



**Foreseeability and Causation in Negligence Law as Explained by the
Supreme Court of Canada:
*Resurfice Corp. vs. Hanke, 2007 SCC 7***

In a judgment issued February 8, 2007, a unanimous Supreme Court of Canada gave a very clear exposition on two basic elements in the law of negligence - foreseeability and causation. Anyone analyzing a negligence claim will want to consider the principles stated in this case.

The case does not break any new legal territory. It is, actually, nothing more than a clear expression of elementary legal principles. It is important, though, because it shows that careful, rigorous application of basic principles is crucial to the proper analysis and disposition of a negligence case.

The case arose from a very unfortunate set of circumstances. The plaintiff erroneously put a hot water hose into the gasoline tank of an ice resurfacing machine. This caused the gas to vaporize and then explode when it was ignited by an overhead heater. The plaintiff was badly injured. The plaintiff sued the machine's manufacturer and distributor, alleging that they were responsible because of the defective design of the machine. The plaintiff argued that it was defective because the gas tank and water tank were placed close together and they were similar in appearance.

The trial judge held against the plaintiff because: (1) it was not reasonably foreseeable that someone would confuse the two tanks; and (2) the defendants did not cause the damage. The trial judge held that the plaintiff knew or ought to have known the difference between the two tanks. However, the Alberta Court of Appeal reversed the decision, on the twin bases that the trial judge was wrong on foreseeability and causation. The case then went to the Supreme Court of Canada.

On the foreseeability issue, the kernel of the Supreme Court's reasoning is this:

The Court of Appeal's second criticism of the trial judge's rejection of reasonable foreseeability was that the trial judge failed to consider policy matters, namely the seriousness of the injury and the relative financial positions of the parties. The Court of Appeal erred in suggesting that these matters are relevant to foreseeability. Foreseeability depends on what a reasonable person would anticipate, not on the seriousness of the

plaintiff's injuries (as in this case) or the depth of the defendant's pockets: *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, 2004 SCC 73, at para. 55. [emphasis added]

Accordingly, the Supreme Court reversed the Alberta Court of Appeal and restored the trial judgment on this issue.

On the causation issue, two subsidiary aspects were involved: (1) the analysis on contributory negligence and comparative blameworthiness; and (2) the use of the "but for" test rather than the "material contribution" test.

On the first aspect, the Supreme Court again reversed the Court of Appeal and upheld the trial judge, saying:

However, I am satisfied that the trial judge found not only that Mr. Hanke's carelessness was responsible for his injuries, but also that the alleged design defects were not responsible for Mr. Hanke's injuries. For example, the trial judge noted that 'the accident was caused by operator error and had nothing to do with the design or manufacture of the machine' (para. 56). In light of this finding there was no need for the trial judge to engage in a contributory negligence analysis.

On the second aspect, the Supreme Court affirmed that the "but for" test should normally be used, and that the "material contribution" test is reserved for exceptional cases. This emerges from three paragraphs:

First, the basic test for determining causation remains the 'but for' test. This applies to multi-cause injuries. The plaintiff bears the burden of showing that 'but for' the negligent act or omission of each defendant, the injury would not have occurred. Having done this, contributory negligence may be apportioned, as permitted by statute.

[...]

However, in special circumstances, the law has recognized exceptions to the basic 'but for' test, and applied a 'material contribution' test. Broadly speaking, the cases in which the 'material contribution' test is properly applied involve two requirements.

First, it must be impossible for the plaintiff to prove that the defendant's negligence caused the plaintiff's injury using the 'but for' test. The impossibility must be due to factors that are outside of the plaintiff's control; for example, current limits of scientific knowledge. Second, it must be clear that the defendant breached a duty of care owed to the plaintiff, thereby exposing the plaintiff to an unreasonable risk of injury, and the plaintiff must have suffered that form of injury. In other words, the plaintiff's injury must fall within the ambit of the risk created by the defendant's breach. In those exceptional cases where these two requirements are satisfied, liability may be imposed, even though the 'but for' test is not satisfied, because it would offend basic notions of fairness and justice to deny liability by applying a 'but for' approach.

In this case, the trial judge correctly used the "but for" test. Thus, the trial judge's approach was approved and the Court of Appeal was held to have erred.

In the overall result, the Supreme Court approved of the trial judge's method and conclusion, and rejected the views espoused by the Court of Appeal. The plaintiff's action was dismissed.

For further information contact one of the following members of our Insurance group:

Todd R. Davies 604 484 1799 or tdavies@ahbl.ca

Bruno De Vita 604 484 1709 or bdevita@ahbl.ca

Jeremy M. Poole 604 484 1722 or jpoole@ahbl.ca

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