

Court File No. 34100

**IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA)**

BETWEEN:

JOAN CLEMENTS, by her litigation guardian, Donna Jardine

**APPELLANT
(Respondent)**

AND:

JOSEPH CLEMENTS

**RESPONDENT
(Appellant)**

**NOTICE OF MOTION TO THE COURT
BY THE ATTORNEY GENERAL OF BRITISH COLUMBIA
SEEKING LEAVE TO INTERVENE**
(Pursuant to Rule 55 and 47 of the Rules of Supreme Court of Canada)

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**Agent for Attorney General of
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Filed December 5th 2011
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BY THE ATTORNEY GENERAL OF BRITISH COLUMBIA
SEEKING LEAVE TO INTERVENE
(Pursuant to Rule 55 and 47 of the *Rules of Supreme Court of Canada*)**

TAKE NOTICE that the Attorney General of British Columbia hereby applies to a judge of this Honorable Court pursuant to rule 55 and 47 of the Rules of Supreme Court of Canada, for an order:

1. granting leave to intervene in this appeal;
2. granting leave to file a single factum not exceeding 10 pages;
3. granting leave to present oral argument at the hearing not exceeding 10 minutes;
4. granting no cost to the Attorney General of British Columbia in this appeal and ordering no costs against it; and
5. any further or order that the judge may deem appropriate.

AND FURTHER TAKE NOTICE that the following document will be referred to in support of such motion:

1. The Attorney General of British Columbia's interest and unique perspective in the proceeding as set out in the Affidavit #1 of Gordon Houston.

AND FURTHER TAKE NOTICE that the motion shall be made on the following grounds:

1. As evidence in the affidavit #1 of Gordon Houston, the Attorney General of British Columbia has a genuine and substantial interest in this appeal.
2. The Attorney General of British Columbia views the issues raised in this appeal as being of public importance and the Court's decision will have impact in this province.

British Columbia's Interest in the Appeal

3. This appeal raises the question of the circumstances in which it is appropriate for the courts to employ a "material contribution" test for causation in a tort action in place of the traditional "but for" test.
4. On August 1, 1974, the *Crown Proceeding Act*, R.S.B.C. 1996, c.89, abolished common law Crown immunity and subjected Her Majesty the Queen in right of the Province of British Columbia to all the liabilities of a natural person. This includes tort liabilities. Since 1974, the Province has been a frequent tort defendant in cases which have raised a variety of complex causation issues. By way of example only, the cases include personal injury actions, motor vehicle accidents, historical sexual abuse, occupier's liability, and negligent investigations. For instance:

Meghji v. Lee, 2011 BCSC 1108

K.L.B. v. British Columbia, 2003 SCC 51

D.N. v. Oak Bay, 2005 BCSC 141

Mooney v. British Columbia, 2004 BCCA 402

5. British Columbia is a defendant in several dozen automobile accident cases every year, many of them with similar facts to the present appeal: a vehicle loses control in wet conditions on a British Columbia highway and personal injury ensues. Given its responsibility for more than 40,000 km of highways, British Columbia is commonly named as a defendant on the basis that the Province caused personal injuries through failure to properly design, build, or maintain the highway. British Columbia's co-defendant in such cases is often the vehicle driver who is alleged to be the more direct cause of the plaintiff's injuries, with British Columbia's liability said to flow from its failure to take steps that would have created safer driving conditions. Causation is an issue of particular significance in cases of this nature.

Meghji v. Lee, 2011 BCSC 1108

6. Any decision by this Court as to the scope of the material contribution test therefore stands to directly impact British Columbia. The financial impact, at least, is in some respects the same as that facing other deep pocket defendants in Canada – British Columbia's potential future liability will increase with any expansion of the material contribution test for causation.
7. As a government defendant, British Columbia has an additional and distinct interest in this Court's consideration of the causation test. It is recognized both in the relevant jurisprudence and academic commentary that resort to a "material contribution" test is grounded largely in policy concerns. The role of the trial judge in the usual tort case is to decide, on the balance of probabilities, what actually happened (*Sienkiewicz v. Grief (UK) Ltd.*, 2011 UKSC 10, at paragraph

158). With respect to the requirement for causation, the question for the trial judge is whether the plaintiff has proved (on a "but for" standard) that the defendant's acts or omissions are in fact the cause of the plaintiff's injuries. In a limited category of cases, the plaintiff is relieved of this burden where it can be shown the "but for" standard is an impossible one to meet, and fairness dictates that the plaintiff should nevertheless recover. In these limited cases, it is a sufficient condition of liability for the plaintiff to prove that the defendant's act or omission materially contributed to the risk of the injury occurring.

