

HANKE V. RESURFICE CORP
RECENT SUPREME COURT OF CANADA DEVELOPMENTS
WITH RESPECT TO FORESEEABILITY AND CAUSATION

Introduction -

The decision in *Hanke v. Resurface Corp* (“*Resurface*”) was released on the 8th of February, 2007 by the Supreme Court of Canada. *Resurface* provides further guidance with respect to the issues of causation and foreseeability.

The Plaintiff, Mr. Hanke, was the operator of an ice-resurfacing machine. While refilling it with water, he mistakenly placed the water hose into the gas tank of the ice-resurfacing machine rather than into the water tank. When water overflowed the gasoline tank, gasoline vapours were pushed into the air. An overhead heater ignited them. Hanke was severely burned in the ensuing explosion. Hanke’s products liability action alleged that the machine was defectively designed as the fill up openings for the gasoline and water tank were similar in appearance, placed closely together and are likely to confuse the operator of such machinery. The Trial Judge found that the tanks were differentiated, as one of the two tanks was much taller than the other. Further the gas tank had a label on it that said “Gasoline Only”.

The action was dismissed on the basis that Mr. Hanke had not established on a balance that the accident was caused by the negligence of the manufacturer or distributor. The Trial Judge found that it was not reasonably foreseeable that an operator of such a machine would mistake the gas and hot water tanks. Further, it was a finding that Mr. Hanke, by his own admission, knew full well the difference between the two tanks. The Trial Judge held the accident was caused by Mr. Hanke’s own negligence in turning the water on when he admitted knowing the difference between the two tanks.

The Alberta Court of Appeal found errors in law with respect to the Trial Judge's decisions on foreseeability and causation. They reversed the Trial Judge's decision. Leave was granted to appeal to the Supreme Court of Canada.

Causation -

In a series of cases the Supreme Court of Canada¹ has struggled with the impact on the traditional "but for" test of the decision of the House of Lords in *McGhee v. The National Coal Board* [1972] 3 ALL E.R. 109 [1973] 1 W.L.R. 1 (H.L.). In that decision Lord Wilberforce seemed to be opening up the test of causation to deal with cases that would have an unjust result using the traditional "*but for/material contribution*" test of causation. The *McGhee* case was itself just such a case. In that case Mr. McGhee contracted dermatitis and was severely disabled while employed emptying pipe kilns which coated him in brick dust. His employer did not provide washing facilities leaving the Plaintiff to ride home "caked with grime and sweat". The evidence at that trial demonstrated prolonged exposure to those working conditions increased the chance of developing disabling dermatitis. Medical evidence could not *scientifically prove* that had washing facilities been provided the Plaintiff would not have contracted the disease. In *McGhee*, Lord Wilberforce has been interpreted to be advocating a reversal of the burden of proof in the following passage from the decision [at page 1012, All E.R.]:

"First, it is sound principal that where a person has, by breach of duty of care, created a risk and injury occurs within the area of that risk, the loss should be borne by him unless he shows that it had some other cause."

In reviewing this decision, *Mr. Justice Sopinka* in *Snell vs Farrell*² interpreted the two theories of causation that might exist as a result of Lord Wilberforce's speech as follows:

¹ *Athey v. Leonati* [1996] 3 S.C.R. 485, 31 C.C.L.T. (2d) 113; *Blackwater v. Plaintiff* [2005] 3 S.C.R. 3; 35 C.C.L.T. (3d) 161; *Walker Estate v. York Finch General Hospital* [2001] 1 S.C.R. 647, 6 C.C.L.T. (3d) 1, *Snell v. Farrell*, [1990] 2 S.C.R. 311, 4 C.C.L.T. (2d) 229, *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3S.C.R. 511, 36 B.C. L.R. (4th) 282

² *Snell v. Farrell*, [1990] 2 S.C.R. 311, 4 C.C.L.T. (2d) 229, at paragraph 22.

