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Clements v. Clements: A material contribution to the jurisprudence - The Supreme Court of Canada clarifies the law of causation

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Clements v. Clements: A material contribution to the jurisprudence - The Supreme Court of Canada clarifies the law of causation

Abstract

The recent Supreme Court of Canada decision *Clements v. Clements*^[1] provides important guidance on the appropriate application of the material contribution test in cases of negligence. This case commentary will provide an overview of the material contribution and “but for” tests of causation, outline the Supreme Court’s reasoning in the decision, and analyze its broader implications. It is suggested that the Court has significantly clarified the law of causation, emphasizing the necessity of utilizing the new “global but for” test, while leaving room for the application of the material contribution test in (as yet to be seen) appropriate circumstances.

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But for the exceptional editorial assistance of Lida Moazzam and the material contribution of the Law Foundation of Ontario this article could not have been produced. Both are gratefully acknowledged.

[1] *Clements v Clements*, 2012 SCC 32 [*Clements*].

Keywords

Clements, Supreme Court, causation, material contribution, but for, 2012 SCC 32, *Clements v. Clements*

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CLEMENTS V. CLEMENTS: IN SEARCH OF A MYTHICAL CAUSATION SCENARIO

BY DR. EMIR CROWNE AND OMAR HA-REDEYE*

INTRODUCTION

The recent Supreme Court of Canada decision *Clements v. Clements*¹ provides important guidance on the appropriate application of the material contribution test in cases of negligence. This case commentary will provide an overview of the material contribution and “but for” tests of causation, outline the Supreme Court’s reasoning in the decision, and analyze its broader implications. It is suggested that the Court has significantly clarified the law of causation, emphasizing the necessity of utilizing the new “global but for” test, while leaving room for the application of the material contribution test in (as yet to be seen) appropriate circumstances.

I. LEGAL CONTEXT AND BACKGROUND

Causation: The But For and Material Contribution to Risk Tests

Causation is central to liability: a defendant is only liable for causing injury to the plaintiff. As affirmed by Chief Justice McLachlin in *Clements*, the general rule of legal causation is that “but for” the defendant’s act or omission, the plaintiff would not have been exposed to injury, or risk of injury.² The “but for” test is a factual determination made on a balance of probabilities.³ It does not require proof that rises to a scientific level of certainty, and a judge may appropriately infer that a breach of duty leading to injury was caused by the defendant’s negligence.⁴

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¹ *Clements v Clements*, 2012 SCC 32 [*Clements*].

² *Ibid* at paras 8-10.

³ *Ibid*.

⁴ The Court also cites several cases to lay the foundation. See *Wilsher v Essex Area Health Authority*, [1988] AC 1074 at 1090, *per* Lord Bridge; *Snell v Farrell*, [1990] 2 SCR 311 [*Snell*]

The material contribution test—or more appropriately, the material contribution to risk approach—is not only a departure from this basic rule, but an exception to it. According to the Supreme Court of Canada, the test is properly confined to cases where there are multiple actors and it is “impossible” to identify, on a balance of probabilities, which actor caused the injury.⁵ The underlying goal of corrective justice would still hold the multiplicity of such actors liable on the basis that each actor unreasonably exposed the plaintiff to a risk. According to the Chief Justice, the material contribution to risk test allows a plaintiff to recover damages without proving that one or more defendants caused an injury, recognizing that it is impossible to tell which specific defendant actually caused the injury.⁶ The test is a judicially created loophole maintained on policy grounds should the factual scenario ever arise that would make denying a plaintiff damages on the “but for” test unfair or unjust.

Pre-Clements Treatment of Material Contribution to Risk: *Hanke v. Resurfice* and the Concept of Impossibility

Until *Clements*, the decision in *Resurfice* was the most recent authority on the use of material contribution test, although a finding of impossibility under this doctrine proved challenging. Given the reluctance of the Supreme Court to apply this test, the majority in *Resurfice* developed a doctrine of “impossibility” for use of the “but for” test, affirming that the “but for” test is the presumptive legal test.⁷ One essential element in applying the material contribution to risk test requires that unfairness or injustice arise as a result of the application of the “but for” test, due to the impossibility of determining the specific tortfeasor. This limitation is not due to any fault of the plaintiff. The Court previously used the current limits of scientific knowledge as an example of this limitation. The second necessary element for the test is that the plaintiff’s injury must fall within the ambit of risk created by a breach of the defendant’s duty of care owed to the plaintiff.

