CAUSATION IN THE LAW OF NEGLIGENCE: WHERE ARE WE NOW? WHERE ARE WE GOING? CLEMENTS V. CLEMENTS; EDIGER V. JOHNSTON

Shantona Chaudhury *

1. Overview

The Supreme Court of Canada’s recent decision in *Clements v. Clements*¹ can be described, with a pinch of poetic licence, as part requiem, part resurrection.

The requiem is for material contribution, a problematic if well-intentioned doctrine brought into Canadian tort law almost two decades ago in an attempt to mitigate the harshness of a strictly applied but for causation test. The resurrection is that of *Snell v. Farrell*² – that old chestnut, no more! – with its “common sense”, “robust and pragmatic” view of how the but for test should be applied.

In *Clements*, the SCC implicitly acknowledged that material contribution has given rise to more problems than solutions over the course of its existence. The SCC last attempted to clarify this doctrine in *Resurfice v. Hanke*,³ released in 2007. In that case, the court declared that material contribution would apply when the but for test was “impossible” to meet, but did little to explain what this meant. Predictably, this gave rise to spirited disagreement on whether material contribution should apply whenever but for causation was factually or scientifically impossible to prove, or whether impossibility implied some higher threshold such as the logical failure of the but for test in the circumstances of the case.⁴

This disagreement over the meaning of “impossibility” was less a dispute over how hard it should be to prove causation than a debate

---

¹ Called to the Law Society of Upper Canada and the Barreau du Québec (2007); Associate, Pape Barristers Professional Corporation, Toronto, Ontario.


about how Canadian tort law should approach causation in difficult cases. Would we be better served by attempting to shape material contribution into a coherent doctrine of relatively wide application or by looking elsewhere for solutions, such as to the pre-existing but somewhat out-of-fashion “robust and pragmatic” approach? This question came squarely before the SCC in *Clements*. At trial, the judge had adopted a “scientific impossibility” model of material contribution but the B.C. Court of Appeal subsequently overturned this, favouring a more stringent, “logical impossibility” approach.

In the end, the SCC chose a path even narrower than logical impossibility. Material contribution as described in *Clements* is limited to the rare circumstance where a plaintiff can prove causation globally against several tortfeasors, but cannot identify which of them was in fact the but for cause of her injury (e.g., the iconic case of *Cook v. Lewis*, discussed below). However, the court prefaced, punctuated, and post-scripted its discussion of material contribution with emphatic reminders that the but for test “must be applied in a common sense fashion”; can be “established by inference only”; and “has never required scientific proof of causation; to repeat yet again, common sense inferences from the facts may suffice”.

Thus, although *Clements* will enter the canon of SCC tort cases as “the case that cleared up (and more or less cut down) material contribution”, the true import of the decision may lie less in its clarification of a troublesome doctrine than in its restoration of “common sense” as the thread that should run through the law of causation.

The trouble with *Clements* is that it gives little guidance on what a “robust and pragmatic”, “common sense” approach really means. If this decision were to remain the SCC’s last word on causation for


10. Ibid., at para. 11 (emphasis added).

11. Ibid., at para. 38 (emphasis added).
another half-decade, it would run the risk of becoming to "robust and pragmatic" what Resurffce was to material contribution, a silent killer. Fortunately this is unlikely to happen as there is another significant causation case coming down the SCC pipeline, in which the meaning of a "robust, pragmatic, common sense inference" approach to causation will be front and centre (Ediger v. Johnston,\textsuperscript{12} scheduled for hearing in December 2012). It is possible, and in this author's opinion, likely, that the SCC's intention in Clements was to put material contribution to relative rest while setting the stage for the next battle in the law of causation, namely, when, where, why, and how but for causation can be established by inferences drawn from circumstantial evidence.

2. Background – Material Contribution, Material Confusion

A brief history of the material contribution doctrine will suffice for present purposes.\textsuperscript{13} The SCC unleashed material contribution, a doctrine borrowed from United Kingdom law, into Canadian tort law in Athey v. Leonati.\textsuperscript{14} In Athey, the court described material contribution as an alternative to the but for causation test, applicable when but for is "unworkable".\textsuperscript{15} However, the court then applied the test to a situation where but for causation was actually workable. In Athey, the defendant's negligence was one of several necessary but for causes of the plaintiff's injuries. The Athey version of material contribution was therefore interpreted to mean that a defendant's negligence does not have to be the sole cause of the injuries, as long as it is a necessary cause, a "material contribution beyond the de minimis range".\textsuperscript{16}


\textsuperscript{13} As with all histories, the history of material contribution recounted here is incomplete, biased, and told from the perspective of the victor. Many interpretations of material contribution have been floated over the years in the case law of various Canadian provinces, not to mention other Commonwealth jurisdictions, and of course in academic discourse. This history is meant only to summarize, in the briefest possible terms, the rise and fall of the material contribution doctrine in the jurisprudence of the Supreme Court of Canada.


