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## SUPREME COURT OF CANADA CONFIRMS THE "BUT FOR" TEST FOR CAUSATION



Following the Supreme Court of Canada decision in *Athey v. Leonati et al.* (1996), 140 D.L.R. (4th) 235, lawyers and courts began to consider that causation was established where a plaintiff proved on a balance of probabilities that the defendant caused or materially contributed to the subject injury. This development caused the SCC to perceive that its ruling in *Athey* was being misapplied and was being used in a broader range of circumstances than what the SCC had contemplated at the time *Athey* was decided. Thus, in *Resurfice Corp. v. Hanke*, 2007 SCC 7, the SCC took steps to clarify its ruling in *Athey*. In doing so the SCC confirmed that the "but for" test is the primary test for causation and that the cases in which the "material contribution" test is properly applied involve two requirements.

### FACTS & BACKGROUND

In *Resurfice Corp.*, the plaintiff was seriously injured when he placed a water hose into a gas tank of an ice-resurfacing machine. The error caused an explosion and fire that injured the plaintiff. The plaintiff sued the manufacturer and the distributor of the ice-resurfacing machine for damages alleging design defects which caused the plaintiff to confuse the water and gas tank.

The trial judge dismissed the claim holding that the plaintiff had not established that the accident was caused by the negligence of the manufacturer or the distributor. The trial judge held that the plaintiff's injuries were caused by his own carelessness. The Court of Appeal ordered a new trial concluding that the trial judge erred in both his foreseeability and causation analysis.

On appeal to the SCC, the Court held that the appeal should be allowed and the trial judgment restored.

## THE RULING

The SCC ruled that the Court of Appeal erred in finding that the trial judge should have applied the “material contribution” test to determine causation. The SCC unanimously ruled that the basic test for causation is still the “but for” test. This test ensures that a defendant will not be held liable where there are many factors contributing to a plaintiff’s injuries unrelated to the defendant and not the fault of anyone. The plaintiff bears the burden of proving that “but for” the negligent act or omission of each defendant, the injury would not have occurred.

The Court held that the “material contribution” test should only be applied where 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. 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.

## IMPACT ON INSURERS

*Resurfice Corp.* confirms the “but for” test as the predominant test for determining causation and places the application of the “material contribution” test in a more defined context than *Athey*.

This ruling affords significant clarity on how liability is assessed and consequently how cases will be resolved. The sometimes tenuous notion of “material contribution” is now relegated to limited and quite clearly defined circumstances.

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