8. Given that the material contribution test is a policy-based exception to the usual common law rules of civil liability, at least one issue that may legitimately be considered in the present appeal is whether further changes to the "but for" test should be implemented by the legislature. The breadth of the Appellant's proposed expansion of the material contribution test is evident in paragraph 104 of her factum under the heading "Deterrence and Public Protection":

104. The twenty-first century world is vastly different from Wardlaw's 1950's world in Scotland. We live in a society teeming with an exponentially increasing broth of chemical compounds. With increasing chemicals come increasing chemical interactions, most of which are unknowable at present, and many of which could be potentially harmful. The tort system must allow for the protection and compensation of victims, and act as a deterrent for companies releasing hazardous compounds into the public arena. If the BCCA's view is upheld emerging class actions involving, for instance, industrial toxins or medications, would be dismissed, likely before trial. There would be less pressure on the companies making such products to comprehensively test for safety. The fear of the catastrophic class action would not exist and our world would be less safe.

9. The Appellant's submissions as a whole suggest she is seeking a significantly broader expansion in the material contribution test than the facts of the case on appeal require. The academic authorities upon which the Appellant relies similarly favour an expansion of recourse to the material contribution test, primarily on the grounds that toxic and mass torts require relaxation of the circumstances when the "but for" test must be utilized.

Collins, Lynda Margaret, "Causation, Contribution and Clements: Revisiting the Material Contribution Test in Canadian Tort Law" (2011) 19 Tort L. Rev. 86

Jones, Craig, "Reasoning through Probabilistic Causation in Individual and Aggregate Claims: the Struggle Continues" in David Cheifetz, Smockum Zarnett Percival, eds., *Causation in Tort II* (Vancouver: CLE, 2011) 3.1.1.

10. If the Court in this appeal is to consider the limited question of whether the facts of the present case fall within an established exception to the "but for" test, or an analogous and equally restricted category, this may be a question that can appropriately be answered by the common law. If the Appellant seeks a fundamental re-articulation of the material contribution test to promote class actions, deter industry in the area of toxic torts, and generally make the world a safer place, there is a legitimate question as to whether such a re-articulation should be left to the legislature.
11. Causation rules have been the subject of legislative intervention in other jurisdictions. For example, the United Kingdom enacted the *Compensation Act, 2006*, c. 29 to address causation in the specific context of damages for mesothelioma caused by exposure to asbestos. This statute was a response to the development of special causation rules at common law for asbestos exposure, starting with the decision in *Fairchild v. Glenhaven Funeral Services Ltd*, [2002] 3 All ER 305.
12. British Columbia itself has altered the rules of common law causation to permit aggregate claims for tobacco related injuries and to allow causation or contribution to be a sufficient basis for recovery by the Province of health care costs in tobacco and non-tobacco contexts: *Tobacco Damages and Health Care Recovery Act*, SBC [2000] Ch. 30, ss. 3(1)(b) and *Health Care Costs Recovery Act* SBC [2008] Ch. 27, s. 1. Other provinces have made similar legislative adjustment to the rules of common law causation: for instance, *Tobacco Damages and Health Care Costs Recovery Act, 2009*, S.O. 2009, Ch. 13.

13. In sum, aside from the direct interest British Columbia has in this appeal in terms of its future tort liability, British Columbia also has a distinct interest in the question of whether common law evolution or legislative intervention is the appropriate means of effecting change to causation principles.

