

Causation in Canada Revisited: Material Contribution to Risk and the Impact of *Clements (Litigation Guardian of) v. Clements*

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AT least until 2012, there was significant confusion in Canadian jurisprudence surrounding one aspect of the standard for causation in negligence actions. Canadian courts referred to this aspect as the “material contribution” test. In some of its articulations of this test, the courts were talking about a concept similar to the U.S. “substantial contributing factor” test.² But in others, they seemed to be talking about something very different. The Supreme Court of Canada had been

criticized by academic commentators for its failed attempts, in its earlier decisions in cases such as *Athey v. Leonati*³ and *Hanke v. Resurfice Corp.*⁴, to clarify the law in this area. Some critics, including one of the authors of this paper, argued that these decisions only served to further complicate an already unclear area of Canadian tort law.⁵ In 2012, the Supreme Court addressed the issues raised in a number of

¹ Jill Lawrie, Annie Leeks and Gordon McKee, *The Test for Causation in Canada: But For, But Maybe Not*, 75 DEF. COUNS J. 378 (2008).

² The U.S. test was most recently discussed in the *Defense Counsel Journal* in an article by Anderson, et al, *The Any Exposure Theory Round III: An Update on the State of the Case Law 2012 – 2016*, 84 DEF. COUNS J. 264 (2016).

³ [1996] 3 S.C.R. 458, 140 D.L.R. (4th) 235.

⁴ 2007 S.C.C. 7, 1 S.C.R. 333.

⁵ Lawrie, Leeks and McKee, *supra* n. 1, at 384; Anthony Duggan, Jacob S. Ziegel and Jassmin Girgis, *Material Contribution and Quantum Uncertainty: Hanke v. Resurfice Corp.*, 43 CBLJ 155, 159 (2006); Gillian Demeyere, *The ‘Material Contribution’ Test: An Immaterial Contribution to Tort Law: A Comment on Briglio v. Faulkner*, 34 U. BRIT. COLUM. L. REV. 317, 318 & 323-324 (2000).

these criticisms, and substantially clarified the law, drawing a clear distinction between two more precisely worded concepts - “material contribution to injury” and “material contribution to risk”.⁶ The former concept is nothing new or surprising, and akin to “substantial contributing factor”. The same cannot be said for the latter, however.

This paper will examine in more detail the 2012 decision of the Supreme Court of Canada in *Clements (Litigation Guardian of) v. Clements*,⁷ and the Court’s guidance regarding the material contribution to risk test. While the material contribution to risk test is now clearly part of Canadian tort law, it is a doctrine that will only rarely come into play. For this reason, the test has been referred to as the “unicorn” of Canadian law, often talked about but rarely seen.⁸ Given the right fact pattern, this doctrine may be available to assist a plaintiff to establish liability in a negligence action where “but for” causation cannot be established, with or without

application of the material contribution to injury test.

I. “But for” Is Still the Default Test for Causation

Causation is one of the requisite elements that must be established to bring an action in negligence. It is required in order to link the harm inflicted on the plaintiff to the breach of duty owed by the tortfeasor.⁹ To allow recovery where an injury would have occurred absent any breach of duty on the defendant’s part would neither further the goals of compensation, fairness and deterrence, nor comport with the theory of corrective justice that underlies the law of negligence.¹⁰

The fundamental rule for determining causation in Canada continues to be the “but for” test.¹¹ The plaintiff must establish that but for the defendant’s negligent conduct (falling below the applicable standard of care) the plaintiff would not have experienced the injury.¹² The defendant’s conduct does not have to be the sole cause or even the most important. It just has to have been a materially contributing factor – a necessary ingredient – in the occurrence of the injury. Establishing this connection is a “factual inquiry”.¹³ Plaintiffs must establish “but for” causation on a balance of probabilities in order to succeed in their claim.