(concerning optic nerve atrophy—and eventual blindness—following cataract surgery and the role that post-anaesthesia bleeding may have played); *Athey v Leonati*, [1996] 3 SCR 458 [*Athey*] (concerning a disc herniation during a “mild” stretching exercise, and the interplay between the appellant’s pre-existing back problems and the two motor vehicle accidents he was involved in).

⁵ *Clements*, *supra* note 1 at para 13.

⁶ *Ibid* at paras. 13-14. The court also refers to *MacDonald v Goertz*, 2009 BCCA 358 at para 17.

⁷ The term “unworkable” was used in *Athey*, to describe circumstances where the material contribution test should be used instead of the “but for” test. See *Athey*, *supra* note 4.

Although the Alberta Court of Appeal found that impossibility existed in *Bowes v. Edmonton (City of)*,⁸ the majority of appellate level cases after *Resurfice* expressed difficulty in identifying the situations where “impossibility” exists. Robin Hansen noted that none of the appellate level cases following *Resurfice* were, as of 2010, able to find “impossibility,”⁹ pointing to *Purvis*,¹⁰ *Jackson*,¹¹ *Mosly*,¹² *Bohun*,¹³ *Fallowka*,¹⁴ *Nattrass*,¹⁵ *Frazer*,¹⁶ and *Barker*.¹⁷ Appellate courts since that time have experienced similar difficulty.¹⁸

⁸ *Bowes v. Edmonton (City of)*, 2007 ABCA 347 at paras 227-30.

⁹ Robin Hansen, “Fallowka v. Pinkerton's of Canada Ltd. and the Material-Contribution Test for Factual Causation in Negligence” (2011) 48:3 Alta L Rev 771 at 781, n 69 [Hansen, “Fallowka”].

¹⁰ *Seattle (Guardian ad litem of) v. Purvis*, 2007 BCCA 349 at paras 70, 71 (regarding medical negligence over use of vacuum device during a lengthy labour resulting in cerebral palsy). The Court of Appeal upheld the trial decision that impossibility could not be found. Although the factual issues were challenging, the court indicated there was no scientific gap which would require departure from the “but for” test.

¹¹ *Jackson v. Kelowna General Hospital*, 2007 BCCA 129 at paras 20-22 (involving medical malpractice against post-operative nurses after a bar fight). Court of Appeal indicates here that material contribution is not appropriate, as with two tortious causes in *Cook* or an unidentifiable person in a chain of causation as in *Walker Estate*.

¹² *BSA Investors Ltd v. Mosly*, 2007 BCCA 94 at para 45, leave to appeal to SCC refused, 32148 (August 7, 2007), (negligence action for the improper execution of mortgage documents resulting in loss due to involvement with a fraudster who did not provide a second signature). The Court of Appeal found that the trial judge could have drawn logical inferences about the fraudster’s likely actions if confronted for the second signature. Furthermore, it was the plaintiff’s responsibility to demonstrate a breach of the defendant’s duty is what caused the loss.

¹³ *Bohun v. Segal*, 2008 BCCA 23 at para 53 (pertaining to medical negligence for delayed cancer diagnosis). The Court of Appeal noted here that the material contribution test is not a less stringent alternative for plaintiffs if they fail the “but for” test.

¹⁴ *Fallowka v. Royal Oak Ventures*, 2008 NWTCA 4 at paras 201-203, aff’d 2010 SCC 5 (regarding an action by survivors of miners who died in a blast). The Court of Appeal found that the trial judge made a reversible error by concluding that the material contribution test was the appropriate test without consideration over whether the “but for” test was workable, and provided no justification for his use of the former.

¹⁵ *Nattrass v. Weber*, 2010 ABCA 64 at paras 43-59 (concerning a medical malpractice action against orthopaedic surgeons who were found negligent for not monitoring blood count, resulting in amputation of both legs). The Court of Appeal reversed the judgement, finding that the trial judge did not even explain why the “but for” test was not used, or demonstrate “impossibility.” *Nattrass* also explicitly states that the test under *Resurfice* is entirely different than *Athey*. See *ibid* at paras 45-47. See also Hansen, “Fallowka”, *supra* note 9 at 777.