Proposed Submissions

14. If granted leave to intervene, British Columbia will argue that no fundamental change is required to the current common law tests for causation.
15. The circumstance in which the "material contribution" test for causation may be used in place of the "but for" test are set out in *Resurfice Corp. v. Hanke*, 2007 SCC 7. British Columbia would argue that *Resurfice* provided a necessary and helpful clarification of the main principles of causation in the law of torts. *Resurfice* confirmed the following:
- "material contribution" is not the causation test whenever there is more than one potential cause of an accident;
 - "but for" remains the basic test for causation, including multi-cause injuries;
 - "but for" recognizes that compensation for negligent conduct should only occur when there is a substantial connection between the injury and the defendant's conduct; and
 - departure from the "but for" test and recourse to "material contribution" may be made on the basis of justice and fairness where it is impossible due to factors beyond the plaintiff's control for the plaintiff to prove that the defendant's negligence caused it damage.
16. Despite the clarity of the *Resurfice* directives, reinforcement is required.

17. As a recent example, British Columbia was found liable for damages to a pedestrian who was hit by a car: *Meghji v. Lee*, 2011 BCSC 1108. The driver was found to be withdrawing from the effects of crystal methamphetamine and had smoked marijuana before rushing off to work in their car. The driver's ability to see was found to be affected by a condensation problem on the car's windshield and windows. After liability was found against the driver, the trial judge ruled that British Columbia breached a standard of care to install lighting in the correct position at the pedestrian crossing. British Columbia was found liable without consideration of causation.
18. *Meghji* is an example of a failure to follow the basic principles of *Resurfice* and supports a reminder from this Court that breach of a standard of care is not sufficient to ground tortious liability in the absence of finding a causal linkage between breach and harm. *Meghji* is also an example of how departure from the *Resurfice* analysis has led to increased exposure for British Columbia.
19. British Columbia would also maintain that this Court should provide further analysis of the *Resurfice* "impossibility" requirement in the reasons for judgment in the present appeal. British Columbia would maintain that the plaintiff must demonstrate that the "but for" causation test *could not* work on the facts of the case, not that the "but for" test *did not* work on the facts and evidence led.
20. In terms of establishing that the limits of science have been reached, therefore justifying the court's conclusion that it is impossible for the plaintiff to establish causation using "but for", British Columbia would recommend caution before such conclusions are made. Without setting out rigid and specific requirements, the court should be satisfied that there is a consensus in the scientific community that causation on a particular point remains unknown. In sum, the court will want assurance that *no one knows* before a conclusion of impossibility is made. For instance, in the mesothelioma cases in the UK, there was a consensus that *no one knew* the causal relationship at issue before the court. Those cases were

decided on the basis that there was no way of identifying, even on a balance of probabilities, the source of asbestos fibre that ultimately culminated in the mesothelioma. In the language of those cases, this was the "rock of uncertainty" on which the relaxation of common law causation rules was based. "Toxic torts", including mesothelioma, were recognized as requiring special causation rules to avoid an injustice.

Sienkiewicz v. Grief (UK) Ltd., 2011 UKSC 10 at para.
133

21. British Columbia notes that *Resurice* has been the subject of some academic criticism, including authorities relied on by the Appellant. The main thrust of this criticism appears to be that the development of the law of causation will be stifled by *Resurice*.
22. British Columbia disagrees with this criticism. To the contrary, British Columbia understands that *Resurice* will continue to permit development of the law of causation. British Columbia similarly believes that Professor Erik Knutsen's paper "Clarifying Causation in Tort", (2010), 33 Dal. L.J. 153 — key to the BCCA judgment below and itself the subject of academic criticism — understands *Resurice* in much the same way.
23. British Columbia would submit that the approach of Professor Knutsen is consistent with *Resurice* and could be endorsed by this Court, when three criticisms of Professor Knutsen's *Resurice* analysis are properly understood.
24. First, the "but for" test contains inherent flexibility in its up-front application that may avoid much of the feared ossification of the law of causation articulated by authorities relied upon by the Appellant. This Court's jurisprudence has specifically underscored that causation may be determined in a robust, pragmatic and common sense manner, as Professor Knutsen expressly noted.