⁶ To add to the confusion, courts have sometimes referenced a third concept, “material increase in risk”. This concept is part of a “but for” analysis, looking at whether, from a general causation standpoint, the defendant’s negligent conduct increased the risk of injury enough (e.g. more than a doubling of the risk) that the court could draw a rebuttable presumption of specific causation in respect of individuals who experienced the injury, absent evidence to the contrary; *Andersen v. St. Jude Medical, Inc.*, 2012 O.N.S.C. 3660 at paras. 520-538, 219 A.C.W.S. (3d) 725. A discussion of this topic is beyond the scope of this paper.

⁷ 2012 S.C.C. 32, 2 S.C.R. 181.

⁸ Ryan Krushelnitzky and Peter Gibson, *Material Contribution: The ‘Unicorn’ of Canadian Law*, CLAIMS CANADA (20112), available at www.claimscanada.ca/material-contribution-the-unicorn-of-canadian-law.

⁹ *Clements*, 2012 S.C.C. 32 at para. 6.

¹⁰ *Id.* at para. 21.

¹¹ *Resurfice*, 2007 S.C.C. 7 at para. 21; *Clements*, 2012 S.C.C. 32 at para. 8.

¹² *Clements*, 2012 S.C.C. 32 at para. 8.

¹³ *Id.*

The Supreme Court of Canada in *Clements* reaffirmed that the court's go-to tool for determining causation remains the "but for" test. However, the Court in *Clements* also acknowledged that there are circumstances where it may be impossible for a plaintiff, through no fault of his or her own, to prove causation. Recognizing that "but for" may "offend basic notions of fairness and justice" in some circumstances, the Court in *Clements* went on to discuss and clarify when a plaintiff might seek to invoke the material contribution to risk test.

II. Clarifying "Material Contribution to Injury" vs. "Material Contribution to Risk"

One issue that arises when attempting to track the evolution of causation through Canadian jurisprudence is the ambiguous use of the term "materially contributed". As stated by Lord Reid in *McGhee v. National Coal Board*,¹⁴ "a [claimant] succeeds if he can [show] that fault of the defender *caused or materially contributed to his injury*." The Supreme Court of Canada endorsed this principle in both *Snell v. Farrell*¹⁵ and *Athey v. Leonati*.¹⁶ The "material contribution" that Lord Reid refers to in *McGhee*, and that the Supreme Court of Canada appears to be referring to in *Athey*,¹⁷ is a material contribution to the *injury*.

In *Snell*, Sopinka J. referenced Lord Bridge's decision in *Wilsher v. Essex Area Health Authority*,¹⁸ in which he held that if a "robust and pragmatic" approach is applied to the facts, it is possible for the Court to legitimately infer that the defendant's negligence *materially contributed to the plaintiff's injury* even though medical or scientific expertise cannot arrive at a definitive conclusion.¹⁹ Where the defendant's act materially contributed to – was a "necessary ingredient" in the occurrence of – the injury, it is no different, in effect, from saying that "but for" that act or omission, the injury would not have occurred.²⁰ Therefore, "material contribution to injury" is encompassed within the "robust and pragmatic" approach to the "but for" causation test.

On the other hand, *material contribution to risk* is a completely "different beast" from "but for" causation.²¹ According to the Supreme Court of Canada in *Clements*, "material contribution [to risk] does not signify a test of causation at all; rather it is a policy driven rule of law designed to permit plaintiffs to recover in such cases despite their failure to prove causation."²² This test imposes liability not because causation is proven, but because the defendant's negligence materially contributed to the risk that injury would occur.

Confusion arose in the past because Canadian courts often referred to "material contribution" without explaining whether they were referencing a material contribution to injury or a material

¹⁴ [1972] U.K.H.L. 7 at 2.

¹⁵ [1990] 2 S.C.R. 311 at paras. 42-43, 72 D.L.R. (4th) 289.

¹⁶ *Athey*, 3 S.C.R. 458 at para. 15.

¹⁷ *Athey*, 3 S.C.R. 458 at para. 41.

