CAUSATION---CASE COMMENT ON CLEMENTS v CLEMENTS

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1. *Clements v Clements* arose as a result of a motorcycle accident that occurred on August 7th, 2004, on Highway 16, approximately 4 ½ kilometres east of the Village of McBride, in British Columbia (the "MVA"). Mr. Clements was the operator of a motorcycle, a large 1998 Harley Davidson Road Glide (the "Harley"), with Mrs. Clements seated behind him.

2. When the parties left McBride it was raining heavily. The road surface was wet, with standing water in shallow ruts in the highway pavement. Mr. Clements passed a Semi, and was concluding a pass of a BMW, when he lost control. The Harley wobbled, developed a 'weave instability' and capsized. Mrs. Clements sustained a severe brain injury and was unable to testify for discovery or at trial.

3. After the MVA a number of ICBC engineers inspected the Harley's rear tire and found a small puncture hole likely caused by from the expulsion of a nail. The trial judge, in a well written judgment, found as a fact that the expulsion of the nail and the subsequent weave instability were not actions for which Mr. Clements was culpable.

4. There were five factors, inextricably intertwined in time and space that caused the MVA. Mr. Clements was not culpable for one - the expulsion of the nail. However, he was culpable for the four other following factors:

    a. Mr. Clements was driving at a speed of **at least** 120 kph (the posted speed was 100 kph);
    b. Mr. Clements' speed was too fast given the road and weather conditions at the time;
    c. The Harley was overweight by **at least** 100 pounds; and
    d. Weight was unsafely distributed, as too much was stowed above or behind the rear axle.

5. The trial judge found as a fact that it was IMPOSIBBLE to prove causation by applying the traditional "but for" test. He concluded that, because of this impossibility, and because of Mr. Clements' tortuous acts, the "material contribution" test set out in *Resurfice v Hanke* applied. In this case, the Chief Justice set out what is required in order to fall within the exception. The factors are as follows:

    a) it must be impossible for the plaintiff to prove that the defendant's negligence caused the plaintiff's injury using the "but for" test;

b) the impossibility must be due to factors that are outside the control of the plaintiff;
c) the defendant has breached a duty of care owed to the plaintiff, thereby exposing the plaintiff to an unreasonable risk of injury;
d) 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 breach of the defendant;*
e) it will be an exceptional case that meets those requirements, and only then because it would offend basic notions of fairness and justice to deny liability by applying the "but for" approach.

6. Some of the key findings of the learned trial judge were as follows:

Para 39: "*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.*"

Para 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 travelling at an excessive speed well above what the circumstances dictated, in an overloaded motorcycle?*"

Para 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 is not able through no fault of her own 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".*

7. Sounding very much like Lord Reid in *McGhee v National Coal*, and Sopinka, J, in *Snell v Farell*, he said the following in paragraphs 63 and 64:

"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. ***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 this accident."*

8. ICBC was displeased with the verdict, and the matter went to the B.C. Court of Appeal. The appeal centered around factual issues, primarily that the plaintiff had the burden to demonstrate "impossibility". The plaintiff had an expert witness, and provided a report to defense counsel, but, for a number of tactical reasons, did not call this witness. The plaintiff's case was very slender, and included the testimony of only one witness (the driver of the BMW), a number of discovery read ins, and a few agreed facts. No engineering evidence was tendered. At the close of the plaintiff's case, the defense made a motion for a non-suit. The motion was unsuccessful. This placed the defense in an interesting situation. If no defense evidence at all would be tendered, the plaintiff would have been successful on a "but for" basis. The case was simply one of an overloaded Harley passing a vehicle at high speed, in the pouring rain, and losing control. There was evidence of a small hole in the rear tire, but no engineering evidence as to what the implications of that might be. On the other hand, if the defense called it's engineer, Mr. Duane MacInnis, they were faced with the following passage in his report:

"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 behavior of the loaded motorcycle in response to the flat tire instability."*

Mr. MacInnis made a number of statements in cross examination that confirmed the above statement.

