Clements: The Supreme Court Clarifies Causation Principles in Negligence Cases

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On June 29, 2012, the Supreme Court of Canada clarified the rules governing proof of causation in the law of negligence and endorsed a robust approach to establishing causation in Canada.

The Court confirmed that the law requires a plaintiff to prove on a balance of probabilities that the injury or loss would not have occurred “but for” the defendant’s negligent act. The trial judge is to take a robust and pragmatic approach in determining whether a plaintiff has proved, as a matter of fact, that the defendant’s negligence caused her loss. Only in exceptional circumstances can proof of factual causation be replaced by proof of a material contribution to the risk that gave rise to the injury.

The Facts

In Clements v. Clements,¹ the plaintiff was a passenger on her husband’s motorcycle. The motorcycle was overloaded by approximately 100 pounds, and the defendant accelerated in order to pass a car. A nail that had punctured the bike’s rear tire fell out, causing the rear tire to deflate suddenly during the passing manoeuvre. The husband lost control of the vehicle and crashed. The plaintiff was thrown off, resulting in traumatic brain injury. She sued her husband, claiming that her injuries were caused by his negligence.

The defendant did not dispute his negligence in operating the motorcycle. However, he took the position that the plaintiff failed to prove that his negligence in fact caused the injury. He presented expert evidence that the probable cause of the accident was the tire puncture and deflation, such that a crash would have occurred even without his negligent acts.

The Lower Courts’ Decisions

The trial judge found that the plaintiff was unable to prove that she would not have been injured “but for” the defendant’s breaches, due to the limitations of the scientific expert evidence in the case. However, the trial judge instead applied a “material contribution” test and found the defendant liable on this basis. The British Columbia Court of Appeal set aside the judgment because the “but for” causation test had not been proven and the material contribution test did not apply.

The Supreme Court’s Conclusions

1. The decision in Clements v. Clements is referred to as an example in the text.
The Supreme Court concluded that the trial judge erred by (i) requiring scientific proof as a necessary condition for finding “but for” causation and (ii) applying the “material contribution to risk” test. The majority of the Court ordered a new trial, since the trial judge’s errors of law were such that the Court could not be certain what the trial judge would have decided had he applied the law correctly.\(^1\)

The Court clarified that the law of negligence does not require scientific proof of causation. However, the “but for” causation test should be applied in a robust, pragmatic and common sense fashion. As a general rule, the plaintiff must show that she would not have suffered the loss “but for” the negligent acts of the defendant.

Proof that the defendant’s conduct “materially contributed” to the risk of the plaintiff’s injury will only suffice in cases where:

(a) the plaintiff establishes that her loss would not have occurred “but for” the negligence of two or more defendants, each of whom is 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 was in fact the necessary or “but for” cause of her injury, because each defendant can point to another as the possible “but for” cause of the injury, defeating a finding of causation against any one of them on a balance of probabilities.

In the exceptional case described above, fairness demands that the defendants cannot be permitted to escape liability by pointing fingers at one another. The “material contribution” approach is a policy-driven rule of law that meets the underlying goals of the law of negligence. It applies if the plaintiff has established the “but for” test globally, but cannot show which of several negligent defendants actually launched the event that led to the injury. In such cases, each defendant who has contributed to the risk of the injury that occurred can be faulted. The special conditions required to apply the “material contribution” test were simply not present in the \textit{Clements} case.

The Court explicitly left open situations such as a mass toxic tort involving multiple plaintiffs where statistical evidence can establish that a defendant’s acts induced an injury to some members of the group but it is impossible to know which ones.

\textit{Conclusion}

The \textit{Clements} decision provides useful confirmation that plaintiffs must continue to prove “but for” causation to recover damages from negligent defendants. Plaintiffs will not be able to rely on the “material contribution of risk” approach except in the very limited circumstances described in the \textit{Clements} case. When one or more defendants are possible “but for” causes of the plaintiff’s loss, they may not be able to defeat a finding of causation simply by virtue of the plaintiff’s inability to prove which of the tortfeasors caused the damage.

\textit{If you have any questions about the subject matter of this Osler Update, or you wish to discuss it further, please contact David Morritt, Sonia Bjorkquist, Patrick Welsh, or Karin Sachar.}

\footnotetext[1]{2012 SCC 32 (\textit{Clements}).}

\footnotetext[2]{Justices Le Bel and Rothstein agreed with the majority’s analysis regarding the law of causation. However, the minority would have simply dismissed the appeal, holding that the trial judge’s finding that}
the plaintiff had not proven causation on the “but for” test was sufficiently clear to dispose of the matter without a new trial.
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