¹⁶ *Frazer v. Haukioja*, 2010 ONCA 249 paras 41-42 (medical malpractice on “but for” basis found for misdiagnosis of ankle fracture following motor vehicle collision, but material contribution discussed). The Ontario Court of Appeal notes that material contribution test could not be used because the scientific difficulty in proving causation for psychiatric harm does not necessarily make it an impossibility. See *ibid*.

The other challenge with *Resurface* is that it has been interpreted by some lower courts as allowing the application of the material contribution test when it is scientifically impossible to apply the “but for” test.¹⁹ Trial level courts have justified this approach based on similar statements in *Snell*²⁰ and *Athey*,²¹ which hold that causation does not require scientific precision.²² Some commentators went as far as to suggest that *Resurface* dispensed with the causation requirement completely.²³ The decision in *Clements* clarified this principle, and expounded upon what exactly the Court meant by the “impossibility” of using the “but for” test. The Court indicated that the “but for” test need not require scientific evidence of precision, and the material contribution test is not simply a default where scientific evidence is lacking.

II. OVERVIEW OF THE CASE

The Facts

On a wet day in 2004, while traveling from Prince George, BC to Kananaskis AB, Joseph and Joan Clements were involved in a tragic accident.²⁴ During their trip, Mr. Clements drove the couple’s motorbike, while his wife sat behind him in the passenger seat. The bike was about 100 lbs over weight during this journey. At some point en route to Kananaskis, a nail punctured the rear tire of the Clements’ motorbike, which the Clements’ were unaware of. As Mr. Clements accelerated to 120km hour in an attempt to overtake a car, the nail fell out and the tire deflated.²⁵ The motorbike then

¹⁷ *Barker v Montfort Hospital*, 2007 ONCA 282 at paras 52-54 (medical malpractice action for complications following bowel surgery).

¹⁸ See e.g. *MB v 2014052 Ontario Ltd*, 2012 ONCA 135 at paras 26-30 (damages for assault and battery where liability was admitted—the trial judge here erroneously applied material contribution test, but it was irrelevant to the findings and application of “but for” test); *Lawson v Viersen*, 2012 ONCA 25 at para 50; *Ediger (Guardian ad litem of) v Johnston*, 2011 BCCA 253 at para 80; *MacIntyre v Cape Breton District Health Authority*, 2011 NSCA 3 at paras 64-65.

¹⁹ *Clements*, *supra* note 1 at para 36.

²⁰ *Snell*, *supra* note 4 at para 328.

²¹ *Athey*, *supra* note 4 at para 16.

²² See, for example, *Valuck v Challandes*, 2012 BCSC 324 at para 65 (released before the decision in *Clements*). At paragraph 57 Rogers J states, “The law is well settled...” but then applies the material contribution test where there was conflicting scientific evidence over the causation of a lumbar hernia following a motor vehicle collision.

²³ Russell Brown, “Material Contribution’s Expanding Hegemony: Factual Causation after *Hanke v. Resurface Corp.*” (2007) 45 Can Bus LJ 432 [Brown, “Material Contribution”].

²⁴ *Clements*, *supra* note 1 at para 1.

²⁵ *Ibid.*

wobbled and crashed, causing a severe brain injury to Mrs. Clements.²⁶ This resulted in Joan Clements suing her husband for his negligent operation of their motorbike.

The Decision of the Supreme Court of British Columbia

At the trial, Justice Grauer of the Supreme Court of British Columbia held that although the “but for” test had not been satisfied, there was sufficient evidence that Mr. Clements had materially contributed to Mrs. Clements’ injuries due to the motorbike’s excessive speed and heavy load. Justice Grauer stated:

[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.

...

[75] In short, setting out in poor weather when the operator had not had enough sleep was not what caused the plaintiff's injuries. The plaintiff was injured because, when the rear tire deflated through no one’s fault, the defendant was driving too fast with too heavy a load. *That cannot be attributed to any fault on the part of the plaintiff.*²⁷

On this basis, Justice Grauer, citing *Athey* and *Resurfice*, found that Mr. Clements’ breach of his duty of care—by driving too fast and with a too heavy a load on the bike—materially contributed to his wife’s injuries.

²⁶ *Ibid.*

²⁷ *Clements (Litigation Guardian of) v Clements*, 2009 BCSC 112 at paras 66, 75 [emphasis added].

