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Supreme Court Clarifies Tort Law Causation Test

The Supreme Court of Canada confirmed that the "but for" test is the standard test for causation in negligence in [*Clements v. Clements*](#), 2012 SCC 32, and that scientific proof of causation is not required. The court left open the possibility of finding liability on a material contribution to risk approach in multi-tortfeasor cases where proof of causation is difficult, but noted such cases are rare. The court summarized the present state of the law on causation in Canada at para.46:

(1) As a general rule, a plaintiff cannot succeed unless she shows as a matter of fact that she would not have suffered the loss "but for" the negligent act or acts of the defendant. A trial judge is to take a robust and pragmatic approach to determining if a plaintiff has established that the defendant's negligence caused her loss. Scientific proof of causation is not required.

(2) Exceptionally, a plaintiff may succeed by showing that the defendant's conduct materially contributed to risk of the plaintiff's injury, where (a) the plaintiff has established that her loss would not have occurred "but for"

the negligence of two or more tortfeasors, each possibly in fact responsible for the loss; and (b) the plaintiff, through no fault of her own, is unable to show that any one of the possible tortfeasors in fact was the necessary or "but for" cause of her injury, because each can point to one another as the possible "but for" cause of the injury, defeating a finding of causation on a balance of probabilities against anyone.

A majority of the court ordered a new trial in the case. There have been many comments on the decision, including:

- [*Clements v. Clements: A Material Contribution to the Jurisprudence - The Supreme Court of Canada Clarifies the Law of Causation*](#) - a scholarly paper on the case which can be downloaded on SSRN;
- [*Supreme Court of Canada: "But For" Is The Default Test For Causation in Negligence*](#) - The Trial Warrior blog;
- [*The Supreme Court Takes Another Stab At The Application Of The "Material Contribution" Test: Clements v. Clements And The Law Of Proof Of Causation In Negligence*](#) - Gowlings;
- [*Clarity into Causation: the SCC articulates the standard in Clements v Clements*](#) - The Court.

Public Interest Standing: Balancing Access to Justice and Limited Court Resources

The Supreme Court endorses a more flexible approach to public interest standing in [*Canada \(Attorney General\) v. Downtown Eastside Sex Workers United Against Violence Society*](#), 2012 SCC 45, the B.C. case in which a former sex worker and a Society working to improve conditions for sex workers challenged the constitutional validity of the *Criminal Code* provisions on prostitution. "Granting standing will not only serve to enhance the principle of legality with respect to serious issues of direct concern to some of the most marginalized members of society, but it will also promote the economical use of scarce judicial resources" said the court, which upheld the B.C. Court of Appeal decision granting standing to pursue the challenge.

Court to Decide if Disclosure of Witness Transcripts Required: MBCA

The inquiry into the death of Phoenix Sinclair has been suspended pending hearing of the stated case ordered in [*The Southern First Nations Network of Care et al. v. The Honourable Edward Hughes*](#), 2012 MBCA 83. The court will consider whether the Commission's rules of procedure or the principles of natural justice require the disclosure of witness interview transcripts to the parties and intervenors. The court also found that the oppositional position taken on the record by Commission counsel concerning disclosure of the witness transcripts did not raise an apprehension of bias with respect to the Commissioner hearing and determining the matter.

Special Damages Can Be the Gist of Defamation Action: MBQB

The court rejected the defendant's argument in [Rashedi v. Johar](#), 2012 MBQB 215 that the plaintiff's defamation action was statute barred because the proviso in [s. 2\(1\)\(c\)](#) of *The Limitation of Actions Act* referring to special damages as being "the gist of the action" no longer has any application or effect. Absent a clear revocation by the Legislature the court must interpret the proviso as having some meaning. Although special damages are no longer the "gist" of the cause of action, they are, or at least can be in appropriate circumstances, the "gist" or "essence" of an action if a defamation has occurred, said the court. The plaintiff therefore had two years from the date of incurring the special damages to commence an action.

Other QB Decisions

- [Canadian Horizontal Drilling Ltd. v. Darco Enterprises Ltd. et al](#), 2012 MBQB 210 - the court refuses to grant the City an order for security for costs against the plaintiff, an Alberta corporation with no assets in Manitoba. The court reviews the factors in Rule 56.01 and in the frequently cited decision of *DeBono v. Smith*, [1989] M.J. No. 580 to be considered on such applications.
- [Raymond v. Manitoba Public Insurance Corporation](#), 2012 MBQB 201 - the court dismisses MPIC's motion to dismiss a 13-year-old case for delay, finding the plaintiff had a good explanation for the delay and that a relative lack of prejudice had been suffered. The plaintiff had delayed pursuing his indemnity action while awaiting the results of the main action in B.C. In addition, the case was largely based on issues of statutory and contract interpretation.
- Queen's Bench Rule 5 is restricted to matters of procedure and cannot be used to circumvent the requirements of *The Limitation of Actions Act* according to the court in [Ben-Ron Farms et al v. The Canadian Wheat Board](#), 2012 MBQB 188. In addition, inadvertence of counsel (in not proceeding with a motion to amend the statement of claim to add a party) does not give rise to special circumstances justifying the amendment. The court found that the CWB was entitled to rely on the expiry of the limitation period and dismissed the motion to amend the 16-year-old claim.

