable" to provide any defensible numeric value.

MacInnis Report, AB Vol. 2, pp. 353-4, 357-358

Testimony of Mr. MacInnis, Tr. p. 49, l. 25 - p. 50, l. 47; p. 76, ll. 7-41; p. 81, l. 24 - p. 82, l. 14

19. With respect to the effect of the location of additional weight, Mr. MacInnis's report explained that "[a] heavy motorcycle with a load at the rear is inherently less stable in weave than a lightly loaded motorcycle" and that "a fully loaded motorcycle with a pillion passenger would be particularly difficult to control when it began to weave". Mr. MacInnis also referred to the Harley Davidson owner's manual and ICBC's "Road Sense for Riders", both of which recommend carrying cargo low and close to the centre of the motorcycle for maximum stability.

MacInnis Report, AB Vol. 2, pp. 356-8

Testimony of Mr. MacInnis, Tr. p. 50, ll. 22-47; p. 52, ll. 4-23; p. 61, l. 37 - p. 62, l. 15; p. 63 l. 14 - p. 64, l. 3; p. 68, ll. 6-8

Harley Davidson owner's manual, AB Vol. 1, pp. 145, 148

"Road Sense for Riders", AB Vol. 3, p. 522

20. Mr. MacInnis also relied in his report on a treatise called "Motorcycle Dynamics" by a Professor Cossalter:

Professor Vittore Cossalter has summarized the factors relevant to this case that will improve the weave mode instability:

- Increasing the distance between the motorcycle centre of mass and the rear axle;
- Increasing height of center of mass; and,
- Increasing the lateral stiffness of the rear tire.

Correspondingly, if the center of mass is moved aft or downwards (by loading of the motorcycle) and lateral stiffness of the rear tire is compromised by tire deflation, then the reverse occurs – the motorcycle becomes less stable in weave.

MacInnis Report, AB Vol. 2, pp. 356-7

21. In explaining this aspect of his report at trial, Mr. MacInnis did not clarify what it meant to “improve” instability. He testified that placing mass high and forward of the centre of gravity would increase stability, while placing mass low and further aft would decrease stability. This appeared to contradict other evidence that cargo should be carried low. The confusion on this point was not clarified during Mr. MacInnis’s testimony at trial. For example, Mr. MacInnis said the following in cross-examination:

Q. ...we have distribution of weight at a dangerous point, like towards the back of the bike as opposed to the front.

A. Well I wouldn’t use your word dangerous. I would say it’s high and aft.

The trial judge interpreted Mr. MacInnis’s evidence to be that “[i]f the weight is aft and high-centered, then it will likely add to the instability”.

Testimony of Mr. MacInnis, Tr. p. 49, l. 33 – p. 50, l. 47; p. 60, l. 35 – p. 62, l. 15; p. 67, l. 21 – p. 68, l. 8; p. 77, l. 31 – p. 78, l. 4

Reasons, para. 40, AR p. 24

22. The trial judge summarized Mr. MacInnis’s opinion on the significance of excessive speed and weight as follows (underlining added):

[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 [the author of *Motorcycle Dynamics*] 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.

Reasons, paras. 60-61, AR pp. 32-3

23. In the result, the trial judge was "unable to accept Mr. MacInnis's opinion that the excess speed and the excess weight were non-contributing factors" (italics in original).

Reasons, para. 62, AR p. 33

The trial judge's findings and conclusions: negligence and causation

24. The Defendant conceded at trial that he had breached his duty of care to the Plaintiff by driving at an excessive speed. The trial judge agreed that the Defendant "fell below an acceptable standard of care in this regard". The trial judge also found as a fact that the Defendant "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". The trial judge found that the overloading would have increased instability of the motorcycle:

[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.

Reasons, paras. 41, 49, 51, AR pp. 25, 28

25. The trial judge found the Defendant's negligence was not "causally connected" to the initial weave instability, which resulted from the deflation of the rear tire. The key question for the trial judge was "[w]ould 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?". While the expert evidence "could not scientifically state what precise effect certain speeds or loads would have on stability, the correlation between them was not in doubt". The trial judge therefore found causation was established:

[63] ...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

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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.