The Decision of the Court of Appeal for British Columbia

On appeal, the Court of Appeal for British Columbia set aside the judgment, stating that the necessary causal link had not been established under the “but for” test, and that the material contribution test did not apply in this situation. Writing for a unanimous Court, Justice Frankel held that:

[64] ... once the trial judge determined that Mrs. Clements had failed to establish that the motorcycle would not have capsized but for Mr. Clements’s negligence, he should have found that causation had not been proven. This is not a case involving either circular or dependency causation. Rather, it is a case like many others in which, given the current state of knowledge, it is not possible to prove whether the negligent actions of a defendant caused harm. I do not consider it either unfair or unjust, or, to use the words of Professor Knutsen (at 172), “just plain wrong” not to fix Mr. Clements with liability when Mrs. Clements has been unable to show factually that his negligence was a cause of her damages.²⁸

Mrs. Clements thus appealed the decision to the Supreme Court of Canada, where the issue became which form of causation was applicable under these circumstances.²⁹

III. ANALYSIS OF THE SUPREME COURT OF CANADA

The Supreme Court of Canada allowed the appeal and ordered a new trial.³⁰ Writing for a 7:2 majority, Chief Justice McLachlin combed through the oft-cited

²⁸ *Clements (Litigation Guardian of) v Clements*, 2010 BCCA 581 at para 64 [*Clements Appeal Decision*].

²⁹ *Clements*, *supra* note 1 at para 5.

³⁰ *Ibid* at para 53. The dissenting judges (LeBel and Rothstein) agreed with the Court’s views on causation but expressly disapproved of ordering a new trial. Justice LeBel, writing for the dissent, stated:

[55] I have read the Chief Justice’s reasons. I agree with the substance of her analysis of the law of causation and the nature of the “but for” test. But, in my respectful opinion, there is no basis in fact and law for ordering a new trial. I would uphold the judgment of the Court of Appeal and dismiss the appeal.

...

[61] Moreover, I wonder whether the order for a new trial itself represents sound judicial policy. I am not arguing that this Court lacks jurisdiction to issue this order and that the order is therefore illegal. But, on policy grounds related to the administration of justice and the conduct

authorities on the material contribution test in Canada and the United Kingdom, before outlining problems in the prior courts' reasoning, and clarifying the proper use of the material contribution to risk approach to causation.

The Chief Justice noted that the English authorities have also embraced the material contribution test in toxic agent cases involving the negligence of more than one employer.³¹ The only English authority to adopt the material contribution test for a single tortfeasor was expressly disapproved of by the Court.³² McLachlin CJC even noted the discontent of some of the Law Lords in arriving at that decision, and explained that the English decision was a result of that court's duty to follow the material contribution test in all mesothelioma cancer cases.³³ No such requirement existed in Canadian jurisprudence.

With respect to the Canadian authorities, Chief Justice McLachlin noted in *Clements* that the Supreme Court of Canada has never actually applied the material contribution to risk test. In fact, all of the leading authorities which discuss the test fail to actually apply it. In *Cook*³⁴ the Court utilized a reverse onus approach, while in

of civil appeals, this Court and courts of appeal should be mindful of the need for finality and efficiency in the civil litigation process. Where it is appropriate to do so, an attempt should be made to resolve the issues and thereby avoid sending the matter back for a new trial, which might itself trigger a new round of appeals.

[62] In this appeal, I am unable to find any basis in the trial judge's judgment for inferring that the overloading of the motorcycle and excessive speed could have been the "cause" of the accident as that term is understood in the context of the "but for" test. Nor is this a case in which it would be appropriate to send the matter back for a new trial."

³¹ *Ibid* at para 29, citing *Fairchild v Glenhaven Funeral Services Ltd*, [2002] UKHL 22 and *Barker v Corus UK Ltd*, [2006] UKHL 20 (both cases concerned the contraction of mesothelioma after being exposed to asbestos while being employed by different employers over the years).

³² See *Sienkiewicz v Greif (UK) Ltd*, [2011] UKSC 10.

³³ *Clements*, *supra* note 1 at para 42.

³⁴ *Cook v Lewis*, [1951] SCR 830 (concerning two hunters that fired simultaneous shots, one of which struck the respondent). In Justice Rand's concurring judgment he expressly held that:

What, then, the culpable actor has done by his initial negligent act is, first, to have set in motion a dangerous force which embraces the injured person within the scope of its probable mischief; and next, in conjunction with circumstances which he must be held to contemplate, to have made more difficult if not impossible the means of proving the possible damaging results of his own act or the similar results of the act of another. He has violated not only the victim's substantive right to security, but he has also culpably impaired the latter's remedial right of establishing liability. By confusing his act with environmental conditions, he has, in effect, destroyed the victim's power of proof.