Small Claims Court Act and Rule Amendments

[Section 9\(1\)](#) of *The Court of Queen's Bench Small Claims Practices Act*, C.C.S. M. c. C285 was amended effective June 14, 2012 to require that all small claims be adjourned to a fixed date rather than *sine die*. Therefore, new subrules [76.07.1\(1\) to 76.07.3\(2\)](#) and [76.14.1 to 76.14.4\(2\)](#), for bringing back on or dismissing old small claims and appeals, will affect only matters previously adjourned *sine die*. These subrules came into effect October 1, 2012.

Practice Direction on Affidavits

A new [practice direction on affidavits](#) issued and in effect August 1, 2012 sets out the formatting and presentation requirements for affidavits filed in the Manitoba Court of Queen's Bench and confirms that the direction does not extend to documents filed in the Bankruptcy Registry.

Notices

The Court of Queen's Bench issued these notices in June:

- [Dauphin-Swan River Scheduling Process](#) - announcing changes to court scheduling in Dauphin and Swan River, including the implementation of a once a month Masters Court in Dauphin and the reduction of QB sittings in Swan River.
- [Amendment to the Court of Queen's Bench Rules -Rule 76- Small Claims](#) - announcing the addition of subrules concerning small claims and appeals that have been adjourned *sine die* and amendments to Form 76J to more clearly reflect the types of orders made by judges, effective October 1, 2012.

Publications

These recent publications deal with litigation topics:

- There's been a lot of talk about the lengthy Alberta Court of Queen's Bench decision in [Meads v. Meads](#), 2012 ABQB 571, in which the judge labels certain vexatious litigants "Organized Pseudolegal Commercial Argument litigants" (para 1). See, for example, the comments on [Slaw, The Court](#), and [Canadian Lawyer](#).
- [Top 5 Civil Appeals](#)- - this Lerner's publication lists the top five litigation appeals from the Ontario Court of Appeal each month and discusses the decisions.
- [Bringing e-discovery inside: 12 tips for in-house counsel](#) – this *Canadian Lawyer In House* article outlines the steps for implementing an inhouse e-discovery system.

Fall CPD: LSM

Be sure to register soon for these upcoming continuing professional development programs offered by the Law Society:

- [Everything You've Ever Wanted to Know About the Professional Liability Insurance Claim Process, But Were Afraid to Ask](#) - Law Society insurance department staff will review insurance coverage and reporting obligations in this lunch hour webinar on October 17, 2012. Groups of two or more people will receive a fee discount.
- [Confidentiality & Privilege: An Estate Litigation Perspective](#) - this program will give you the information you need to respond appropriately to third party requests for confidential information concerning powers of attorney or wills. It takes place October 25, 2012, from noon to 1:30 p.m.

at the Law Society classroom. [Register](#) soon to attend in person or by teleconference.

- The Law Society is bringing back Martin Latz, one of North America's leading experts and instructors on negotiating techniques, for two day-long workshops on negotiation strategy. [Gain the Edge!® Negotiation Strategies for Lawyers](#) takes place November 7, 2012 and [Advanced Negotiation Strategies](#) is on December 6, 2012. Further information can be found in the program agendas ([Nov 7](#) and [Dec 6](#)) and on the [presenter's website](#),
- [Electronic Legal Research Booster \(An Intermediate Level Legal Research Program\)](#) - Enhance your online legal research skills at this hand-on program where you will learn how to find the best free legal commentary on recent case law and legislative developments in your practice area. The program takes place on November 14, 2012, from 1:00 to 4:00 p.m. at the Law Society classroom.
- [Practical Ethics: Real Problems, Real Solutions](#) - [register](#) soon to attend either the morning or afternoon session of this live repeat of last winter's popular program on practising ethically. The sessions take place on December 10, 2012 and feature leading legal ethics instructor Paul Paton and local panellists Vivian Rachlis, Bill Gange and Anita Southall.

Skilled Lawyer Series III: CBA

The CBA continues its skilled lawyer series with a new line-up of online courses designed to help litigators refine their core advocacy skills. Lawyers can register for the full stream of [eight programs](#) or by individual session, and group rates are available. The first program, [Managing Complex Commercial Litigation](#), takes place November 6, 2012.

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