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MATERIAL CONTRIBUTION IS THE UNICORN OF CANADIAN TORT LAW

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Today, the Supreme Court of Canada rendered its most recent judgment on causation in *Clements v. Clements*, 2012 SCC 32. The decision of the majority, written by the Chief Justice, will be of interest to lawyers and insurers across the Country, who deal with questions of negligence on a daily basis.

Plaintiffs who are unable to show causation on a "but for" test argue for the less onerous "material contribution" standard, while defendants (and their insurers) argue for a more rigorous and universal application of the "but for" test. This most recent decision adds to a consistent line of line of cases emphasising that the "but for" test is the standard test in negligence law, and that the "material contribution" test is only available in the rarest of circumstances.

While it was hoped that the Court would have used *Clements* as an opportunity to explain the application of the "material contribution" test, the Court left that issue for a future case. Instead, the majority of the Court built on the incremental approach in *Resurfice Corp v. Hanke*, [2007] 1 S.C.R. 333 and provided further clarification as to when the "material contribution" test might be available (though also noting that it had never been applied by the Supreme Court of Canada).

Clements involved a case in which a motorcycle was overloaded, and, unknown to the driver, the rear tire had been punctured by a nail. While the motorcycle was accelerating to pass a car, the nail fell out of the tire, the tire deflated, the bike wobbled, and a crash ensued. A passenger on the motorcycle suffered severe injuries and sued the motorcycle driver in negligence.

The trial judge held that the driver's negligence contributed to the injuries, but also held that the plaintiff was unable to prove causation on the "but for" standard because of limitations in the scientific reconstruction evidence. The trial judge applied the "material contribution" test to find the driver liable. The Court of Appeal disagreed, and held that the "but for" test ought to have been applied, and that the plaintiff had failed to prove causation.

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In *Clements* the Court was faced with the issue of whether the "but for" test applied, or whether the "material contribution" test applied. The Chief Justice reaffirmed that the "basic rule" for negligence cases was the "but for" test for causation. She explained that the "but for" test was a "different beast" from the "material contribution" test. This is because "the material contribution test removes the requirement of 'but for' causation and substitutes proof of material contribution to the risk" (*Clements* at para. 14). The Chief Justice explained that material contribution "imposes liability not because the evidence establishes that the defendant's act caused the injury, but because the act contributed to the risk that injury would occur" (*Clements* at para. 15).

In *Resurfice*, the Chief Justice had earlier held that the "material contribution" test can only be properly applied in limited circumstances— i.e. proof of causation using the "but for" test was impossible, and the plaintiff was exposed to an unreasonable risk of an injury that occurred. In *Clements*, she clarified when these limited circumstance might arise. She held that the motorcycle accident in *Clements* was not the kind of case in which the material contribution test would apply. Instead, she held that the "material contribution" test could apply when (*Clements* at para. 46):

> " […] (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."

The majority decision was limited to stating that the "material contribution" test might apply in circumstances in which "but for" cannot be proven against a number of multiple defendants, and left the question of whether such a test for causation would be available for circumstances involving a lone defendant (e.g. such as in a mass toxic tort case) for another day.

Notably, after an extensive review of the Supreme Court's earlier jurisprudence on causation, the Chief Justice observed that "while accepting that it might be appropriate in 'special circumstances', **the Court has never in fact applied a material contribution to risk test**" (*Clements* at para. 28, emphasis added). The majority concluded that the circumstances at bar did not give rise to a situation in which the "material contribution" test could be applied, and ordered a new trial so that the trial judge could apply the "but for" test.

The decision of the majority, therefore, confirms that while it may be possible, in rare circumstances, for the "material contribution" test to apply, that it has never in fact been applied by the Supreme Court of Canada. Accordingly, the specific application of the "material contribution" test is an open issue that has yet to have been dealt with conclusively by the Supreme Court of Canada. 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 siting so far has proven to be a hoax.