

APPLICANTS MEMORANDUM OF ARGUMENT

PART I

STATEMENT OF FACTS

1. The central question in this case is whether the Court of Appeal's clarification of this Court's formulation of the material contribution test is correct or represents an illogical narrowing of the test. It is clear that the Court of Appeal's decision is inconsistent with the formulation set out in this Court's decision in *Resurfice Corp. v Hanke*, [2007] 1 S.C.R 333. The question is whether this inconsistency is a correct narrowing of the scope of the doctrine, or an artificial and unjust restraint on its application.
2. The applicant, Joan Clements, by her litigation guardian, Donna Jardine, seeks leave to appeal from the judgment of the British Columbia Court of Appeal pronounced on December 17, 2010, setting aside a Supreme Court of British Columbia trial judgment pronounced on 4 February 2009.
3. This case arises out of a motorcycle accident on August 7, 2004. The applicant (Plaintiff) suffered a severe traumatic brain injury when the respondent (Defendant) lost control of his overloaded motorcycle passing a BMW sports car at approximately 30 km/h above the speed limit on a wet highway. 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 respondent was unable to control the motorcycle, which "capsized" and flipped over.
4. The trial judge found that, at the time of the accident, the motorcycle was travelling at excessive speed and was overloaded. The trial judge held that scientific evidence could not detail the precise impact of the defendant's tortious conduct in speeding and overloading the motorcycle such as to satisfy the traditional 'but for' test, but nevertheless causation was established by the application of the 'material contribution' test. On appeal, the Court adopted an academic analysis of the case-law and held that there are only two logical categories of cases which fit within the material contribution test.

5. In any event, given the factual circumstances of the case, it was open to both the trial and appellate Courts to infer causation to the “but for” standard notwithstanding the evidentiary gap, by relying on the common sense inferences arising out of the available evidence.

6. It is apparent from the decision of the Court of Appeal, and from the prevailing debate and divergence amongst the Courts of Canada and academics alike, that considerable uncertainty persists as to the appropriate test for causation in circumstances where the available scientific knowledge cannot provide a precise answer.

7. The proposed appeal is a timely opportunity for the Court to resolve not inconsiderable juridical confusion by providing the trial and appellate courts with an authoritative statement on when departure from the traditional test for cause is necessary or justified, and in those rare cases, how the alternative test for causation ought properly be constructed and applied.

The accident

8. The applicant relies on the findings of fact made by the trial judge. These findings were not rejected by the Court of Appeal.

The Trial Judgment

9. At trial, the respondent conceded he had breached his duty of care to the applicant by driving at an excessive speed. The trial judge found that the respondent had been travelling at least 120 kilometres per hour when it passed the BMV.

Reasons of trial judge, paras. 32,45, 46.

10. The trial judge also held that the respondent had breached his duty of care to the applicant by failing to understand the gross vehicle weight rating of his motorcycle, and to ensure that it was not overloaded. In this regard, the trial judge found that the motorcycle was carrying more than 100 pounds over the gross vehicle weight rating in the owner’s manual, i.e., the maximum allowable loaded vehicle weight.

Reasons of trial judge, paras. 13, 15,41.

11. On the question of causation, however, the trial judge concluded that the applicant had failed to satisfy the generally applicable 'but for' test. It had not been established that even if the respondent had not breached his duty of care by travelling overloaded and at an excessive speed, the bike would not have capsized when the rear tire deflated. That is, whilst the trial judge accepted that there was clearly a correlation between stability on one hand, and speed and weight on the other, the precise effect was scientifically impossible to determine based on the expert evidence given for the defendant by Mr MacInnis, an engineer qualified as an expert in accident reconstruction and motorcycle dynamics.

12. Instead, the trial judge found that the facts of the case gave rise to the "special circumstances" discussed by McLachlin C.J.C. in *Resurfice* as justifying the application of the "material contribution" test as an exception to the 'but for' general rule (at para. 65).

...I have found that the defendant breached his duty of care to the plaintiff as his passenger. His breaches gave rise to an unreasonable risk of injury from highway accident due to instability, which is the form of injury suffered by the plaintiff.