\textsuperscript{15} Athey, supra, at para. 15.

\textsuperscript{16} Ibid., at paras. 15-20, 44-45.
And so began the descent into material confusion. While the court in *Athey* was correct to state that causation does not require the defendant to be the sole cause of the plaintiff’s injuries, there is no need to resort to material contribution in order to recognize this. Material contribution used this way is not an alternative to the but for test; it is simply an application of but for which acknowledges that injuries can (and do) have more than one cause. 17 *Athey* is ambiguous, and can be (mis)interpreted as suggesting that a lower threshold test should replace but for in all cases where the evidence suggests more than one cause of the injury. 18 This is precisely how the Alberta Court of Appeal erred in *Resurface v. Hanke*. 19

When *Resurface* reached the SCC, the court attempted to clear up the confusion. The *Resurface* decision emphasized that material contribution was not meant to supplant but for causation in all multiple cause cases. Rather, it was meant to be an exceptional, risk-based approach to causation, applicable only when: (1) the but for test is impossible to meet due to factors outside the plaintiff’s control, such as “the current limits of scientific knowledge”; and (2) the injury suffered falls within the ambit of the unreasonable risk created by the defendant’s negligence. The court referred to two scenarios where material contribution might apply. The first was *Cook v. Lewis*, 20 where two hunters had negligently fired their guns and one of them had hit the plaintiff, but it was impossible to know which one. The second was *Walker Estate v. York-Finch General Hospital*, 21 an action in which plaintiffs who contracted HIV from tainted blood sued the hospital and the Canadian Red Cross Society (CRCS) for negligence in donor-screening procedures. The CRCS argued that but for causation could not be established because the donor whose tainted blood infected the plaintiff would have given blood even if he had been properly warned against doing so. Although the court in *Walker Estate* held that but for causation had been established on the facts of that case (the donor would not have given blood if warned), it noted that material contribution could have been used if this had been

18. This is further supported by the language of *Walker Estate v. York-Finch General Hospital*, [2001] 1 S.C.R. 647, 198 D.L.R. (4th) 193, 6 C.C.L.T. (3d) 1 (S.C.C.) (“Walker Estate”), at para. 87, which also suggests that the but for test may be unworkable where there are multiple independent causes of a single harm.
impossible to prove, because “[t]he added element of donor conduct in [screening] cases means that the but-for test could operate unfairly”.\textsuperscript{22} As the SCC explained in \textit{Resurfice}, an exception to the but for test may be necessary where it is impossible to prove what a particular person in the causal chain would have done had the defendant not committed a negligent act or omission.

Unfortunately, as the SCC later acknowledged in \textit{Clements}, the test set out in \textit{Resurfice} was incomplete.\textsuperscript{23} The SCC had asserted that material contribution would apply when but for is impossible to meet, and had suggested that this might arise from scientific uncertainty. But the court had given only two examples of possible material contribution scenarios, neither of which shed much light on how the test they supposedly epitomized should be applied. Debate raged on the meaning of “impossibility”. Should material contribution apply in cases of factual or scientific impossibility, \textit{e.g.}, where the science “just isn’t there yet” to pin the injury on the defendant’s negligent act? Or, did the SCC intend “impossibility” to set a higher threshold, such as the logical failure of the but for test in the circumstances of the case?\textsuperscript{24} No one could be certain. Given this, trial judges were understandably reluctant to invoke material contribution; in the rare instances where they did so, they were often overturned on appeal.\textsuperscript{25} \textit{Resurfice} created an enigmatic beast of a doctrine, which neither bench nor bar understood. In its wake, material contribution became a “paper tiger”, much discussed, but unusable and unused.

3. \textbf{Clements v. Clements – The SCC Gets Another Kick at the Can}

\textit{Clements} brought the debate over material contribution, and more specifically the meaning of “impossibility”, to a head.