9. Most of the Supreme Court of Canada oral argument dealt with the "impossibility" issue. I took the position that I could demonstrate "impossibility" from evidence gleaned from Mr. McInnis. In cross examination he confirmed that it was impossible to reconstruct this accident. ICBC argued that I ought to have called my own expert, performed computer simulations, bring on similar fact evidence and so on. It remains to be seen who wins the day.

10. The Court of Appeal ignored the factual backdrop, the arguments with respect to "impossibility" and the inferences that the trial judge made. Instead, the Court found an article, published by an academic, Professor Knutsen. This article was not tendered by either party at the BCCA, neither counsel knew of its existence, and neither party was given an opportunity to comment on it. The

article has been heavily criticized by other academics. The appeal judgment came as a complete surprise to both counsel.

11. The court reviewed the *Resurfice* test and focused on the two examples given in paragraph 27 and 28 of that decision. These two paragraphs set out two **examples** where the test would apply. The first being the two hunters case (two hunters simultaneously shoot a third), *Cook v Lewis*, [1951] SCR 830. and the second being one of the Red Cross "tainted blood" cases, *Walker v York Finch General Hospital* [2001] 1 SCR 647. Professor Knutsen called the first class of cases "circular causation" and the second, "dependency causation".

12. Professor Knutsen delivered a sharp critique of one of the aspects of the "impossibility" requirement as set out in the *Resurfice* test, namely the "current limitations of scientific knowledge". He constrains the requirement to logical impossibility only. This is what the Learned Professor says on page 8 and 9 of his paper:

> *"The Supreme Court's noting in Hanke of 'Current limits of scientific knowledge' as one possible reason 'but for' causation being beyond the reach of the plaintiff to prove requires some clarification. The statement must be read in the context of what the Supreme Court was trying to say: in order to depart from the standard 'but for' test, the test must be unworkable for circular or dependency causation reasons, neither of which is the fault of the plaintiff.*
>
> *'Current limits of scientific knowledge' should not be read out of context to mean that the material contribution test is appropriate in any case where the science involved is difficult, complex, or 'just not there yet'. Frankly, that is just about any case where personal injury is involved. The science of medicine as it relates to the interaction of disease, medication and trauma on the body is more of an art than a science. It is constantly evolving. Indeed, one might argue it will always have current limits that soon get eclipsed by future, unknowable limits. But the Supreme Court's statement is nothing more than an explanatory reason, so to speak, for the existence of circular causation. It is not a reason to turn to the material contribution test. It is certainly not a gatekeeper for the material contribution test. The gatekeeping function is met by the two pre-conditions which must be satisfied in instances of circular or dependency causation."*

13. In paragraph 63 of the Court of Appeal decision, his Lordship delineates the ratio of the case as follows:

> *"[63] In summary, having regard to the over-arching policy that the material-contribution test is available only when a denial of liability under the but-for test would offend*

basic notions of fairness and justice, I agree with the following statement made by Professor Knutsen in setting out his conclusions (at 187):

The 'but for' test rarely fails, and currently only in situations involving circular causation and dependency causation:

1) Circular causation involves factual situations where it is impossible for the plaintiff to prove which one of two or more possible tortious causes are the cause of the plaintiff's harm;

2) Dependency causation involves factual situations where it is impossible for the plaintiff to prove if a third party would have taken some action in the face of a defendant's negligence and such third party's action would have facilitated harm to the plaintiff;

If the 'but for' test fails, the plaintiff must meet two pre-conditions to utilize the material contribution test for causation:

1) It must be impossible for the plaintiff to prove causation (either due to circular or dependency causation); and

2) The plaintiff must be able to prove that the defendant breached the standard of care, exposed the plaintiff to an unreasonable risk of injury, and the plaintiff must have suffered that type of injury."