¹⁸ [1988] 1 All E.R. 871, [1988] 2 W.L.R. 557.

¹⁹ *Snell*, 2 S.C.R. 311 at para. 23.

²⁰ Lawrie et al., *supra* n. 1, at 381.

²¹ *Clements*, 2012 S.C.C. 32 at para. 14.

²² *Id.*

contribution to risk. Without these distinguishing qualifiers, readers could be misled. It is now clear from *Clements* that the former is part of a “robust and pragmatic” approach to the “but for” causation requirement, while the latter deals with a policy driven finding of liability where “but for” causation may be impossible to prove.

III. Evolution of the Material Contribution to Risk Test

At paragraph 25 of the Supreme Court of Canada’s reasons in *Resurfice*,²³ McLachlin C.J. stated that a material contribution approach might be used where:

- (i) it is *impossible* for the plaintiff to prove causation using the “but for” test, on a balance of probabilities, due to factors beyond the plaintiff’s control; and
- (ii) it is clear that the defendant breached a duty in a way that exposed the plaintiff to an unreasonable risk of injury; and that the plaintiff suffered that form of injury.

While the Court’s articulation of the test in *Resurfice* left some questions unanswered,²⁴ including what “impossibility” meant, it was made clear in *Clements* that *Resurfice* was referring to the material contribution to risk test, and that it is not, in fact, meant to simply be a loosening of the “but for” standard—it is an entirely “different beast”.²⁵

In *Clements*, McLachlin C.J. summarized and clarified the present state of Canadian law on causation in negligence as follows:

- (i) As a general rule plaintiffs cannot succeed against the defendant unless they can establish that they would not have suffered a loss “but for” the negligent act of the defendant. A trial judge is to take a robust and pragmatic approach to determining if a plaintiff has established that the defendant’s negligence caused her loss. Scientific proof of causation is not required.
- (ii) Exceptionally, a plaintiff may succeed by showing that the defendant’s conduct materially contributed to risk of the plaintiff’s injury where:
 - a. the loss would not have occurred “but for” the negligence of two or more tortfeasors, each possibly in fact responsible for the loss; and
 - b. it is impossible for the plaintiff, through no fault of her own, to show that any one of the possible tortfeasors in fact was the necessary or “but for” cause of her injury, because each can point to the other as the possible “but for” cause of the plaintiff’s injury, defeating a finding of causation on a balance of probabilities against any one of them.

McLachlin C.J.’s framework from *Clements* means that where a plaintiff seeks to rely on the material contribution to risk test, that plaintiff must establish “global

²³ *Resurfice*, 2007 S.C.C. 7 at para. 25.

²⁴ Lawrie et al., *supra* n. 1, at 384-385.

²⁵ *Clements*, 2012 S.C.C. 32 at para. 14.

but for” in regard to multiple tortfeasors²⁶ and an impossibility of establishing individual “but for” through no fault of her own.²⁷ McLachlin C.J. quoted from Smith J.A.’s judgment in *MacDonald (Litigation Guardian of) v. Goertz*,²⁸ when she stated that the material contribution to risk test is a “policy-driven rule of law designed to permit plaintiffs to recover in such cases despite their failure to prove causation.”²⁹ This principle underlines the “corrective justice”³⁰ aspect of tort law and allows recovery where denial would “offend basic notions of fairness and justice.”³¹

It is noteworthy that the Supreme Court expressly considered whether “scientific impossibility” might be sufficient to engage the material contribution to risk test in a case of a single tortfeasor (as the trial judge had found in *Clements*), and rejected that as a sufficient basis on its own.³² The Court reasoned that, because

the law of negligence has never required “scientific proof” of causation,³³ it is difficult to see how its absence could be raised as a basis for ousting the usual “but for” test. The Court noted that, thus far, courts in Canada have not applied a material contribution to risk test in a case involving a single tortfeasor.³⁴

The Supreme Court ultimately found in *Clements* that, while the trial judge should not have applied the material contribution to risk test to find causation in that single tortfeasor case, he erred in his application of the “but for” test.³⁵ The majority felt that the judge had incorrectly insisted on scientific precision in the evidence as a condition of finding “but for” causation and accordingly ordered a new trial.