Reasons, para. 58, 63-67, AR pp. 32-34

PART 2

ISSUES ON APPEAL

26. The trial judge correctly found that causation could be established where the Defendant's negligence materially contributed to the Plaintiff's injuries and where it was impossible to conclude either that the Defendant's negligence played no role, or that but for the Defendant's negligence the Plaintiff would have not been injured.

27. The trial judge also correctly found that recoverable damages are not reduced to the proportion by which the Defendant's negligence contributed to the Plaintiff's injuries where there are other non-negligent causes.

PART 3
ARGUMENT

Overview of Respondent's position

28. The Defendant does not dispute the trial judge's finding that the Defendant was negligent in driving too fast in and in failing to ensure the motorcycle was not overloaded. As at trial, the central issue on appeal is causation: was the Defendant's negligence a cause of the Plaintiff's injuries? It is submitted that the trial judge correctly found causation was established on the facts and on the law. The submissions directed at excluding the material contribution test from motor vehicle cases should be rejected as unprincipled and inconsistent with the Supreme Court's governing decisions. Similarly, the submissions that policy should be invoked to exclude certain classes of cases or to limit recovery to the proportion of risk created by the tortfeasor are inconsistent with both principle and governing authority.

Standard of review

29. Determining causation is "essentially a practical question of fact which can best be answered by ordinary common sense". Chief Justice Finch has said recently that "[c]ausation is a question of fact and reviewable on a standard of palpable and overriding error". The Plaintiff agrees, however, that a misapprehension about the correct legal test may give rise to an error of law reviewable on a standard of correctness.

Athey v. Leonati, [1996] 3 S.C.R. 458, per Major J. at para. 16

Simpson v. Baechler, 2009 BCCA 13, per Finch C.J.B.C. at para. 47

See also *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, 2002 SCC 33, at paras. 70, 75; *H.L. v. Canada*, [2005] 1 S.C.R. 401, 2005 SCC 25, at paras. 121-133

30. Although the error asserted by the Defendant in Part 2 of his Factum is that the trial judge "erred in stating and applying the laws of causation", the Defendant later submits the trial judge "made findings and drew conclusions ... that were wrong"

(Appellant's Factum, para. 59). Whether the Defendant is attacking findings or inferences of fact, including an inference of causation drawn from the evidence, this Court may interfere only if the trial judge made palpable and overriding errors.

Athey, supra, at para. 16; *Housen, supra*, at paras. 1, 10, 19-25

31. In the Plaintiff's submission, the trial judge made no palpable and overriding error in his findings or inferences of fact, and His Lordship did not err in his interpretation or application of the applicable legal principles.

Trial judge correctly applied the governing legal principles

(a) Trial judge correctly applied principles of causation

32. The trial judge correctly interpreted and applied the governing principles, summarized by Chief Justice McLachlin, in *dicta*, in *Resurfice Corp. v. Hanke*, [2007] 1 S.C.R. 333, 2007 SCC 7.

33. The Supreme Court of Canada confirmed in *Resurfice* that the "but for" test remains the basic test for determining causation. The Court described two exceptions that have been recognized by the courts in which a "material contribution" test may be appropriate. For convenience, the relevant passage from the Chief Justice's reasons in *Resurfice* is reproduced below:

[24] ... 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.

34. As the trial judge recognized, the case at bar meets the two requirements set out in para. 25 of *Resurfice*. First, it was impossible, due to factors outside of the plaintiff’s control, for the Plaintiff to prove that the Defendant’s negligence caused her injury using the “but for” test. Mr. MacInnis’ evidence established a direct correlation between the Defendant’s negligence (excessive speed and overloading) and the ability to recover from weave instability. As Mr. MacInnis explained, however, it is impossible to determine, through mathematical calculation or scientific modelling, the combination of lower speed and weight that would have permitted the Defendant to recover from the loss of control. Second, the Defendant’s breaches of care exposed the Plaintiff to an unreasonable risk of the very form of injury she suffered in the accident. Ultimately,

because these two criteria were met, "it would offend basic notions of fairness and justice to deny liability".