[66] Notwithstanding that the science of motorcycle dynamics tells us that the nature of those breaches, excess speed and excess load, will increase the weave instability of the motorcycle in the event of a flat tire, which is what occurred, the plaintiff through no fault of her own is unable to prove that "but for" the defendant's breaches, she would not have been injured. This is because after the fact, it is not possible through accident reconstruction modeling to determine at what combination of lower speed and lesser weight recovery from the weave instability would have been practicable. At the same time, the evidence did not establish that the plaintiff would have suffered harm in the absence of the defendant's breaches.

[67] I conclude on all of the evidence that the defendant's breaches of duty materially contributed to the injuries suffered by the plaintiff as a result of the accident. In short, her injuries were the result of her husband driving too fast with too heavy a load when his rear tire unexpectedly deflated. Causation is therefore established within the parameters discussed by the Supreme Court of Canada in *Athey* and *Resurfice*. The defendant is accordingly liable.

13. The trial judge went on to find that the applicant had not been contributorily negligent, and that the respondent was 100% liable for the accident.

The Judgment on Appeal

14. On appeal, the respondent argued that the trial judge had erred in stating and applying the laws of causation, and erred in fact in relation to Mr. MacInnis' evidence.

15. The Court of Appeal agreed with the respondent's view on causation and held that the present case was not one which permitted causation being established on a basis other than the 'but for' test.

Reasons of appeal judge, paras. 4, 39.

16. The reasons given by Justice Frankel indicate that, in arriving at this conclusion, the Court unreservedly accepted the academic views of Professor Erik S. Knutsen as "fully and articulately" answering the question of when the material contribution test will apply; that is, the 'but for' test will only be supplanted as the test for cause in circumstances where the facts give rise to the presence of either 'circular causation' or 'dependency' causation." It was found that neither were present on the available facts.

Reasons of trial judge, paras. 54, 63, 64.

PART II

QUESTIONS IN ISSUE

17. Should this court grant leave on the grounds that the appeal will raise the following issues of national and public importance:

- (a) Is the material contribution test for causation available only in circumstances of circular or reliance causation?
- (b) Did the British Columbia Court of Appeal err in restating and narrowing the material contribution test for causation pronounced by this Court?

PART III

STATEMENT OF ARGUMENT

Material Contribution

18. The ‘but for’ test is and remains the primary test for causation in tort law. Over time the Courts have recognised, however, that in particular circumstances of factual uncertainty a strict application of the ‘but for’ test is “unworkable” (*Athey v Leonati* [1996] 3 S.C.R. 458) or “impossible” (*Resurfice, supra*). This may be because of, for example, the current limits of scientific knowledge (*Resurfice, supra*), as in the present case where the trial judge found the contemporary science of motorcycle dynamics to be incapable of determining the speed and vehicle weight at which weave instability becomes unrecoverable.

19. In order to avoid outcomes which would otherwise be unjust or against public policy in those (infrequent and special) cases, the Courts have indicated that the traditional approach may be dispensed with in favour of an alternative, more lenient “material contribution” test.

20. The ‘material contribution to injury’ test arising out of *Snell v. Farrell* [1990] 2 S.C.R. 311 and the subsequent decision of Major J. in *Athey*, is concerned primarily with whether the negligence of the defendant materially contributed to the injury suffered by the plaintiff. The more recent ‘material contribution to risk’ iteration focuses on whether the tortious conduct materially increased the risk of the injury ultimately suffered. At present, the authoritative statement by this Court of the latter test appears only in obiter dicta in *Resurfice*. The two requirements for the application of the material contribution test were described by the Chief Justice, at paragraph 25, as follows:

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.

21. This Court categorised the above as broad principles which "are helpful in defining the situations in which an exception to the "but for" approach ought to be permitted" (para. 26), but did not further elucidate on the underlying principles, deciding it was "...neither necessary nor helpful to catalogue the various debates" as to the proper test for causation (para 20).

22. Two non-exclusive examples given by this Court demonstrate instances in which the two-part test would apply. The first is the instance in which there are two tortious acts and it cannot be determined which caused the injury. The second example given is where the 'but for' chain of causation has been broken because it is impossible to prove how a particular person in the causal chain would have acted had the defendant not been negligent (para. 26).

Material Contribution in Clements

23. It is submitted that the Court of Appeal in *Clements* has interpreted and applied *Resurfice* in a manner which unjustly restrains the application of the material contribution test to a limited set of factual circumstances.