IV. Scope of Material Contribution To Risk Test

Given the evolution in Canada of the material contribution test, we look back on two benchmark cases to consider how the material contribution to risk test might have impacted the reasoning, if not the result, if these cases were decided today.

²⁶ The Court suggested that this could apply not only where the multiple tortfeasors are all defendants but also where one tortfeasor was a third party (*id.* at paras. 24-25 and 45).

²⁷ *Id.* at paras. 40-41.

²⁸ 2009 B.C.C.A. 358 at para. 17, 275 B.C.A.C. 68.

²⁹ *Clements*, 2012 S.C.C. 32 at para. 14.

³⁰ *Id.*

³¹ *Resurface*, 2007 S.C.C. 7 at para. 25.

³² *Clements*, 2012 S.C.C. 32 at paras. 37-38. The Court left open for another day the scenario that might arise in mass toxic tort litigation with multiple plaintiffs where it is established statistically that the defendant’s acts induced an injury in some members of the group, but it is impossible to know which ones (*id.* at para. 44). Should this issue come before the court directly, it may well be resolved on the basis that the “material increase in risk” concept, articulated by the Ontario Superior Court in *Andersen v. St. Jude Medical*, *supra*, n. 6, or some variant thereon is adequate to the

task using the “but for” test, and that there continues to be no need for an extension of the material contribution to risk test even in these circumstances.

³³ The Court noted that common sense inferences from the facts, applying a robust and pragmatic approach, may suffice (*id.* at para 38).

³⁴ *Id.* at para. 42

³⁵ *Id.* at para. 50.

A. *Cook v. Lewis*

The facts in *Cook v. Lewis*³⁶ present the perfect example of a situation where the material contribution to risk test could have been applied.³⁷

In *Cook*, the two defendants were hunting and both defendants negligently shot into an area where another hunter was walking. One of the bullets made contact with the third hunter and injured him. It was impossible for the plaintiff to establish *which* of the two men had fired the bullet that hit him, so the plaintiff could not establish “but for” causation against either on a balance of probabilities.³⁸

Even though the case was actually resolved by reversing the onus of proof onto the defendant,³⁹ this case would seem to clearly fall within the two part test enunciated by McLachlin C.J. in *Clements*, necessary to invoke the exception to the “but for” test. Here there were two tortfeasors each of whom acted negligently, and thereby materially contributed to the risk of harm to the plaintiff. “But for” the globally negligent actions of the defendants, the plaintiff would not have been injured. Moreover, through no fault of his own, the plaintiff was unable to establish individual “but for” causation.

As may be seen from the comments below, a finding of liability, premised on material contribution to risk may have been what Cartwright J. (who wrote for

the majority in *Cook*) was proposing all along:⁴⁰

If under the circumstances of the case at bar the jury, having decided that the plaintiff was shot by either Cook or Akenhead, found themselves unable to decide which of the two shot him because in their opinion both shot negligently in the direction, both defendants should have been found liable. I think that the learned trial judge should have sent the jury back to consider the matter further with a direction to the above effect.⁴¹

Had the material contribution to risk framework from *Clements* been applied in *Cook*, it may have permitted the Court to find liability on a more appropriate basis than a reversal of the onus of proof.

B. *Athey v. Leonati*

The facts in *Athey v. Leonati*, unlike *Cook*, would not support application of the material contribution to risk test. The plaintiff, Mr. Athey, was injured in two motor vehicle accidents, which occurred within three months of one another. Mr. Athey had a pre-existing degenerative disc disease, but his prior activities, including regular exercise, had not caused any significant back injury. Several months after the second accident, upon the recommendation of his physician, Athey resumed his regular exercise routine. In the process of warming up, Athey suffered a herniated disc in his lower back. This injury resulted in surgery, more physio-

³⁶ [1951] S.C.R. 830, 1 D.L.R. 1.