35. The case at bar thus resembles the second example in *Resurface* of a situation where the "but for" test does not apply: it is impossible to prove exactly what would have happened had the Defendant been driving at a speed appropriate for the conditions and on a motorcycle that was not overloaded. Importantly, however, the trial judge found as a fact that the evidence did not establish that the Plaintiff would have suffered harm in the absence of the Defendant's breaches (Reasons, para. 66). On the trial judge's findings, it cannot be said the Plaintiff would have been injured in any event, even if the Defendant had not been negligent.

36. The Defendant complains that the trial judge erred in finding "impossibility", the first element required under the *Resurface* analysis (at paras. 91-96 of his Factum). With respect, the trial judge found, based on the evidence of the Defendant's own expert, that "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" (Reasons, para. 66, AR p. 55). To paraphrase the Defendant's submission (at para. 94 of his factum), it does not lie in the mouth of the Defendant to assert that his own witness's evidence was wrong. And, as explained in more detail below, the trial judge made no palpable and overriding error in assessing the evidence of Mr. MacInnis.

37. The heart of the Defendant's appeal is the argument that *Resurface* confines the "material contribution" test to specific categories such as cases involving the contraction of disease or medical malpractice. Thus, at paras. 97 and following of the Appellant's Factum, the Defendant submits that even if causation is established under the principles stated by the Supreme Court of Canada, the case should be decided against the Plaintiff on the grounds of policy. With respect, the Defendant's submission cannot be accepted as it is founded in decisions from the United Kingdom that are not consistent with Canadian law, and the dissenting opinion in this Court in *Bigcharles v. Lomax* 2001 BCCA 350.

38. Yet the facts the Defendant relies on to invite a policy-based decision are that the parties are related, and the Plaintiff urged the Defendant to continue with the trip in the face of possibly bad weather. Neither of these facts justifies introducing the uncertainty of a policy dimension to the application of the material contribution test. Rather, the facts required for the application of the material contribution test are those set out by the Supreme Court in *Resurfice*, and those facts were found by the trial judge. Ultimately His Lordship was satisfied, as *Resurfice* requires, that causation could not be established under the “but for” test.

39. *Resurfice* did not purport to set down a code to define when the “material contribution” test could be invoked; instead, “without dealing exhaustively with the jurisprudence”, the Chief Justice provided “a few examples”. Indeed, the Chief Justice cited as an example *Walker Estate v. York Finch General Hospital*, which involved a failure to warn rather than an analysis of causation in the scientific sense. Since *Resurfice*, courts in Canada have applied the “material contribution” (directly or in the alternative) in other contexts where the “but for” test is not workable and it would offend basic notions of fairness and justice to deny liability.

See, e.g., *Wozniak v. Alexander*, 2008 ABQB 430, at paras. 31-44 (defendant boat rental company liable for failing to provide renters with sufficient knowledge to avoid emergency); *Cartner v. Burlington (City)*, 2008 CanLII 37900 (Ont.S.C.), at paras. 18-27 (municipality liable for sidewalk’s disrepair in slip and fall case); *Fuller v. Schaff et al.*, 2009 YKSC 23, at paras. 70-75 (snow plow operator driving too fast for conditions liable for accident resulting from loss of visibility created by larger snow cloud); *Bowes v. Edmonton (City)*, 2007 ABCA 347, per Ross J.A. for the majority at paras. 227-245 (City’s negligence caused plaintiffs’ losses from landslide, but action statute-barred).

40. The trial judge did not base his conclusions on “policy” or on presumptions discussed in English decisions (as the Defendant submits at paras. 97-106) but on the legal principles enunciated by the Supreme Court of Canada. The trial judge found causation on the facts of this case in accordance with the law as enunciated in *Resurfice* and the earlier decisions approved in *Resurfice*.

(b) Trial judge correctly applied other principles approved in *Resurface*

41. In *Resurface* the Supreme Court expressly approved its own earlier decisions on causation, including *Athey v. Leonati, supra*, and *Snell v. Farrell*, [1990] 2 S.C.R. 311. The *obiter dicta* in *Resurface* do not alter the existing approach to causation when there may be several contributing causes of the loss in question. Pre-*Resurface* cases dealing with causation in such situations remain relevant.

