

SCC RE-AFFIRMS TEST FOR FAULT AND CAUSATION IN NEGLIGENCE ACTIONS

In its recent decision in *Resurface Corp. v. Hanke*, February 9, 2007, the Supreme Court of Canada has re-affirmed the importance of the principle of reasonable foreseeability and the traditional “but for” causation test in negligence cases.

In *Hanke*, the plaintiff was the operator of an ice-resurfacing machine (i.e., a Zamboni) who was seriously burned and injured when he placed a hot water hose into the gas tank of the unit, causing vaporized gasoline to ignite when it contacted the open flame of a space heater. He sued the manufacturer of the ice-resurfacing unit for negligence, relying on product liability principles.

At trial, the action was dismissed on the grounds that it was not reasonably foreseeable that the operator of an ice-surfacing machine would confuse the gas tank and hot water tanks, and in any case, the plaintiff had not established that the defendant manufacturer had caused the plaintiff’s loss. The trial judge concluded that the accident was caused by the plaintiff’s decision to turn the water on when he knew, or ought to have known, that the water hose was in the gasoline tank. He found as a fact, based

on the plaintiff’s own admission, that the plaintiff was not confused by the placement and character of the tanks, and that the configuration of the tanks had therefore not caused the accident.

The Alberta Court of Appeal allowed the plaintiff’s appeal and ordered a new trial. On appeal by the defendant to the Supreme Court of Canada, the Supreme Court restored the trial judgment and dismissed the action.

Foreseeability

The court re-affirmed the principle that “liability for negligence requires the breach of a duty of care arising from a reasonably foreseeable rise of harm to one person, created by the act or omission of another.” The court also re-affirmed that liability for negligence was fault-based, as tort law reflected “the principle of moral wrongdoing” underlying negligence law.

The Supreme Court found that there was evidence to support the trial judge’s conclusion that it was not reasonably foreseeable that an operator of the ice-resurfacing machine would mistake the gas tank and the hot

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water tank, place a water hose in the gas tank so as to generate vaporized gasoline that might be ignited by an open flame, leading to an explosion and fire. The two tanks were different in size; the gas tank bore a label stating “gasoline only”; and, the plaintiff had admitted that he knew the difference between the two tanks. The trial judge had found that the plaintiff was not confused between the two tanks.

The Court rejected the plaintiff’s argument that the trial judge had failed to consider alleged design errors, or had improperly discounted lay and expert evidence which supported the plaintiff’s case. The court found that the trial judge was entitled to reject that additional evidence, so long as there was evidence which supported the trial judge’s conclusion. Because there was evidence which supported the trial judge’s conclusion that there was no confusion, it was not open to the Court of Appeal to set that finding aside.

The Supreme Court disagreed with the Court of Appeal’s conclusion that the trial judge had erred in failing “to consider policy matters, namely the seriousness of the injury and the relative financial positions of the parties,” stating:

“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.”

Causation

With respect to the issue of causation, the Court of Appeal had found that, in dismissing the action entirely, the trial judge had erred in failing to give due consideration to “comparative blameworthiness” and whether fault should have been apportioned through the application of contributory negligence. It also suggested that it might be sufficient if the defendant’s act or omission had “materially contributed” to the risk of harm which occurred.

The Supreme Court held that the trial judge had taken the correct approach to causation and the question of contributory fault, and disagreed with the Court of Appeal on the issue of causation. The Supreme Court noted that the trial judge had correctly concluded that:

“The Plaintiff has failed to establish that the injuries were caused by negligent design... That being the case, it is not necessary for this Court to consider the apportionment of fault under

the rules of contribution...”.

The Supreme Court found that the trial judge had properly considered each of the plaintiff’s allegations of design error, and had correctly concluded that “there is no evidence that would show to the balance of probabilities that this event was caused by the defendants”.