“Two theories of causation emerge from an analysis of the speeches of the Lords in this case. The first, firmly espoused by Lord Wilberforce, is that the Plaintiff need only prove that the Defendant created a risk of harm and that the injury incurred within the area of the risk. The second is that in these circumstances, an inference of causation was warranted in that there is no practical difference between materially contributing to the risk of harm and materially contributing to the harm itself.”

The *McGhee* decision was revisited fifteen years later by the House of Lords in *Wilsher v. Essex Area Health Authority*, [1988] 1 All E.R.871. Lord Bridge indicated that he believed the *McGhee* decision laid down *no* new principal of law and criticized cases suggesting there was new law as an attempt to extract some “*esoteric principal*” which was a “*fruitless exercise*” in his view.

In *Snell*, Mr. Justice Sopinka, citing Lord Bridge’s comments, indicated that even in medical malpractice cases such as the *Snell* case, there was no need to depart from the traditional “but for/ material contribution” test. He said:

“In my opinion, properly applied, the principals relating to causation are adequate to the task”. (para 27)

He then went on to say:

“The ‘dissatisfaction’ with the traditional approach to causation “stems to a large extent from its too rigid application by the Courts in many cases. Causation need not be determined by scientific precision”.
(para 30)

He relied on Lord Salmon’s famous quote from the *Alpha Cell* case as follows:

“Causation is ‘essentially a practical question of fact which can best be answered by ordinary common sense rather than abstract metaphysical theory’”. (para 30)

In *Athey*, the Supreme Court of Canada reconfirmed the use of the traditional causation test. In applying the “but for/material contribution” tests, the Supreme Court arrived at a result which I think surprised the bench and bar generally.

In *Athey*, the Plaintiff had a history of “minor back problems” since 1972. He was then involved in two motor vehicle accidents injuring his back in both of them. As he recovered from the second accident his physician encouraged him to get back to his exercise program. While stretching, he heard a “pop”. He was unable to move having suffered from a herniated disc that required a discectomy. He was disabled from his position doing heavy lifting as an auto body repairman and took a lesser job, which caused economic loss.

The Trial Judge awarded 25% of Mr. Athey’s damages finding that the motor vehicle accidents were 25% responsible for his back problems and that his pre-existing condition was 75% of the cause of his disc herniation. The Court of Appeal for British Columbia agreed with that decision. Both were reversed by *Mr. Justice Major* of the Supreme Court of Canada. While reconfirming the traditional “but for/material contribution” test, *Mr. Justice Major* confirmed that causation need not be determined by scientific precision. It is essentially a *practical question of fact* to be answered by ordinary common sense. At paragraph 17 of the decision he said as follows:

“It is not now necessary, nor has it ever been, for the Plaintiff to establish that the Defendant’s negligence was the “sole cause” of the injury. There will frequently be a myriad of other background events which were necessary preconditions to the injury occurring . . . as long as the Defendant is part of the cause of an injury, the Defendant is liable, even though his act alone was not enough to create the injury.”

At paragraph 19 of the decision he says:

“The law does not excuse a Defendant from liability merely because other causation factors for which he is not responsible also helped to produce the harm . . . it is sufficient if the Defendant’s negligence was a cause of the harm.”

At paragraph 20 he went on to say:

“If the law permitted apportionment between tortuous and non-tortuous causes, a Plaintiff could recover 100% of his or her loss only when the Defendant’s negligence was the sole cause of the injuries . . . this would be contrary to the established principals and the essential purpose of tort law, which is to restore the Plaintiff to the position he or she would have enjoyed but for the negligence of the Defendant”

Causation Test in Hanke v Resurface

In *Resurface*, the Chief Justice of Canada confirmed again that the “but for” test is the *primary test* in Canada for causation. The Court confirmed that where the “but for” test is unworkable; the “material contribution” test may be applied in *special circumstances*. The Court was critical of the Alberta Court of Appeal in the manner in which they applied the *material contribution* test. The Chief Justice said as follows (at para 19):

“The Court of Appeal erred in suggesting that, where there is more than one potential cause in injury, the ‘material contribution’ test must be used. To accept this conclusion is to do away with the ‘but for’ test all together, given that there is more than one potential cause in virtually all litigated cases of negligence. If the Court of Appeal’s reasons in this regard are endorsed, the only conclusion that could be drawn is that the default test for cause-in-fact is now the material contribution test. This is inconsistent with this Court’s Judgments in Snell v. Farrel . . . Athey v. Leonati . . . Walker Estate v. York - Inch General Hospital . . . and Black Water v. Plint.”