\textbf{(1) Clements v. Clements, pre-SCC}

\textit{Clements} is about a motorcycle accident. The defendant, Mr. Clements, was driving the bike and his wife was riding behind him on the passenger seat. Mr. Clements had overloaded the bike by about 100 pounds and was speeding by 20 km/hr. Unknown to Mr.

\begin{itemize}
  \item \textsuperscript{22} \textit{Ibid.}, at para. 88.
  \item \textsuperscript{23} \textit{Clements}, supra, footnote 1, at para. 34.
  \item \textsuperscript{24} See footnotes 5 and 6, supra.
\end{itemize}
Clements, a nail had punctured the bike’s rear tire. As Mr. Clements attempted a passing manoeuvre, the nail fell out, the rear tire deflated, and the bike began to wobble. Mr. Clements was unable to bring the bike under control, and it crashed. Mrs. Clements was thrown off and suffered a severe traumatic brain injury. She then sued Mr. Clements in order to trigger his liability insurance.

There was no dispute that Mr. Clements had been negligent in overloading the bike and speeding in wet weather. The sole issue was causation: would he have been able to regain control of the wobbling bike after the tire deflation had it not been for the excess speed and load?

The defence called an expert witness on accident reconstruction and motorcycle dynamics. He acknowledged that in general, excess speed and backloading increase the instability of a motorbike, but opined that in this case, Mr. Clements would probably have been unable to recover from the instability in any event. The expert conceded that this opinion was largely conjectural and could not be supported scientifically because the exact circumstances of the accident were unknown and impossible to re-create.

The trial judge concluded that, in light of the defence expert’s opinion, this was a case where but for causation was incapable of proof: it was impossible to determine the threshold combination of speed and weight beyond which recovery would not have been feasible. The trial judge therefore considered it appropriate to employ the Resurface material contribution test. He proceeded to hold Mr. Clements liable for having created a risk of injury which materialized, applying the material contribution doctrine because but for causation was factually or scientifically impossible to prove in the case.

The B.C. Court of Appeal overturned the trial judge’s decision, holding that the material contribution test applies only when but for causation is logically impossible, not just practically difficult, to prove.  

(2) Clements v. Clements at the SCC

The SCC took Clements as an opportunity to address not only the confusion surrounding material contribution, but the widespread misunderstanding of but for causation as well. The court held that the trial judge made two significant errors. First, he insisted on scientific reconstruction evidence as a necessary condition of finding but for causation. The plaintiff did not call an expert.

26. The plaintiff did not call an expert.
27. Clements, supra, footnote 7, at paras. 38-64 (B.C.C.A.).
causation. As the court noted at least four times in its reasons, scientific precision is not necessary to a conclusion that but for causation is proved on a balance of probabilities. The trial judge's second error was to apply a material contribution test in the absence of the special conditions for its application. The court adopted a similar interpretation of material contribution as the B.C. Court of Appeal, but for simplicity's sake did not use the terminology of "logical impossibility". In the result, the SCC sent the case back to the trial judge to be dealt with on the correct application of but for causation.

(a) Clements and the "Material Contribution to Risk" Approach

The court's discussion of material contribution can be summarized as follows:

1. Material contribution is not a test of causation, but a rule of policy which imposes liability on the basis of risk creation. It should therefore be known as the "material contribution to risk approach". While but for causation is a factual inquiry into what likely happened, material contribution replaces proof of causation with proof of risk creation. So when a court invokes the material contribution doctrine, it is not "finding causation" on a less strict test – it is imposing liability despite the fact that causation cannot be proven. While this may seem like an academic nuance, it explains why the applicant's material contribution to risk must be exceptional: it allows recovery in tort despite the acknowledged absence of an essential element of tort liability.