42. In *Athey v. Leonati*, for example, Major J. agreed that the “but for” test “is unworkable in some circumstances”. Similarly, in *Snell v. Farrell*, Sopinka J. explained that the “traditional” approach to causation, usually described as the “but for” test, contemplates a “robust and pragmatic approach to the facts”. The court may draw an “inference of causation” provided there is a “substantial connection” between the injury and the defendant’s conduct. Sopinka J. agreed that “[a]n inference of causation may be drawn although positive or scientific proof of causation has not been adduced”, provided the defendant does not adduce evidence to the contrary or the trial judge does not accept the evidence proffered by the defendant.

Athey v. Leonati, supra, at para. 15

Snell, supra, at pp. 327-329

43. The trial judge here was satisfied causation was established in accordance with the analyses expressed in both *Resurface* and earlier decisions such as *Athey* and *Snell* (Reasons, para. 56, AR p. 31):

As *Athey* was cited with approval in *Resurface*, 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*).

44. Although he decided it was appropriate to apply the “material contribution” exception described in *Resurfice*, the trial judge also approached causation as a “practical question of fact which can best be answered by ordinary common sense” and drew the common sense inferences open to him on the evidence adduced at trial. The trial judge explained that “ordinary common sense” supported the correlation between the Defendant’s inability to recover from the weave instability and the Defendant’s negligence in driving an overloaded motorcycle too fast. His Lordship cited the Harley Davidson manual as well as the Defendant’s own impression of factors that contributed to the accident, which included speed and weight. And the trial judge made the key finding that “the evidence did not establish that the plaintiff would have suffered harm in the absence of the defendant’s breaches” (Reasons, para. 66; underlining added). The evidence was more than sufficient to establish the “substantial connection” between the Plaintiff’s injury and the Defendant’s conduct and to supported the drawing of an inference of causation applying “ordinary common sense” (*per Snell and Athey, supra*).

45. Recent decisions of this Court have drawn a distinction between the Supreme Court’s use of the phrase “material contribution” in *Resurfice* and its use in earlier decisions. Smith J.A. has observed that in *Resurfice*, the phrase is used “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”, while in earlier decisions, such as *Athey* and *Snell*, the phrase is used where the defendant’s negligence “materially contributed to the occurrence of the plaintiff’s injury”. It is submitted this distinction is not material for present purposes, as the trial judge found causation was established in accordance with the analyses expressed in both *Resurfice* and the earlier decisions such as *Athey* and *Snell*.

See, e.g., *Chambers v. Goertz*, 2009 BCCA 358, *per* Smith J.A. at paras. 16-23

Trial judge made no palpable and overriding errors in assessing the evidence

46. Determining the weight to be given evidence, including expert evidence, is the province of the trial judge. A trial judge may accept none, some or all of the opinion evidence tendered at trial. As the Supreme Court of Canada reconfirmed in *Resurfice*,

supra, “a trial judge is not obliged to consider the opinions of expert witnesses if he can arrive at the necessary conclusions on issues of fact and responsibility without doing so” (at para. 9).

See also *Lapointe v. Hôpital le Gardeur*, [1992] 1 S.C.R. 351, at para. 16

47. The Defendant complains, in effect, that the trial judge erred in rejecting the Defendant’s expert’s opinion that speed and overloading likely played no significant role. No principled objection to the trial judge’s treatment of his evidence is advanced; rather, the Defendant’s submission is that the trial judge effectively had no choice but to accept all or none of the expert’s evidence. This of course is not the law respecting expert opinion. A trial judge is entitled to accept parts of an expert’s testimony, reject other parts, and make appropriate findings.

Fox v. Danis, 2006 BCCA 324, per Donald J.A. for the Court at para. 26

48. The trial judge based his “conclusions on issues of fact and responsibility” on the Defendant’s admissions and the evidence at trial including the evidence of Mr. MacInnis. The Defendant admitted he had breached his duty of care to the Plaintiff by driving at an excessive speed. There was evidence that excess speed increases the influence of any other condition affecting stability or control. Similarly, there was evidence that excess weight can affect the ability of a motorcycle driver to react to and recover from a loss of control. The trial judge properly gave no weight to the Defendant’s suggestion that he had not noticed any problem with the motorcycle before he experienced the tire deflation. The evidence accepted by the trial judge supported His Lordship’s findings concerning the correlation between excess speed and overloading and the ability to control a motorcycle in the event of weave instability.