The legal consequence of that is, I should say, that the onus is then shifted to the wrongdoer to exculpate himself; it becomes in fact a question of proof between him and the other and innocent member of the alternatives, the burden of which he must bear. The onus attaches to culpability,

*Snell, Athey, Walker Estate*³⁵ and *Resurfice*³⁶ the Court merely discussed the material contribution test, ultimately choosing to rely on the “but for” test. The Supreme Court has described the appropriate fact scenario for this test as one of “exceptional circumstances” but has not yet encountered those circumstances. In contrast, many trial and appellate level courts have used the material contribution test, but have done so inconsistently. Some courts have previously used material contribution to refer to conduct that is necessary but not sufficient to cause the injury.³⁷ Others have employed it as a less stringent form of causation.³⁸

The Court then identified two errors in the reasoning of the trial judge. First, Justice Grauer wrongly required scientific precision in assessing “but for” causation.³⁹ Second, he incorrectly applied the material contribution test, which should not have been adopted for a “simple single-defendant case.”⁴⁰ As a result of this, the parties did not receive a hearing based on appropriate legal principles, and the majority therefore ordered that a new trial be held.⁴¹ The Court also indicated that the analysis employed by the Court of Appeal to determine the circumstances in which the material contribution test should be employed was correct, which also implicitly endorsed the approach employed by Professor Erik Knutson in the Dalhousie Law Journal.⁴² In the Court of Appeal decision, Justice Frankel held that:

- 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

and if both acts bear that taint, the onus or prima facie transmission of responsibility attaches to both, and the question of the sole responsibility of one is a matter between them.

³⁵ *Walker Estate v York Finch General Hospital*, 2001 SCC 23 (concerning HIV tainted blood supplied by the Canadian Red Cross, who was shown to be negligent in its screening process).

³⁶ *Resurfice Corp v Hanke*, 2007 SCC 7 (concerning an explosion that occurred due to the ignition of gasoline vapours after water was mistakenly poured into the gas tank of an ice-resurfacing machine).

³⁷ *BM v British Columbia*, 2004 BCCA 402 at paras 187, 190 [Mooney]. See also, LN Klar, *Tort Law*, 3d ed (Toronto: Carswell, 2003) at 396.

³⁸ See *Athey*, *supra* note 4 at para 466. See also, *Myers v Peel County Board of Education*, [1981] 2 SCR 21; *Bonnington Castings Ltd v Wardlaw*, [1956] AC 613; *McGhee v National Coal Board*, [1973] 1 WLR 1.

³⁹ *Clements*, *supra* note 1 at para 49.

⁴⁰ *Ibid* at para 50.

⁴¹ *Ibid* at para 53.

⁴² Erik S Knutson, “Clarifying Causation in Tort” (2010) 33:1 Dal LJ 153.

- 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.⁴³

The Supreme Court was however reluctant to directly employ an application of "circular causation"⁴⁴ or "dependency causation"⁴⁵ to avoid complicating the decision.⁴⁶ Instead, the Court articulated the test in the following manner:

- (1) As a general rule, a plaintiff cannot succeed unless she shows as a matter of fact that she would not have suffered the loss "but for" the negligent act or acts of the defendant....
- (2) Exceptionally, a plaintiff may succeed by showing that the defendant's conduct materially contributed to risk of the plaintiff's injury, where:

⁴³ *Clements Appeal Decision*, *supra* note 28 at para 63.

⁴⁴ Circular causation is when it is impossible to tell which of multiple potential tortfeasors caused the harm to the plaintiff, as in *Cook*, *supra* note 34.

⁴⁵ Dependency causation is when the causal link between the plaintiff and the defendant is mediated by the action of a third party, as in *Walker Estate*, *supra* note 35, and relies on evidence beyond the relationship between the parties that can be difficult to obtain.

⁴⁶ *Clements*, *supra* note 1 at para 45.