24. In arriving at its decision, the Court of Appeal relied on the conclusions of Professor Erik S. Knutsen, expressed in his article entitled "*Clarifying Causation in Tort*" (2010), 33 Dal. L.J. 153. Professor Knutsen's paper was neither cited by, nor the subject of submissions from, either party to proceedings. Though the commentary on this issue is voluminous, the Court of Appeal did not reference the opinions of any other legal scholars in arriving at its preferred interpretation of the law.

25. The following principles stated by Professor Knutsen were adopted verbatim by the Court of Appeal (at para. 63) as the proper test for material contribution:

- (g) The "but for" test rarely fails, and currently only in situations involving circular causation and dependency causation:

- 1) Circular causation involves factual situations where it is impossible for the plaintiff to prove which one of two or more possible tortious causes are the cause of the plaintiff's harm;
 - 2) Dependency causation involves factual situations where it is impossible for the plaintiff to prove if a third party would have taken some action in the face of a defendant's negligence and such third party's action would have facilitated harm to the plaintiff;
- (h) If the "but for" test fails, the plaintiff must meet two pre-conditions to utilize the material contribution test for causation:
- 1) It must be impossible for the plaintiff to prove causation (either due to circular or dependency causation); and,
 - 2) The plaintiff must be able to prove that the defendant breached the standard of care, exposed the plaintiff to an unreasonable risk of injury, and the plaintiff must have suffered that type of injury.

26. Knusten's analysis, endorsed by the Court of Appeal, takes the illustrative examples given by this Court and makes them a functional part of the test for material contribution, by making the presence of either 'circular' or 'dependency' causation an essential pre-condition to the application of the test for 'material contribution'. It is submitted that insisting that the fact patterns in these two examples are the only kind of fact patterns in which the "but for" test is supplanted renders application of the test impractical in a number of situations.

27. For instance, in order to establish the presence of circular causation, each of the competing potential causes must be sufficient to have caused the injury independently of the other causes (*Knutsen*, at pp. 12-13, 15). Further, each of competing potential causes must be identical in nature: for example, they must both be the discharge of shotguns, or exposure to asbestos fibres (*Clements*, para. 62). This requirement is contradictory to the decision of this Court in *Myers v. Peel County Board of Education* [1981] 2 S.C.R. 21, in which the competing causes were (a) a child attempting a gymnastic manoeuvre and (b) the School's failure to provide supervision or adequate protective matting.

28. Moreover, by imposing the requirement for circular causation, the test is now limited in its application to those circumstances where there are at least two or more tortious acts

which could potentially have caused harm to the plaintiff. The test becomes unworkable in those circumstances in which it is impossible to determine cause as between tortious and non-tortious acts or omissions. This outcome sits uncomfortably with the general principle established in *Athey* that a defendant is not excused from liability where there is another, non-negligent cause.

29. In addition to narrowing the test for material detriment by imposing additional pre-requisites, there are a number of other instances in *Clements* where the Court of Appeal demonstrably departed from the reasoning of this Court in *Resurfice*.

30. Relevantly, the Court of Appeal interpreted the requirement under the first limb of *the Resurfice* test (that is, that causation be factually impossible to prove using the ‘but for’ test) as meaning that it instead be logically impossible to prove, because the test “is not a solution for evidentiary insufficiency” (*Clements*, paras. 58-59, 54). It is submitted that the material contribution test is answer for evidentiary insufficiencies, but only those of the kind identified in *Resurfice*; that is, insufficiencies arising (through no fault of the plaintiff) which make it impossible for the standard of proof under ‘but for’ to be discharged. The absence of unassailable scientific evidence relating to motorcycle weave instability is but one such example.

31. Similarly, the Court of Appeal refused to apply the “current limits of scientific knowledge” example given in *Resurfice* as an example of circumstances in which the application of the material contribution test might be appropriate (para. 59). The present case is, however, precisely an example of where the limits of scientific knowledge make it impossible for the applicant to prove cause using a strict application of the ‘but for’ test. The respondent’s negligence (excessive speed and weight) undoubtedly increased the risk that the applicant would suffer damage in the event of the rear tire deflation. That negligence may also have caused the damage suffered. However, it cannot be proven to have done so, as the evidence simply could not categorically conclude whether, had the vehicle been lighter and travelling slower, the respondent would have been able to maintain control of the motorcycle and recover from the weave instability.