The Court went on to restrict the material contribution test to “*special circumstances*” [para 24 and 25]. The Court said that the material contribution test in order to be properly applied had two requirements:

First, it must be impossible for the Plaintiff to prove 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 dealing with causation the Chief Justice also dealt with the 'comparative blame worthiness' component of a causation analysis. In so doing, she found that such a review was appropriate and that the carelessness of Mr. Hanke did not automatically absolve the manufacturer or distributor from liability. She found however that the Trial Judge had made appropriate findings of fact that Mr. Hanke's carelessness led to his injuries and that there were no design defects that were responsible for those injuries.

In conclusion, the Supreme Court of Canada found that the Court of Appeal erred in applying the material contribution test in circumstances where it was not justified. The Supreme Court restored the Trial Judge's dismissal of the action based on the Trial Judge's findings of fact.

Foreseeability

The Trial Judge found that it was not reasonably foreseeable that an operator of the ice resurfacing machine would mistake the two tanks. This conclusion is based on the following:

1. they were different sized tanks;
2. the gas tank had a label on it 'gas only';
3. Hanke admitted he knew the difference between the two tanks;
4. a review of the alleged design errors raised by the Plaintiffs;
5. he rejected evidence of the Plaintiff's expert witnesses;

6. he rejected other workers' instances of similar confusion.

The Supreme Court of Canada in restoring the Trial Judge's decision rejected the Court of Appeal's reversal and made the following findings with respect to foreseeability:

- “1. **Liability for negligence requires breach of duty of care arising from a reasonably foreseeable risk of harm to one person created by the act or omission of another;**
2. **By enforcing reasonable standards of conduct so as to prevent creation of reasonably foreseeable risks of harm, tort law serves as a disincentive to risk creating behaviour [para 6].”**

The Supreme Court rejected the Alberta Court of Appeal's suggestion that the Trial Judge should have considered the seriousness of the injury and relative financial positions of the parties as an element or elements to foreseeability. Highlighting the object test Madam Justice McLaughlin said as follows:

“Foreseeability depends on what a reasonable person would anticipate, not the seriousness of the Plaintiff's injuries . . . or the depth of the Defendant's pockets”. [para 11]

Madam Justice McLaughlin found no error of law in the decision made by the Trial Judge after weighing the above noted findings on the evidence.

Conclusions

The most significant aspect of the case seems to be a clear limiting of circumstances where the material contribution test is applicable to those noted above.

The *Resurfice* case certainly confirms the traditional approach lauded by *Lord Bridge* in the *Wilsher* case and by *Mr. Justice Sopinka* in the *Snell* case. By reinforcing the 'but for' test and more particularly setting forth the elements necessary for the “material contribution” test to apply, it is debatable as to

whether or not the Supreme Court of Canada provided an assistive step in guiding Courts and litigants on when the material contribution test is relevant. The challenge will be in being able to predict when a Court will find that there are “*special circumstances*” which go beyond the primary ‘but for’ test. It is debatable as to whether the directive in *Resurface* will provide useful guidance on the use of the material contribution test.

One must also wonder whether the test of foreseeability in a negligent design products liability case should have anything to do with the individual Plaintiff’s knowledge. I would have thought that foreseeability was an objective test whereas personal knowledge seems to be a subjective issue. Surely such information goes to the issue of causation as opposed to foreseeability even though it appears to have been dealt with as a foreseeability issue in the various levels of the decision.

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