- (a) the plaintiff has established that her loss would not have occurred “but for” the negligence of two or more tortfeasors, each possibly in fact responsible for the loss; and
- (b) the plaintiff, through no fault of her own, is unable 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 one another as the possible “but for” cause of the injury, defeating a finding of causation on a balance of probabilities against anyone.⁴⁷

The basic notions of fairness and justice (described in *Resurfice* above) are achieved by dispensing of the usual requirements of “but for” causation in cases where fault has been determined globally against a number of tortfeasors and a specific responsible defendant is not identifiable.⁴⁸ The Court also left open the rare possibility of a single tortfeasor, as described in *Snell*.⁴⁹

THE PRACTICAL SIGNIFICANCE OF *Clements v. Clements*

The decision in *Clements* provided clarity on the material contribution test, especially in light of the ambiguity around *Resurfice*, *Athey* and *Snell*.⁵⁰ Recourse to the material contribution test should be rare. It should only be invoked where multiple putative wrongdoers make the “but for” test “impossible” to meaningfully apply. The Chief Justice emphasized that use of the material contribution to risk approach is rare because the elimination of causation is a radical departure from the negligence analysis.⁵¹ Further, she reiterated that the facts alone might demonstrate negligence.⁵²

⁴⁷ *Ibid* at para 46.

⁴⁸ *Ibid* at paras 39, 41.

⁴⁹ *Ibid* at paras 20, 42.

⁵⁰ See Brown, “Material Contribution”, *supra* note 23 (for an early criticism of the Supreme Court’s decision in *Resurfice*). See also, Lynda Collins & Heather McLeod-Kilmurray, “Material Contribution to Justice: Toxic Causation after *Resurfice Corp. v. Hanke*” (2010) 48 Osgoode Hall LJ 411 [Collins & McLeod-Kilmurray, “Toxic Causation”] (for a contrasting perspective on the *Resurfice* decision).

⁵¹ *Clements*, *supra* note 1 at para 16. She refers to the statements by Diplock L.J. in *Browning v War Office*, [1962] 3 All ER 1089 at 1094-95, (who stated that “...[a] defendant in an action in negligence is not a wrongdoer at large; he is a wrongdoer only in respect of the damage which he actually causes to the plaintiff”). See also *Mooney*, *supra* note 37 at para 157, Smith JA.

⁵² *Clements*, *supra* note 1 at paras 38, 39.

The negligence analysis has *never* required scientific proof of causation, and so a lack of scientific evidence cannot be used to remove the requirement for the “but for” test.⁵³ Thus, the Supreme Court is promoting the use of a “global but for” test, to be applied in practically all negligence situations.

The Court also affirmed the policy reasons for retaining the material contribution to risk test. The Chief Justice indicated that, in the rare circumstances which necessitate the use of this test, the goals of negligence law would be met by justly providing compensation for injury, but only against defendants that failed to act with appropriate care.⁵⁴ Here the Court also hinted at the ultimate purpose of this judicially created fiction—a general deterrence against potential tortfeasors who would otherwise seek to escape liability by blaming others. However, the effectiveness of this test as a deterrent (either through in-house counsel conducting risk management analysis, or defence lawyers assessing potential liability) is questionable, considering the Court’s reluctance to identify a specific factual scenario where it would be applicable. Those cases that could effectively use the material contribution test at the trial level may be settled (or not appealed) perhaps because of reluctance by defence counsel to have judicial findings on a factual scenario that could broaden the applicability of the test.

Clements also provides a comprehensive review of the Canadian and English jurisprudence on the material contribution test, examining relevant cases which demonstrate a ‘common sense’ approach to the “but for” test. Some will quibble that, in surveying these cases and providing examples, the Court did not draw ‘enough’ of a bright line—or a ‘brighter’ line—between applying the “but for” test and the material contribution test. We disagree. The Court was mindful of the specific case before it, and left open the possibility that future cases (like toxic tort litigation)⁵⁵ might also benefit from the material contribution test. The cases discussed by the Court for future applications did refer to traditional mesothelioma cancer litigation, one of the classical

⁵³ *Ibid.*

⁵⁴ *Ibid* at para 41.

⁵⁵ *Clements*, *supra* note 1 at para 44:

[44] This is not to say that new situations will not raise new considerations. I leave for another day, for example, 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 on some members of the group, but it is impossible to know which ones.

applications of the material contribution test.⁵⁶ The Court also indicated that scientific knowledge may one day provide the factual basis to identify asbestos specific to a single employer, which in turn caused a claimant's mesothelioma, providing the factual proof that would render the material contribution test inapplicable.⁵⁷

Although the material contribution test may seem appealing to plaintiffs in medical malpractice actions, (indeed, a significant portion of material contribution litigation before *Clements* was in medical malpractice), there are some strategic hurdles that plaintiffs will have to overcome. Causation under the new "global but for" approach would appear to require proof that all of these defendants owed a duty of care and breached the standard by acting negligently. If a plaintiff fails to demonstrate negligence on the part of any one of these defendants, they will have failed to prove causation on a "global but for" basis. This significantly multiplies the risk for plaintiffs at trial. Defence lawyers will also be tempted under these circumstances to adduce evidence about non-tortious causes that are more likely sources of injury than the "global but for" standard.⁵⁸ Plaintiffs in medical malpractice actions may therefore find the material contribution test after *Clements* unfeasible and too risky to employ.