14. The Court of Appeal test suffers from serious inconsistencies with the rule as set out in *Resurfice*. It constricts the test in several ways. First, it replaces "impossibility" with "logical impossibility". The set of things that are "impossible" is greater that those things that are "logically impossible." Secondly, it discards the concept of the "limits of scientific knowledge" as a basis for finding "impossibility", even though the Chief Justice specifically refers to this in *Resurfice*. The following passage is from Justice Frankel's reasons for judgment, and while it is eloquent, it is, with respect, wrong.

> *"As he (Knutson) points out, our knowledge of science is ever increasing. What is provable today may not have been provable last year; what cannot be proven today may be provable next year. That forensic science is not always able to provide an answer to a causation question is not a reason for doing away with causation as an essential element of a plaintiff's case."*

15. The third error in the case is the error of making the example the rule. Chief Justice McLachlin, in paragraph 27 and 28 of *Resurfice* provides two examples were "but for" causation fails, but liability

was nevertheless established. In preparing for the Supreme Court appeal, hundreds of cases from many jurisdictions were reviewed, as were dozens of scholarly articles. The only case that uses the terms "circular causation" and "dependency causation" is *Clements v Clements*. **These terms appear nowhere else.** This is an area of the law that is bedeviled with confusing terminology, and the creation of new terms or categories is, with respect, not particularly helpful.

16. Curiously, Professor Knutson was retained by ICBC to assist them in the Supreme Court of Canada Appeal. He was present at the hearing. He has, however, since authored an article. entitled *"Causal Draws and Causal Inferences: A solution to Clements v Clements"*. This article retreats from the position that he took in his earlier article, and suggests that, depending upon the evidentiary inferences drawn by the trial judge, the material contribution might or might not apply. He advocated "a return to first principles".

17. In a subsequent case, *Fullowka v Pinkertons,* the Supreme Court reiterated the Resurfice test in one short paragraph. It is my belief that the Court will issue a judgment in Clements that will say that "we really meant what we said in *Resurfice*", but the case is still under reserve, and that remains to be seen.

18. It is an important feature of the *Resurfice* test that it be applied only in exceptional circumstances. The Chief Justice repeated this more than once in the decision. The case makes it clear that in the vast majority of causation cases, the traditional test of "but for" must be used. Only in exceptional circumstances can this be departed from. The English cases on which *Resurfice* rests, such as *Fairchild v Glenhaven* also repeat this warning. In departing from the "but for test" one is tinkering with the foundations of the tort of negligence, a legally risky (our Court of Appeal has used the word "adventurous") proposition. Many academics have been sharply critical of Resurfice because it does away with the concept of cause altogether, and, from one perspective, this is correct. Causation found pursuant to *Resurfice* is not factual causation. It is a legally imposed causation, where, in some circumstances, a tortfeasor might be unfairly punished in that he is found liable to a plaintiff even though factually there is no causation. It is for this reason that the bar in applying *Resurfice* is set so high. It is essentially a floodgates type of argument. This is why the Supreme Court of Canada was so careful in setting the boundary conditions of the test. The "material contribution test" is not an alternative test, as the Alberta Court of Appeal held in *Resurfice.* It is legally incorrect to say that if "but for" causation fails, counsel can simply move on to "material contribution" and try that. The admonishment against that by the Supreme Court is strong.

19. There is an important distinction between *Athey v Leonati* and *Resurfice v Hanke*, but the language is sometimes confusing. In both cases the "material contribution test" is referred to, but the *Resurfice* test is significantly different than the *Athey v Leonati* test. It is, in fact, somewhat misleading to refer to the *Resurfice* test as a "material contribution" test. That phrase comes from the English Cases- *Bonnington Castings v Wardlaw, McGhee v National Coal, Wilshire v Essex County, Fairchild v Glenhaven*, and many others. It raises the question of what in fact the word "material" means in the test. Much academic ink has been spilled over this, and sharp criticism has been directed at the Supreme Court for not providing at least some guiding principles to establish a legal framework around the word "material". My personal view is, that, on a careful reading of *Bonnington Castings*, "material" means "very small"; just a tick above de minimus. But on a careful reading of *Resurfice*, and particularly of paragraph 25, the word "material" is not used. The test does not say that when there is a "material increase in risk". It states that there must be an **unreasonable** increase in risk. This takes the test out of arcane Scottish Industrial Revolution law and into a 21st century concept that lawyers and judges deal with on a daily basis. The question of what is reasonable and what is not reasonable is debated continually in our courts, and our tort law is well equipped to handle such a concept. It again imposes a higher threshold that *McGhee v National Coal*, and its progeny, in that things "material" are a subset of things "reasonable." It is my view that the Supreme Court will place some emphasis on this in Clements.