2. Material contribution is not triggered by factual or scientific impossibility of establishing but for causation. This does not mean that a plaintiff who faces the hurdle of scientific impossibility is out of luck. On the contrary, it means that scientific proof is not necessary in

28. Clements, supra, footnote 1, at paras. 9, 33, 46, 48-49.
29. The trial judge can surely be forgiven for this error, since no one really understood what those conditions were until Clements was released.
30. The court's holding regarding the misapplication of the but for test is particularly interesting given that counsel for Mrs. Clements abandoned the "robust and pragmatic approach" in the first few minutes of the oral hearing, conceding that the inconclusive expert evidence meant that but for causation could not be proven in the case. The SCC's revival of this argument is an indication that the court felt strongly about correcting the manner in which the but-for test had been applied in the case (archived webcast available at: <www.scc-csc-gc.ca>.
31. Clements, supra, footnote 1, at paras. 14-16.
order for the plaintiff to establish but for causation. As the court wrote (in a tone bordering on exasperation), “The law of negligence has never required scientific proof of causation; to repeat yet again, common sense inferences from the facts may suffice. If scientific evidence of causation is not required, as Snell makes plain, it is difficult to see how its absence can be raised as a basis for ousting the usual ‘but for’ test”. 32

(3) The “material contribution to risk” approach will be appropriate only where:

(a) there are several tortfeasors, all of whom are at fault;
(b) one or more of these tortfeasors have in fact caused the plaintiffs’ injury;
(c) the plaintiff would not have been injured but for their negligence, viewed globally;
(d) it is, however, impossible for the plaintiff prove but for causation against any of these tortfeasors individually because they can each “point the finger” at the other, thus escaping liability. 33

Thus, in a legitimate material contribution to risk case, the but for test will fail only when applied separately to each defendant, as each one could say “you can’t prove it was me because it could just as well have been him” 34.

The court cited the examples of Cook v. Lewis and the United Kingdom toxic agent cases, 35 where the plaintiff’s developed asbestos-related diseases after working for several employers, all of whom had exposed them to asbestos. Since all of the employers had exposed the plaintiff to the same risk, it was impossible to say which employer had in fact caused the disease. The defendants attempted to escape liability by “pointing the finger” at each other, but the House of Lords imposed liability on the basis of material contribution. 36

32. Ibid., at para. 38. To quote Dave Chappelle, “OH SNAP!”.
33. Ibid., at paras. 39-41.
34. The court justified imposing liability despite the absence of causation in this “point the finger” situation on the basis of the “corrective justice” theory underlying tort law. Tort imposes liability when the defendant and plaintiff are in a “correlative” relationship, i.e., when they are the doer and sufferer of the same harm. In a “point the finger” situation, said the court, the plaintiff is in such a relationship with the defendants viewed as a group, if not necessarily with each one individually (Clements, ibid., at paras. 7, 41).
36. The SCC also fit Walker Estate under the material contribution umbrella: in that situation, the defendant would not be permitted to escape liability by
It is worth noting that in these cases, the underlying cause of the harm was undisputed. A bullet caused the injury, and exposure to asbestos caused the disease. The only question in those cases was, to put it colloquially, "whodunnit?". It is not entirely clear whether material contribution would still apply in a case where the factual cause of the injury is also in dispute – for example, if the disease could have been caused by exposure to asbestos by one employer or to coal dust by another. In this example, unlike in those cited in Clements, the plaintiff would not really have proven but for factual causation of her injury at all. Does this change the equation? I would argue that it should not. In material contribution à la Clements, the basis of liability is risk creation. What the plaintiff has to prove is that each defendant exposed her to a risk of injury; what unites the defendants in liability is that they did so. So long as the defendants each exposed the plaintiff to a risk of the injury, and so long as they can each escape liability by blaming each other, difficulty in identifying the precise causal mechanism of the injury should not preclude recovery.

(4) The SCC was careful not to close the door on material contribution entirely, noting that new situations may raise new considerations. In particular, the court left the door open to the possible application of a material contribution to risk approach in mass toxic tort litigation.37 An example of this would be a class action against a polluter who released a contaminant into the population, resulting in increased cancer rates. Statistical evidence can establish the increased risk, but no individual plaintiff can establish that his/her cancer resulted from the pollutant rather than another cause.38 In such a case, but for causation would be proven in the population (the increased rate of cancer attributable to the pollutant), but impossible to prove with respect to any individual.39

(b) Clements on Common Sense Inferences and the Robust and Pragmatic Approach

The court's intention in Clements was evidently to shift the focus from material contribution and restore Snell v. Farrell as the guiding light for judges faced with difficult causation cases. The decision is a cri de coeur, a directive to end our obsession with "scientific proof" of causation. And it is a reminder that Snell is not only good law but very

37. Clements, supra, footnote 1, at para. 44.
38. L. Collins, supra, footnote 5, at p. 93.
likely the best tool we have to cope with causation in an era where advanced-yet-incomplete scientific knowledge can easily (and needlessly) complicate the question. Before even turning its attention to material contribution in Clements, the court emphasized that:

The “but for” causation test must be applied in a robust common sense fashion. There is no need for scientific evidence of the precise contribution the defendant’s negligence made to the injury...