Inference Causation

32. In assessing causation, the Court of Appeal erred not only in interpreting and applying the “material contribution” test, but also in failing to turn its mind to the trial judge’s finding on the application of the basic ‘but for’ test to these particular factual circumstances. Having determined that the trial judge should not have applied the material contribution test, the Court of Appeal ought to have revisited whether causation could be established under the traditional test for cause.

33. It is submitted that, by following a process of inferential reasoning, it was open to the Court to make a finding of fact that the necessary causal relationship existed to the ‘but for’ standard, notwithstanding the absence of expert scientific proof. Indeed, though he ultimately adopted the *Resurface* test, the trial judge in *Clements* 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.

34. The legitimacy of the inference approach to legal fact-finding was recognised by Justice Sopinka in *Snell*, and continues to be accepted today. In his decision, Justice Sopinka acknowledges that “[d]issatisfaction with the traditional approach to causation stems to a large extent from its too rigid application in many cases”, and that “causation need not be determined with scientific precision”.

35. Instead, Justice Sopinka categorised both the burden and standard of proof not as inflexible standards but as rather as adaptable concepts capable of being tailored to particular factual circumstances. Sopinka J observes that:

The legal or ultimate burden remains with the plaintiff, but in the absence of evidence to the contrary adduced by the defendant an inference of causation may be drawn although positive or scientific proof of causation has not been adduced.

36. It is not difficult or unreasonable, in the circumstances of the present case, to infer a “but for” causal connection between the plaintiff’s severe brain damage and her fall from a motorcycle being driven in a negligent manner by the respondent. The evidence at trial supported a correlation between the defendant’s tortious conduct and the instability of the bike, even if the

precise extent of that correlation could not be quantified. The fact that the plaintiff is therefore a probable victim of the plaintiff's negligence may be inferred on the facts.

37. Ultimately, it is simply illogical to suggest that, because of the complexities of proof in this matter, a defendant whose negligent conduct clearly has a substantial connection to the plaintiff's injury, will escape liability for that conduct.

Conclusion

38. It is submitted that the British Columbia Court of Appeal erred in restating and narrowing the material contribution test for causation pronounced by this Court. The decision of the Court of Appeal has limited the application of the doctrine in a manner which is artificial and inconsistent with the formulation set out in this Court's decision in *Resurface*.

39. Moreover, this decision has resulted in an outcome which is contrary to the 'basic notions of fairness and justice'; a severely brain damaged plaintiff has been denied the right to compensation simply because it was impossible (due to factors that are outside her control) for her to prove that her husband's negligence was the cause of her injury on a strict application of the "but for" test. Surely these are the exceptional circumstances specifically for which the more lenient, policy- driven test was designed. At the very least a process of inferential fact finding ought to have been conducted to determine whether, on the 'but for' standard of proof, causation could be established.

40. The facts of the present case provide this Court with an invaluable and timely opportunity to resolve the prevailing uncertainty amongst the trial and appellate courts more generally as to the role and ambit of the 'material contribution' test by providing an unequivocal statement of the law in this regard.

PART IV

SUBMISSION ON COSTS

41. This application for leave to appeal raises important issues of law within the meaning of subsection 40(1) of the *Supreme Court Act*. The applicant seeks her costs of this application.

PART V

NATURE OF ORDERS SOUGHT

42. The applicant seeks an order granting the application for leave to appeal, with costs to the applicant in any event of the cause.


ALL OF WHICH IS RESPECTFULLY SUBMITTED.


DATED at the City of Vancouver, in the Province of British Columbia,
this _____ day of February 2011.


D. Geoffrey Cowper, Q.C.
Counsel for the Applicant, Joan Clements


PART VI

LIST OF AUTHORITIES

Athey v Leonati, [1996] 3 S.C.R. 458, CITED at paras. .

Knutsen, Erik S, “*Clarifying Causation in Tort*” (2010), 33 Dal. L.J. 153, CITED at paras. .

Myers v. Peel County Board of Education [1981] 2 S.C.R. 21, CITED at paras. .

Resurfice Corp. v Hanke, [2007] 1 S.C.R. 333, CITED at paras. .

Snell v. Farrell [1990] 2 S.C.R. 311, CITED at paras. .