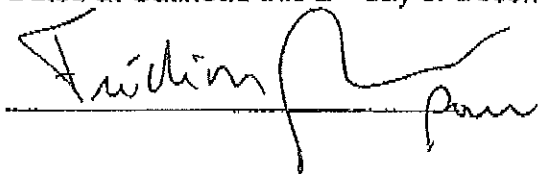
25. Second, the categories of exceptions to the "but for" test are not closed. Professor Knutsen identified two main classes of exceptions to the "but for" test, which he termed *current* exceptions. He stated at page 12 of his article: "There must be first a logical impossibility in proving "but for" causation. The examples given by the Supreme Court include both circular causation and dependency causation. Perhaps there may be more. But these are the present examples."
26. British Columbia would maintain that it is immaterial whether the nomenclature of circular causation and dependency causation is adopted. The categorization of cases to date proposed by Professor Knutsen appears empirically correct to British Columbia. However, as this Court made clear in *Resurface*, impossibility and fairness and justice remain grounds for departing from "but for" on a case by case basis. As such, British Columbia would argue that this Court could accept that the Knutsen / BCCA categorization provides a good working understanding of the current "but for" exceptions, without preventing the common law from developing further analogous exceptions to "but for" grounded, as *Resurface* noted, in impossibility, fairness and justice.
27. Third, the recent experience with departures from the "but for" test in the UK demonstrates that caution is advised. The UKSC has expressly warned: "the law tampers with the 'but for' test of causation at its peril", *Sienkiewicz*, para. 186. Fully considered legislative intervention may prove to be the soundest way to address the particular problems with mass and toxic torts. As mentioned, British Columbia and other provinces are already adjusting the common law to meet the particular causal problems that arise in establishing liability of tobacco related injuries.
28. British Columbia would argue that the present case, a single-vehicle automobile accident, is an inappropriate fact pattern to seek to understand and explore the ramifications of a significant alteration to the presumptive limited recourse to the "material contribution" test. Alterations of law that would allow "material

contribution" to make class actions easier, to address mass torts, and to ensure that "our world would [not] be less safe", ought to be left to the legislature, the law-making body that is best suited to deal with complex changes to the law with uncertain ramifications.

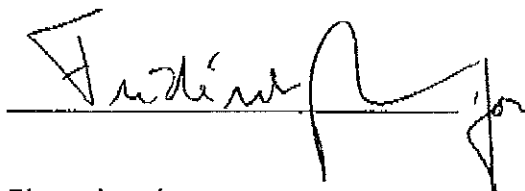
Watkins v. Olafson, [1989] S.C.J. No. 94

29. The attorney General of British Columbia relies on rule 55 and 47 to the Rules of Supreme Court of Canada and such further and other grounds as counsel may be permitted.

Dated at Gatineau this 2nd day of December, 2011



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NOTICE TO THE RESPONDENT TO THE MOTION: A respondent to the motion may serve and file a response to this motion within 10 days after service of the motion. If no response is filed within that time, the motion will be submitted for consideration to a judge or the Registrar, as the case may be.

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**APPELLANT
(Respondent)**

AND:

JOSEPH CLEMENTS

**RESPONDENT
(Appellant)**

AFFIDAVIT

I, Gordon Houston, of 3rd Floor, 1001 Douglas Street in the City of Victoria in the Province of British Columbia, MAKE OATH AND SAY AS FOLLOWS THAT:

1. I am Senior Counsel of the Civil Litigation Group in the Ministry of Attorney General of British Columbia. As such, I have personal knowledge of the facts hereinafter deposed to except where stated to be based on information and belief and where so stated, I believe them to be true.
2. I act on behalf of the Attorney General in British Columbia and my instructions are to make application for leave to intervene in this appeal.
3. The Attorney General of British Columbia views the issues raised in this appeal as being of public importance and the Court's decision will have impact in this province.

British Columbia's Interest in the Appeal

4. This appeal raises the question of the circumstances in which it is appropriate for the courts to employ a "material contribution" test for causation in a tort action in place of the traditional "but for" test.