49. In the case at bar, Mr. MacInnis offered an opinion that a certain speed and a certain weight likely did not contribute to the accident, but he readily admitted he could not support that opinion with mathematical calculations or scientific certainty. In fact, Mr. MacInnis’s evidence supported the inferences drawn by the trial judge, that speed and load are related to the ability to respond to a loss of control caused by a tire deflation.

50. The trial judge was not obliged to accept Mr. MacInnis's ultimate belief that based on his estimates of speed and overloading those factors likely had no significant role, because Mr. MacInnis's opinion was based on assumptions that did not accord with the trial judge's findings of fact. Mr. MacInnis assumed the motorcycle was travelling at between 110 and 115 kph; the trial judge found the motorcycle was going at least 120 kph. Mr. MacInnis assumed the motorcycle was overloaded by approximately 59 pounds, while the trial judge found the amount of overloading was in excess of 100 pounds. Mr. MacInnis admitted his impressions could not be justified with any scientific or mathematical certainty. Given these shortcomings, the trial judge was not obliged to give any weight to Mr. MacInnis's ultimate opinion.

51. As explained above, Mr. MacInnis's evidence was unclear as to the significance of the location of additional mass. There was certainly some evidence to support the trial judge's understanding that placing additional weight "high and aft" would likely affect stability. More importantly, Mr. MacInnis confirmed there is a relationship between both speed and overloading and the ability to control a motorcycle in the event of a tire deflation. As the trial judge observed, this correlation was borne out in the scientific literature, the owner's manual, and the ICBC guide, all of which Mr. MacInnis cited in his report and in his oral testimony. In addition, the trial judge correctly stated that "[o]rdinary common sense ... supports such a relationship". And, to repeat, the trial judge found that "the evidence did not establish that the plaintiff would have suffered harm in the absence of the defendant's breaches".

52. Contrary to the Defendant's argument (at paras. 62-65 and 73-78 of his Factum), the Plaintiff was not obliged to rehabilitate Mr. MacInnis's opinion where it was founded on incorrect assumptions about weight and speed. The Defendant cannot now distance himself from Mr. MacInnis's evidence that it was scientifically impossible to determine the precise effect of overloading and speed in the circumstances of this case. Similarly, it is illogical to argue that the Plaintiff should have called a witness to discuss this scientific impossibility.

53. The Defendant objects (at paras. 60 and 79-82 of his Factum) that the trial judge was not entitled to rely on “common sense” in relation to a matter on which expert evidence has been tendered. With respect, Mr. MacInnis’s evidence confirmed that “specialized scientific knowledge” could not determine the exact speed or load factors that would have permitted the Defendant to respond to the tire deflation and avoid injury to the Plaintiff. The trial judge in this case was entitled to accept parts of Mr. MacInnis’s evidence while rejecting his rather tentative opinions that slightly lower loads or speeds would likely have made no difference. Mr. MacInnis’s impressions were based on incorrect assumptions about speed and weight and could not be supported by mathematical calculation or scientific modelling. As *Resurface*, *Snell* and the other decisions cited above illustrate, a trial judge is not obliged to find against the plaintiff on causation simply because the defendant proffers some “scientific” evidence on the question of causation. The trial judge is entitled to assess and reject evidence if it is flawed or otherwise unpersuasive. The situation is very different from a medical malpractice case where experts provide opinions on areas about which the trial judge has no knowledge. The inferences drawn by the trial judge in this case were founded in the evidence and accorded with common sense.