Finally, it is also unclear whether the application of *Clements* in a dependency causation type of material contribution test will be helpful for certain high profile public interest cases. Civil claims regarding police inaction in incidents of domestic violence and sexual assault provide problematic chain of causation issues, and yet contain strong policy reasons for finding liability, to ensure public protection and responsibility.⁵⁹ This remains one of the redeeming qualities of the material contribution test—it usually works in favour of the plaintiff because causation against a defendant (as opposed to *the* defendant) whose behaviour increased the risk of harm can usually be established. As Professor Erik Knutson stated in the *Resurface* era, "material contribution has the

⁵⁶ See Collins & McLeod-Kilmurray, "Toxic Causation", *supra* note 54 (for more information on the use of the material contribution test in toxic torts, and the potential significance of the move under *Resurface* and now *Clements* to a material contribution to risk, as phrased in the judgement).

⁵⁷ *Clements*, *supra* note 1 at paras 36, 38.

⁵⁸ Stephen R Moore, "The Last Word on Causation From the Supreme Court of Canada (Maybe?)" (28 September 2012), online: Blaney McMurtry <<http://www.blaney.com/>>.

⁵⁹ See e.g. Erika Chamberlain, "Tort Claims for Failure to Protect: Reasons for (Cautious) Optimism Since Mooney" (2012) 75 Sask L Rev 245. The author expresses optimism over the material contribution test being one of the more feasible ways to address dependency causation causes for vulnerable and battered women.

potential to create liability for breach of a standard of care plus risk creation.”⁶⁰ For now, we are simply waiting for the right plaintiff and the right risks to justify its use on grounds of fairness and justice.

IV. CONCLUSION

The limits of science are often a justification for asserting impossibility, but they are not the cause of a logical impossibility, which is now clearly required to apply the “but for” test. Plaintiffs will not be able to rely on a material contribution test simply because the factual record makes it impossible to apply a “but for” test, unless the factual uncertainty relates to the identification of a specific tortfeasor. Consequently, *Clements* could signal an even more restrictive approach to using material contribution than what has occurred since *Resurfice*. Future courts may adopt and advance Professor Knutsen’s classification and terminology of circular and dependency causation, which should help refine the analysis of how and why the material contribution test is being applied. As the material contribution test is essentially a judicial loophole created for public policy reasons to deal with particularly complex or unusual facts, it is likely that the doctrine will continue to evolve in the years to come.

Prior to *Clements*, Vaughn Black and David Cheifetz summarized the state of the law as follows: “Two important questions have reigned since the approval of the material-contribution test: when is that test available and what is its content?”⁶¹ Although *Clements* may have shed some light on both questions by removing some of the ambiguous language surrounding previous decisions, what most spectators (including trial level judges) are still waiting for are those rare circumstances where the Court deems a fact scenario appropriate for application of the material contribution test. That day may not arrive any time soon. As Ryan Krushelnitzky and Peter Gibson state,

Just like the unicorn, the "material contribution" test is a rare and "different beast", and given the right set of circumstances, might be spotted one day in a Canadian courtroom, but every reported sighting [at the Supreme Court level] so far has proven to be a hoax.⁶²

⁶⁰ Knutsen, *supra* note 36 at 162. See also, Erik S Knutsen, “Ambiguous Cause-in-Fact and Structured Causation: A Multi-Jurisdictional Approach” (2003) 38 *Tex Int’l LJ* 249.

⁶¹ Vaughan Black & David Cheifetz, “Through the Looking Glass, Darkly: *Resurfice Corp. v. Hanke*” (2007) 45 *Alta L Rev* 241 at 245.

⁶² Ryan Krushelnitzky & Peter Gibson, “Material Contribution is the Unicorn of Canadian Tort Law”, online: Field Law Insurance <http://www.fieldlaw.com/newsletters/insurance_2012_3.htm>.