The SCC deliberately sought to minimize the significance of material contribution in its own jurisprudential history, remarking that although Athey, Walker Estate and Resurface are all considered material contribution cases, the approach to causation actually applied in each of them can be read as a “robust and common sense application of the ‘but for’ test”. This might involve a degree of historical revisionism, but be that as it may, the take-away message is that material contribution was not necessary in those cases. What they called for was a robust, pragmatic, common sense approach to but for causation.

By emphasizing that “the ‘but for’ causation test must be applied in a robust common sense fashion”, the court made it clear the so-called “robust and pragmatic approach” has no on/off switch. It is not a test or a doctrine that applies only to certain cases; it is the approach to take in but for causation. The trouble is that Clements is more or less silent on what a robust, common sense approach to the but for test should look like. It is all very well to say “don’t get mired in the science” and to underline the validity of circumstantial evidence, but judges (and lawyers) need more precise guidance than that. The court in Clements addressed the inference-drawing process only briefly, sketching out two basic propositions. These propositions are quoted below, and my interpretation of them follows.

1. "A common sense inference of ‘but for’ causation from proof of negligence usually flows without difficulty. Evidence connecting the breach of duty to the injury suffered may permit the judge, depending on the circumstances, to infer that the defendant’s negligence probably caused the loss." In other words, if there is sufficient circumstantial evidence suggesting causation, direct evidence is unnecessary: causation can be inferred from the circumstances. The strength of

40. Clements, supra, footnote 1, at para. 9.
41. Ibid., at para. 28.
42. Ibid., at para. 9 (emphasis added).
43. Ibid., at para. 10.
the inference will depend on how compelling the circumstantial evidence is.

It is clear from this that an inference of causation does not require overwhelming evidence; such inferences generally flow as a matter of common sense. The court reminds us in this paragraph that the plaintiff's burden is not to prove that the defendant actually caused the loss; it is to prove that s/he probably caused the loss. Thus, if the circumstances suggest a probable (i.e., over 51%) link between the negligence and the injury, a finding of causation should follow. This is a pointed reminder and an important clarification, as some courts have until now been reluctant to draw inferences in all but the most overwhelmingly compelling instances. 44 Thus, while the Court of Appeal for Ontario was no doubt correct to state that Snell does not modify the amount of proof necessary to prove causation, 45 the SCC's declaration that causal inferences generally flow without difficulty may hint that the amount of proof demanded has sometimes been excessive — closer to scientific precision than to a "balance of probabilities".

(2) "Where 'but for' causation is established by inference only, it is open to the defendant to argue or call evidence that the accident would have happened without the defendant's negligence, i.e. that the negligence was not a necessary cause of the injury, which was, in any event, inevitable." 46 In other words, circumstantial evidence, even if it cannot be proved directly. This is not a reversal of the burden of proof, since the initial burden of persuading a court to draw the inference still lies with the plaintiff. But once the inference has been drawn, prima facie causation has been established, and in the absence of more persuasive evidence adduced by the defendant to displace that inference, a finding of causation will follow.

Together, these propositions set out a two-stage approach to drawing and sustaining a causal inference. The court's intention seems to be to make the first stage, the drawing of the prima facie


45. Aristorenas, supra, at para. 60.

46. Clements, supra, footnote 1, at para. 11.
inference, less difficult for a plaintiff to pass. If so, then the real battleground in these cases, and the next battle in the law of causation, may well centre on the second stage: what does a defendant have to do in order to displace a *prima facie* inference? According to Clements, the defendant must establish “that the injury would have happened in any event”. It seems, therefore, that it would be insufficient for the defendant to argue that something else might or could have caused the injury; s/he must demonstrate that something else is *as likely (or more likely)* as the inferred cause to have caused the injury, despite the circumstances that led to the drawing of the inference. This, and other key questions, will no doubt arise when the SCC hears argument in Ediger v. Johnston.