Trial judge correctly found the Defendant liable for the Plaintiff’s losses

54. The Defendant argues that damages should be apportioned on policy grounds, submitting the Plaintiff’s recovery should be limited to “damages proportional to the increase in risk” caused by the Defendant’s negligence (Appellant’s Factum, paras. 107-110). With respect, this remedy is contrary to the law of Canada. A tortfeasor whose acts have contributed to the loss is liable in full absent contributory negligence. A defendant is not excused where there is another non-negligent cause. In *Athey, supra*, the Supreme Court confirmed that where a loss is the result of tortious and non-tortious causes, the tortious actor is properly found liable for all of the plaintiff’s damages. Here, there was a non-tortious cause (the tire deflation caused by ejection of the nail) but the only negligent actor was the Defendant. In the result, the Defendant is liable for all of the Plaintiff’s damages.

55. The Defendant also appears to suggest that the Plaintiff herself was at fault and the Defendant should not therefore be liable for all of her damages (Appellant's Factum, paras. 103-104). The onus was, of course, on the Defendant to prove contributory negligence. The trial judge found no contributory negligence on the part of the Plaintiff. The Defendant has shown no basis on which this Court could disturb that finding of fact.

Conclusion

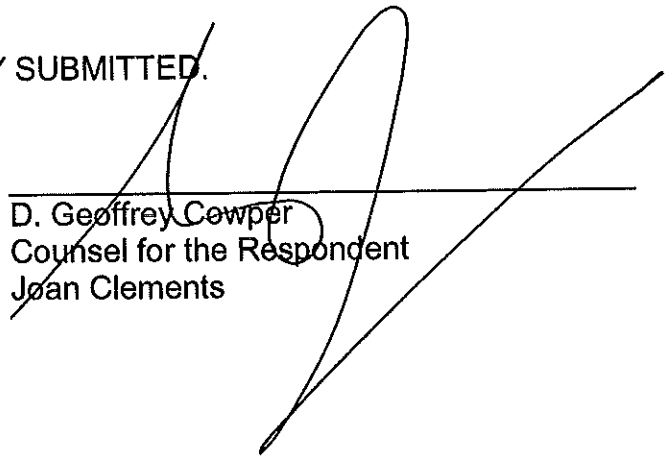
56. The evidence at trial confirmed the obvious inference that excessive speed and overloading reduce a motorcycle rider's ability to steer and respond to a loss of control. Negligence on the part of the Defendant materially contributed to the Plaintiff's injuries as held by the trial judge. The trial judge correctly found that causation was established under the law and the Defendant raises no persuasive ground for limiting the class of cases in which material contribution may be sufficient to establish causation where it is impossible to prove causation on the "but for" standard.

PART 4

NATURE OF ORDER SOUGHT

57. That the appeal be dismissed, with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.



D. Geoffrey Cowper
Counsel for the Respondent
Joan Clements

Dated: November 27, 2009

PART 5
LIST OF AUTHORITIES

	PARA(S).
<i>Athey v. Leonati</i> , [1996] 3 S.C.R. 458	29, 30, 41, 42, 43, 44, 45, 54
<i>Bigcharles v. Lomax</i> 2001 BCCA 350	37
<i>Bowes v. Edmonton (City)</i> , 2007 ABCA 347	39
<i>Cartner v. Burlington (City)</i> , 2008 CanLII 37900 (Ont. S.C.)	39
<i>Chambers v. Goertz</i> , 2009 BCCA 358	45
<i>Fox v. Danis</i> , 2006 BCCA 324	47
<i>Fuller v. Schaff et al.</i> , 2009 YKSC 23	39
<i>H.L. v. Canada</i> , [2005] 1 S.C.R. 401, 2005 SCC 25	29
<i>Housen v. Nikolaisen</i> , [2002] 2 S.C.R. 235, 2002 SCC 33	29, 30
<i>Lapointe v. Hôpital le Gardeur</i> , [1992] 1 S.C.R. 351	46
<i>Resurface Corp. v. Hanke</i> , [2007] 1 S.C.R. 333, 2007 SCC 7	32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 43, 44, 45, 46, 53
<i>Simpson v. Baechler</i> , 2009 BCCA 13	29
<i>Snell v. Farrell</i> , [1990] 2 S.C.R. 311	41, 42, 43, 44, 45, 53
<i>Wozniak v. Alexander</i> , 2008 ABQB 430	39