³⁷ Lynda M. Collins and Heather McLeod-Kilmurray, *Material Contribution to Justice? Toxic Causation after Resurface Corp. v. Hanke*, 48 OSGOODE HALL L. J. 411, 438 (2010).

³⁸ *Cook*, 1 D.L.R. 1 at para. 44.

³⁹ *Clement*, 2012 S.C.C. 32 at para. 28.

⁴⁰ David Mangan, *Confusion in Material Contribution*, 91 CAN. B. REV. 701, 712 (2014).

⁴¹ *Cook*, 1 D.L.R. 1 at 44.

therapy and ultimately required Athey to leave his current job as an automobile repairman and body shop manager for a lower paying job which did not have the same physical demands.⁴²

Athey v. Leonati was resolved using a robust and pragmatic approach to the “but for” test.⁴³ In *Athey*, both motor vehicle accidents were found to have materially contributed to the plaintiff’s back injury (as opposed to materially contributing to the risk of injury) by exacerbating the pre-existing condition.⁴⁴ The Court held that the defendant’s negligence did not need to be the *sole* cause of injury,⁴⁵ and held that the plaintiff successfully established causation by inference:⁴⁶ “When a plaintiff has two accidents which both cause serious back injuries, and shortly thereafter he suffers a disc herniation during a mild exercise which he frequently performed prior to the accidents, it seems reasonable to infer a causal connection”⁴⁷ between the accidents and the injury.

The situation in *Athey* is distinctly different from that in *Cook*. In *Cook*, it could not be said that either defendant’s conduct more likely than not materially contributed to the plaintiff’s injury since there was only one bullet wound and therefore only one cause.⁴⁸ Each defendants’ liability in *Cook* could have been grounded only in their material contribution to the risk that injury could, and did,

occur.⁴⁹ In *Athey*, the Court found that *both* car accidents contributed to the plaintiff’s injuries on a balance of probabilities.

V. Influence of Clements Moving Forward

A. Appellate and Trial Decisions

Clements has received positive treatment by Canadian courts over the past four years, and has been cited hundreds of times. However, it is referenced far more often as authority for the standard “but for” test than for what it said about the material contribution to risk test. This makes sense since “but for” is the leading test for causation, while material contribution to risk is merely a limited exception to the general rule.

That being said, *Clements* has been cited a handful of times by Canadian courts for its discussion of material contribution to risk.

In 2014, the Ontario Court of Appeal discussed the material contribution to risk test in *Fowlow v. Southlake Regional Health Centre*,⁵⁰ although ultimately decided it was inapplicable to the case based on the facts. In *Fowlow*, the trial judge (Stinson J.) dismissed the plaintiff’s medical malpractice claim, finding that although the defendant doctor had fallen below the standard of care, the plaintiffs had failed to demonstrate that the defendant’s actions,

⁴² *Athey*, 3 S.C.R. 458 at paras. 2-7.

⁴³ *Id.* at para. 44.

⁴⁴ *Ild.* at para. 47.

⁴⁵ *Id.* at para. 17.

⁴⁶ Mangan, *supra* n. 40, at 706.

⁴⁷ *Athey*, 3 S.C.R. 458 at para. 45.

⁴⁸ Mangan, *supra* n. 40, at 712.

⁴⁹ *Id.*

⁵⁰ *Fowlow v. Southlake Regional Hospital Centre*, 2014 O.N.C.A. 193 at para. 11, 238 A.C.W.S. (3d) 754 .

or inactions, caused Mr. Fowlow's death.⁵¹ On appeal, the appellants attempted to invoke the "material contribution approach"⁵² in place of having to establish "but for" causation. In rejecting this argument, the Court of Appeal stated that, "Not only was there only a single tortfeasor in this case, but the appellants had not established it was truly impossible for them to satisfy the "but for" test."⁵³

Fowlow provides an example of how claimants may try to use the material contribution to risk test as a relaxed standard of causation.