*Ediger* is an obstetrical malpractice case. In a nutshell, the defendant doctor commenced a mid-forceps extraction without ensuring that the resources for a C-section would be “immediately available” in case of emergency. The forceps attempt failed, and a C-section became necessary. Within a minute or two of the forceps being removed, the baby’s heart became bradycardic (prolonged slow heartbeat), indicating that the umbilical cord was compressed and the baby was not getting sufficient oxygen. It took nearly 20 minutes to assemble the C-section team and deliver the baby. As a result of the prolonged asphyxia, Cassidy Ediger was born with severe cerebral palsy. The trial judge found that the doctor had been negligent in failing to obtain the mother’s informed consent, and in failing to ensure that back-up was immediately available before applying forceps.47

The judge accepted that in order to prove that the failure to ensure back-up caused Cassidy’s injuries, the plaintiff had to prove that the forceps were the factual cause of the cord compression.48 She found

---

48. It should be noted that the trial judge may have asked the wrong but for question here. The question in factual causation is whether the injuries would have occurred but for the defendant’s negligent act. Here, the defendant’s negligent act was the failure to assemble a C-section team before applying forceps. Let’s say the cord compression and bradycardia were caused by something entirely unrelated to the forceps. The fact remains that if the C-section team had been assembled when it occurred, Cassidy would have been delivered sooner. In this scenario, the causal mechanism of the injury is arguably unrelated to the but-for relationship between Dr. Johnston’s negligent act and Cassidy’s injuries. Of course, it might not be *fair* to hold
that the precise mechanism that caused the compression could not be identified in this case, but found a causal link despite this lack of scientific proof. Applying a “robust and pragmatic” approach, the judge drew a causal inference based on the following circumstances: close proximity in time of the forceps application and the onset of compression; the fact that cord compression is a known risk of forceps procedures; the mechanics of forceps application, which can create space into which the umbilical cord may slip; and the mechanics of labour contractions, which can force the cord into the space created after the forceps are removed. 49

The B.C. Court of Appeal overturned the trial judge’s decision on appeal, holding that she was not entitled to draw a “common sense inference” of causation in circumstances where the defence had tendered evidence contradicting the plaintiff’s theory. 50 Essentially, the Court of Appeal held, in keeping with its past decisions, that a judge’s ability to draw an inference of causation ends as soon as the defence adduces evidence of another possible cause. In this case, the defendant’s experts had testified that cord compression can also be caused by a kinked cord, a nuchal (wrapped) cord, or “unknown reasons”. 52

Importantly, and in my view, untenably, the B.C. Court of Appeal painted “proof of causation on a balance of probabilities” and the “robust and pragmatic/common sense approach to causation” as mutually exclusive alternatives: 53

Dr. Johnston liable for an injury caused by the unfortunate “coincidence in time” of his negligence and an unrelated event. However, this would be a question of remoteness or “legal causation” – whether it is just to hold the defendant responsible in these circumstances – rather than a question of factual causation.


50. The Court of Appeal’s decision also rested on factual findings that are not relevant for the purposes of this article: the court found that causation could not be established because the forceps and bradycardia were not contemporaneous and because there was insufficient evidence that Cassidy would have been delivered sooner if a back-up team had been immediately available. These findings are also being challenged on appeal. For a more complete understanding of the issues on appeal, see the facia of the Appellant and Respondent, posted at: <http://www.scc-csc.gc.ca/casedossier/cms-sgd/fac-mem-eng.aspx?cas = 34408 >.


52. Ediger, supra, footnote 12 (B.C.C.A.), at para. 49.

The "robust and pragmatic" approach to the analysis of evidence adopted in Snell, which permits an inference of causation to be drawn in certain circumstances, is not applicable where evidence to the contrary on a plaintiff's theory of causation is tendered. As Sopinka J., for the Court, stated:

[33] 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. If some evidence to the contrary is adduced by the defendant, the trial judge is entitled to take account of Lord Mansfield's famous precept. This is, I believe, what Lord Bridge had in mind in Wilsher when he referred to a "robust and pragmatic approach to the . . . facts" (p. 569).

This court confirmed in Moore v. Castlegar & District Hospital (1998), 49 B.C.L.R. (3d) 100 (C.A.) that "where both parties have led expert evidence on the issues of causation, it is not open to this court to apply the 'common sense' reasoning urged in Snell" (para. 11).