20. The test is also very different from the "material contribution" test in *Athey v Leonato*. In *Athey*, the court is dealing with a material contribution **injury**, whereas in Resurfice the court is dealing with a "material (or unreasonable) contribution" to **risk**. These are two fundamentally different concepts, and the difficulty arises because the same label is attached to each. The *Athey v Leonati* factual backdrop is a common scenario in personal injury cases. Who has not encountered a plaintiff where there is a pre-existent history of significant, but quiescent degenerative disc disease, who is involved in several accidents, some of which are tortuous and some of which are not. Every plaintiff over the age of 50, it seems, has such a history. In *Athey*, the Trial Court and the BCCA confounded the concepts of causation with damages. If there are multiple causes leading to an indivisible injury, each cause, if it is not *de minimis*, will be sufficient to establish factual causation, so long as the cause is not *de minimis*. In *Athey,* we had a plaintiff with a pre-existent history of back problems, involved in 2 accidents, and subsequently suffers a disc herniation during a stretching exercise. The accidents were a cause. It does not matter that there were other causes. It is common, in motor vehicle cases, to have multiple cause accidents. So long as the tortuous cause is a cause, causation is established. If a

cause materially contributes to the injury, and the cause is not *de minimis*, that cause will be a cause-in-fact. The triggering condition in *Athey* was that if the but for test was "unworkable", the material contribution test could be used. This is a lower threshold than the "impossibility" requirement in *Resurfice*. The one place where I disagree with the trial judge is that he used the two words interchangeable, and that is probably incorrect. We have here two profoundly different tests, sharing the same name, with different triggering provisions.

21. In these two cases we are confronted with a nomenclature issue, which has created some confusion. Professor Knutsen and the BCCA have aggravated the problem by dumping further words into the causation lexicon, and hopefully, the Supreme Court will correct this.

22. The material contribution test is a creature of policy. But then, most aspects of the law of negligence at some point grew out of this crucible. The policy issues arising out of weighing the rights of the injured party against the obligations of the tortfeasor are neatly expressed by Professor Collins, of the University of Ottawa, in "Causation, Contribution and Clements, Revisiting the Material Contribution Test in Canadian Tort Law", framed the issue as follows:

> *"Should the Supreme Court of Canada reinstate the material contribution test as articulated in Hanke, material contribution to risk will once again become a viable alternative for plaintiffs faced with a burden of intractable scientific uncertainty. The result will be that some defendants will compensate some plaintiffs for injuries which, as science evolves, may later be shown to be unconnected to the defendant's conduct. On the other hand, should the restrictive approach adopted by the Court of Appeal in Clements stand, the converse will be true; plaintiffs actually harmed by a defendants negligence will receive no compensation (and defendants will experience no correlative deterrent effect). Thus, the Supreme Court in Clements is faced with a necessarily imperfect range of choices, each of which will produce some injustice in some situations. The author has argued that from the perspectives of compensation, deterrence and fairness to the parties, the principled test of material contribution to risk articulated in Hanke is preferable to the narrow, categorical approach adopted in Clements. The basic premise is simple: whenever the causal inquiry is thwarted by intractable scientific uncertainty and the defendant has created a risk of the very harm that was ultimately suffered, the negligent risk creator, not the innocent plaintiff, should bear the burden of that uncertainty. Should defendants wish to avoid liability in negligence, the task is not a Herculean one; they need only comport themselves in the manner prescribed by that paragon of common law virtue–the reasonable person."*