The Supreme Court stated:

“The Court of Appeal erred in suggesting that, where there is more than one potential cause of an injury, the ‘material contribution’ test must be used. To accept this conclusion is to do away with the ‘but for’ test altogether, 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 Farrell*, *Athey v Leonati*, *Walker Estate v York Finch General Hospital*, and *Blackwater v Plint...* [citations omitted]

The Court reaffirmed that “the basic test for determining causation remains the ‘but for’ test.” The onus is on the plain-

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tiff to show that the injury would not have occurred ‘but for’ the defendant’s negligent conduct. If the plaintiff meets that test, then contributory negligence may be taken into account.

The “but for” test remains the primary rule for the determination of causation in negligence actions. However, in special circumstances, the law has recognized exceptions to the ‘but for’ rule, and will apply a “material contribution” test, broadly speaking, when two requirements are met:

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.

The Court gave the following examples as illustrative of circumstances when the “material contribution” test of causation might be applied, rather than the more general “but for” test:

“(a) where it is impossible to say which of two tortious sources caused the injury, for example, as was the case in *Cook v Lewis*, [1951] S.C.R. 830, where two shots are fired towards the victim, but it is impossible to say which shot caused the injury.

(b) 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, thus breaking the ‘but for’ chain of causation. For example... where it was impossible to prove that the donor whose tainted blood infected the plaintiff would not have given blood if the defendant had properly warned against donating blood. Once again,

the impossibility of establishing causation and the element of injury-related risk created by the defendants are central.”

The Court found that the basic “but for” test of causation was sufficient to determine liability on the facts of the Hanke case, without resort to the “material contribution” test, the use of which was “neither necessary nor justified” in the circumstances.

Summary and Conclusion

The Hanke does not break new ground, insofar as it re-affirms that negligence rests on proof of fault on the part of the defendant, and holds that it is not necessary to consider the issue of contributory negligence if the plaintiff fails to prove that there was any negligence on the part of the defendant. In addition, it confirms that the “but for” test of causation remains applicable to most claims in negligence, and gives clear guidance regarding the limited range of circumstances in which the “material contribution” test may be employed. Accordingly, while the Hanke decision breaks no new ground, it remains an important decision of the court, in re-affirming a number of basic principles of the law of negligence.

PUNITIVE DAMAGES UPDATE

A recent decision by the Ontario Court of Appeal, *McIntyre v. Grigg*, [2006] O.J. No. 4420, is worthy of note. It deals with a number of issues arising from a jury verdict in a motor vehicle accident.

At first blush, and subject to an appeal, it may encourage the prospects for punitive damage awards in civil impaired driving cases. It also includes some interesting comments on coverage for punitive

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damage awards under a standard automobile policy.

On liability, the Court upheld a finding of 30% against the taverner, (the defendant, McMaster Student Union, which operated the campus bar known as "The Downstairs John"), as being within the range of previous apportionment findings in commercial host cases.

On damages, the jury awarded \$250,000 in general damages. The plaintiff sustained "serious and permanent" injuries, including a closed head injury, soft tissue and orthopaedic injuries, and depression. The Court found the quantum "generous" and at the high end

of the range, but declined to interfere with the award.

The jury also awarded \$100,000 in aggravated damages against the Griggs. The Court found there was no legal basis for such an award, and allowed the appeal on this issue.

A punitive damages award was upheld by a 2-1 majority, but the quantum was reduced from \$100,000 to \$20,000. The majority, (McMurtry C.J.O. and Weiler J.A.), finds that punitive damages should be awarded because the driver's actions were "deliberate and intentional", and "showed a conscious and reckless disregard for the lives and safety of

others". Blair J.A., in dissent, states he would not award punitive damages because he does not think there is a rational basis for doing so. He also says that since punitive damages appear to be covered under a standard automobile policy, there would be no deterrent value. The majority was not as certain about coverage for such damages, noting that the "terms of the policy will dictate whether or not punitive damages would be included", and indicating that even if they were, there was still reason for awarding them.

FIRM NEWS

Pamela Stevens recently spoke at the Advocates Society conference "Tricks of the Trade" on the subject of videotaping of medical examinations.

On February 23, 2007, Jamie Trimble will speak about Opening and Closing Statements at an OBA program on civil trials.