In this case, the appellant led evidence to the contrary. While some potential causes for the cord compression were ruled out by the medical experts (including cord prolapse, placental abruption, and a short cord) there was also evidence that cord compression could occur from a "kink" in the cord or a nuchal cord, or in some instances for unknown reasons. The fact that the precise mechanism of how the cord compression occurred could not be determined did not lessen the burden of proof on the respondent or the trial judge's task of having to weigh the evidence on causation in the context of her other findings of fact. The inference of causation from Snell was not available to be drawn. The trial judge had to determine whether the evidence established that, on a balance of probabilities, the appellant's attempted forceps delivery was the cause of the cord compression. [Emphasis added.]

An inference of causation and proof of causation on a balance of probabilities are not alternatives. Inference is a reasoning process that leads to a finding of causation on the balance of probabilities – it is simply a way of getting to proof of causation via indirect evidence rather than direct evidence or expert opinion. The Snell/Clements approach to causation does nothing more than advise judges to do what they are already entitled – indeed, supposed – to do: consider indirect evidence and draw inferences where appropriate. There is no magic to this; in other areas of fact-finding, judges give weight to circumstantial evidence, draw inferences, and adhere to a "balance of probabilities" standard of proof every day. Snell and Clements simply remind courts that indirect evidence, inferential reasoning, and the probability standard apply to causation as well.

In light of this, the labels "robust and pragmatic approach" and "common sense inference approach" are unnecessary. Arguably,
they might even be detrimental, inadvertently perpetuating the notion that the *Snell/Clements* view of but for causation is a doctrine that may or may not apply in any given case. “Robust and pragmatic” and “common sense inference” are code words from the SCC to the courts below. They aim to correct a specific problem, which is the tendency of some courts to treat causation differently from other fact-finding exercises. This tendency is understandable: because causation is so often a battle of the scientific experts, judges are not entirely at ease finding causal connections based on circumstances without the comfort of a supporting expert opinion. They assume that since causation questions can *sometimes* be answered more or less conclusively, they should *always* be answered more or less conclusively. But this approach is wrong. Not only does it give insufficient weight to indirect evidence, it effectively raises the standard of proof for causation to something more than a 51% balance of probabilities. It also displays a touching but misplaced faith in the ability of “science” to provide conclusive answers. Science is ever-changing, and a causal link proven today might be disproven tomorrow or vice-versa. This does not mean that we should stop using the best available science to guide our decisions; but it does mean that we should be cautious about requiring a “proven” scientific basis for causation in a legal context. It is the job of the judge, not of “science”, to answer the causation question based on the totality of the evidence in the case. Judges might be imperfect; but then again, so is science.

If and when the insistence on something close to “scientific precision” ceases, it will no longer be necessary to refer to the *Snell/Clements* view of but for causation as a “robust and pragmatic” or “common sense” approach. It will simply be the but for causation test, properly applied.

It follows from the above that a defendant’s suggestion of other possible causes does not “oust” the *Snell/Clements* approach. First, as discussed above, my view is that the *Snell/Clements* approach to but for causation can never be “ousted”. The proper question to ask is not “when does this approach apply?”, but “when will an inference of causation have sufficient weight to prevail?” The mere existence of other possible causes cannot by itself drain an inference of all weight. To accept this would be to eviscerate the concept of the causal inference, since other possible causes exist in virtually every litigated negligence case.54 The B.C. Court of Appeal cites as support for its “ousting” policy Sopinka J.’s assertion that “in the absence of evidence to the contrary adduced by the defendant, an inference of causation

may be drawn” (emphasis added). But stopping at “in the absence of evidence to the contrary” is premature, and results in an unfair reading of Snell. The real question is: what constitutes “evidence to the contrary” sufficient to displace the inference? Is it enough for the defendant to show that something else could have caused the injury, or does s/he have to establish that some other cause was as likely (or more likely) to have caused the injury? In my view, the answer is “as (or more) likely”, and it stems from the rules governing circumstantial evidence, as explained in Fontaine v. British Columbia.55

Should the trier of fact choose to draw an inference of negligence from the circumstances, that will be a factor in the plaintiff’s favour. Whether that will be sufficient for the plaintiff to succeed will depend on the strength of the inference drawn and any explanation offered by the defendant to negate that inference. If the defendant produces a reasonable explanation that is as consistent with no negligence as the res ipsa loquitur inference is with negligence, this will effectively neutralize the inference of negligence and the plaintiff’s case must fail. Thus, the strength of the explanation that the defendant must provide will vary in accordance with the strength of the inference sought to be drawn by the plaintiff. [Emphasis added.]