5. On August 1, 1974, the *Crown Proceeding Act*, R.S.B.C. 1996, c.89, abolished common law Crown immunity and subjected Her Majesty the Queen in right of the Province of British Columbia to all the liabilities of a natural person. This includes tort liabilities. Since 1974, the Province has been a frequent tort defendant in cases which have raised a variety of complex causation issues. By way of example only, the cases include personal injury actions, motor vehicle accidents, historical sexual abuse, occupier's liability, and negligent investigations. For instance:

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- 4 -

hazardous compounds into the public arena. If the BCCA's view is upheld emerging class actions involving, for instance, industrial toxins or medications, would be dismissed, likely before trial. There would be less pressure on the companies making such products to comprehensively test for safety. The fear of the catastrophic class action would not exist and our world would be less safe.

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Proposed Submissions

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- departure from the “but for” test and recourse to “material contribution” may be made on the basis of justice and fairness where it is impossible due to factors beyond the plaintiff’s control for the plaintiff to prove that the defendant’s negligence caused it damage.
17. Despite the clarity of the *Resurfice* directives, reinforcement is required.
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 21. In terms of establishing that the limits of science have been reached, therefore justifying the court’s conclusion that it is impossible for the plaintiff to establish causation using “but for”, British Columbia would recommend caution before such conclusions are

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made. Without setting out rigid and specific requirements, the court should be satisfied that there is a consensus in the scientific community that causation on a particular point remains unknown. In sum, the court will want assurance that *no one knows* before a conclusion of impossibility is made. For instance, in the mesothelioma cases in the UK, there was a consensus that *no one knew* the causal relationship at issue before the court. Those cases were decided on the basis that there was no way of identifying, even on a balance of probabilities, the source of asbestos fibre that ultimately culminated in the mesothelioma. In the language of those cases, this was the "rock of uncertainty" on which the relaxation of common law causation rules was based. "Toxic torts", including mesothelioma, were recognized as requiring special causation rules to avoid an injustice.

Sienkiewicz v. Grief (UK) Ltd., 2011 UKSC 10 at para. 133

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- 8 -

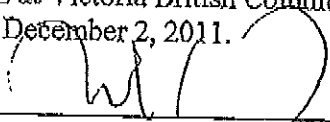
causation may be determined in a robust, pragmatic and common sense manner, as Professor Knutsen expressly noted.

26. Second, the categories of exceptions to the “but for” test are not closed. Professor Knutsen identified two main classes of exceptions to the “but for” test, which he termed *current* exceptions. He stated at page 12 of his article: “There must be first a logical impossibility in proving “but for” causation. The examples given by the Supreme Court include both circular causation and dependency causation. Perhaps there may be more. But these are the present examples.”
27. British Columbia would maintain that it is immaterial whether the nomenclature of circular causation and dependency causation is adopted. The categorization of cases to date proposed by Professor Knutsen appears empirically correct to British Columbia. However, as this Court made clear in *Resurfice*, impossibility and fairness and justice remain grounds for departing from “but for” on a case by case basis. As such, British Columbia would argue that this Court could accept that the Knutsen / BCCA categorization provides a good working understanding of the current “but for” exceptions, without preventing the common law from developing further analogous exceptions to “but for” grounded, as *Resurfice* noted, in impossibility, fairness and justice.
28. Third, the recent experience with departures from the “but for” test in the UK demonstrates that caution is advised. The UKSC has expressly warned: “the law tampers with the ‘but for’ test of causation at its peril”, *Stenkiewicz*, para. 186. Fully considered legislative intervention may prove to be the soundest way to address the particular problems with mass and toxic torts. As mentioned, British Columbia and other provinces are already adjusting the common law to meet the particular causal problems that arise in establishing liability of tobacco related injuries.
29. British Columbia would argue that the present case, a single-vehicle automobile accident, is an inappropriate fact pattern to seek to understand and explore the ramifications of a significant alteration to the presumptive limited recourse to the “material contribution”

test. Alterations of law that would allow "material contribution" to make class actions easier, to address mass torts, and to ensure that "our world would [not] be less safe", ought to be left to the legislature, the law-making body that is best suited to deal with complex changes to the law with uncertain ramifications.

Watkins v. Olafson, [1989] S.C.J. No. 94

SWORN (OR AFFIRMED) BEFORE
ME at Victoria British Columbia
on December 2, 2011.



A commissioner for taking
affidavits for British Columbia