B. Supreme Court of Canada

Clements has been referenced and followed twice by the Supreme Court of Canada: *Henry v. British Columbia (Attorney General)*⁵⁴ and *Ediger (Guardian ad litem of) v. Johnston*.⁵⁵ Like many lower court decisions citing *Clements*, *Ediger* references it as the leading authority on the "but for" test with no mention of the material contribution to risk test. While the Supreme Court of Canada did not directly apply the material contribution to risk test in *Henry*, its discussion in that case of how the doctrine might be relevant in future proceedings is instructive.

In 1983, Mr. Henry was convicted of 10 "sexual offences", involving 8 different complainants, and was sentenced to an

"indefinite period of incarceration."⁵⁶ In 2010, the British Columbia Court of Appeal quashed all of the convictions after finding several errors with the trial proceedings. Henry subsequently brought civil suits against the City of Vancouver, the Attorney General of British Columbia and the Attorney General of Canada seeking damages for wrongful conviction and imprisonment.⁵⁷ Henry's suit against the Attorney General of British Columbia was based on his claim that the Crown prosecutors and the police had intentionally withheld information that was material to Henry's defense, breaching their *Charter* obligations. The 2015 appeal to the Supreme Court of Canada centered on the issue of Mr. Henry's right to amend his pleadings to include a claim for *Charter* damages resulting from intentional non-disclosure by the Crown and police.⁵⁸

In its decision on the appeal of the pleadings motion, the Supreme Court of Canada discussed what would be required for Mr. Henry's claim to be successful. Moldaver J., writing for the majority, stated that a claimant would have to establish that, "'but for' the wrongful non-disclosure [he] would not have suffered harm". However, referencing the Court's decision in *Clements*, Moldaver J. went on to note that "where the claimant alleges that a wrongful conviction was caused by the failure of police to provide material information to prosecutors, and in part by the Crown's failure to disclose, then showing 'but for' causation will not be necessary. In this scenario, the causation requirement will be satisfied if the claimant

⁵¹ *Fowlow v. Southlake Regional Hospital Centre*, 2012 O.N.S.C. 6531 at paras. 87-89, 221 A.C.W.S. (3d) 1012.

⁵² *Fowlow*, 2014 O.N.C.A. 193 at para. 9.

⁵³ *Id.*

⁵⁴ 2015 S.C.C. 24, 2 S.C.R. 214.

⁵⁵ 2013 S.C.C. 18 at para. 28, 2 S.C.R. 98.

⁵⁶ *Henry*, 2015 S.C.C. 24 at para. 1.

⁵⁷ *Id.* at para. 2.

⁵⁸ *Id.* at paras. 2, 99, and 138.

can prove that the prosecutorial misconduct contributed to the harm suffered.”⁵⁹ While he did not elaborate on this comment, it would seem that Moldaver J. was acknowledging the possible applicability of the material contribution to risk test in this case if “global” misconduct could be proven to have contributed to the incarceration.

Going back to McLachlin C.J.’s reasons in *Clements*, there must be global “but for” caused by the negligence of two or more tortfeasors and an impossibility of proving individual causation because the tortfeasors could each point to the other as the sole cause. While this case is still at the pleadings stage, it will certainly be an

interesting one to follow in Canada going forward.

VI. Conclusion

Clements provided the Supreme Court of Canada with an opportunity to tie up several loose ends left hanging after its decision in *Resurfice*. In doing so, the Court clarified the law surrounding material contribution to risk. However, given that no Canadian court has yet applied the material contribution to risk test in a situation where “but for” causation could not be established, it is hard to predict how much the material contribution to risk test, as articulated in *Clements*, will actually impact Canadian law in the long-term.

⁵⁹ *Id.* at paras. 97-98.