Just as the plaintiff’s causal inference must be grounded in the evidence, so must the defendant’s negation of that inference. The defendant must show not only that another possible cause existed, but that considering the totality of the evidence, this other possible cause was at least as likely as the inferred one to have caused the injury. This is not an “ousting” of the Snell/Clements approach to causation; it is a refusal to draw an inference because the evidence in the case does not support it.

A related question concerns the role of Lord Mansfield’s oft-quoted but seldom analyzed “famous precept”, which states that “all evidence is to be weighed according to the proof which is in the power of one side to have produced and in the power of the other side to have contradicted”.56 In Snell, Sopinka J. reminded us that “if some evidence to the contrary is adduced by the defendant, the trial judge is entitled to take account of this precept”.57 This must mean that the inference is not automatically defeated by the defendant’s introduction of “evidence to the contrary”. Instead, the judge must

57. Snell, supra, footnote 2, at para. 33.
measure the strength of the plaintiff’s suggested inference in view of what it was possible for that plaintiff to prove, and likewise must weigh the strength of the defendant’s counter-argument in view of what it was possible for him or her to prove. Thus, in a case where the facts lie particularly within the knowledge of the defendant, the inference might be easier to draw and uphold, as the plaintiff is at an evidentiary disadvantage and more is expected of the defendant due to his/her evidentiary advantage. This does not mean that the Snell/Clements view of causation applies only where there is an imbalance of evidentiary power; it simply means that where this imbalance exists, it will be a factor for the court to take into account when evaluating each party’s case.

The relationship between expert evidence on causation and inferential reasoning also requires clarification. Is it open to the trial judge to draw an inference of causation when experts have opined on the question? Can a judge draw an inference that contradicts expert opinion? The B.C. Court of Appeal’s approach appears to be a blanket ban on common sense inferences in all cases where expert opinion exists.58 Again, the premise here is wrong: the question is not whether the Snell/Clements approach applies, but whether an inference of causation will succeed, given the totality of the evidence. Expert opinion often consists of inferences drawn by applying specialized knowledge to assumed facts. The presence of expert opinion on causation changes the playing field, but it does not kick judicial inference out of the game. Evidently, judges must always retain the ability to reject expert opinion as being biased, unsupported, not credible, or otherwise unacceptable. Moreover, judges should not have to defer to expert opinion when that opinion does no more than propose other possible causes. Also, it may be open to the court to reject the factual foundations of an expert’s opinion but to arrive at an inference of causation by applying knowledge acquired from the expert opinion to the facts as found (as the trial judge in Clements appears to have done, albeit while relying on the wrong causation test). And it is conceivable that a judge, having admitted and heard expert evidence on causation, will nevertheless decide that the question can be answered without recourse to the expert testimony; perhaps even by “common sense”.

58. In Ontario, this approach was recently quoted with approval in Andersen v. St. Jude Medical Inc., 2012 ONSC 3660 (Ont. S.C.J.), at para. 560. Lax J. wrote that “it is not open to the trial judge to draw a common sense inference of the cause of the medical complication where both parties have led expert medical evidence of causation”.
That said, affirmative expert opinions will generally render “common sense inferences” unnecessary, because the experts will have drawn the necessary inferences and handed them to the court in a ready-made, expert-sanctioned package.

5. Conclusion

By narrowing the scope of material contribution and (re)endorsing Snell in Clements, the SCC re-injected a dose of common sense into the law of causation. The way forward is for judges to take a so-called “robust and pragmatic” approach to the but for test, accepting the validity of circumstantial evidence and inferential reasoning in causation. Unfortunately, Clements gives little in the way of guidance to judges and lawyers seeking to understand and implement this. Fortunately, and probably by design, the upcoming Ediger appeal offers fertile ground for the court to address many of the unanswered questions surrounding its chosen approach. These include, but are by no means limited to: (1) the types of circumstances that may lead to an inference being drawn (e.g., temporal proximity; known association between the negligent act and the type of injury that occurred; plausible theory of causal mechanism; elimination of some (but not necessarily all) other possible causes, etc.); (2) the level of proof required for the defence to displace the inference; (3) the meaning of Lord Mansfield’s “famous precept”; and (4) the relationship between expert opinion and judicial inference. The Clements decision is an important step forward in the struggle to clarify causation – but the fun has only just begun.