CANADIAN TORT LAW

Allen M. Linden
A Justice of the Federal Court of Appeal

and

Bruce Feldthusen
B.A., LL.B., LL.M., S.J.D.
Dean, University of Ottawa, Faculty of Law
Common Law Section

Eighth Edition



LexisNexis®
Butterworths

tortfeasors pursue each other for indemnity or contribution,[93] they may do so, but this is of little concern to the plaintiff.

The "but for" test ran into stormy sailing where two or more defendants combined to cause loss. If the injury would have transpired if either cause alone had been operating, neither party might be a cause under the "but for" test. Suppose A and B negligently light fires at different places and the fires spread to engulf the plaintiff's house. A and B both might argue that the fire would have resulted without their negligence. Consequently, a blinkered court might hold that neither of the defendants, although both negligent, was the cause of the loss, because it would have occurred in any event.

This just could not be tolerated and, happily, the courts have handled this situation with common sense. They devised the substantial factor test, which holds that if the acts of two people are both substantial factors in bringing about the result, then liability is imposed on both[94] on the theory that both "materially contributed to the occurrence".[95] Consequently, in *Lambton v. Mellish*,[96] two merry-go-round operators were sued for nuisance as a result of the maddening noise made by their organs. Injunctions were granted against them individually, because according to Mr. Justice Chitty:

> If the acts of two persons, each being aware of what the other is doing, amounted in the aggregate to what is an actionable wrong, each is amenable to the remedy against the aggregate cause of complaint. The defendants here are both responsible for the noise as a whole so far as it constitutes a nuisance affecting the Plaintiff, and each must be restrained in respect of his own share in making the noise.

In another case, *Corey v. Havener*,[97] the plaintiff, in a horse and wagon, was passed by two motorists driving at a high rate of speed, one on each side. The horse took fright and the plaintiff was injured. Although the defendants acted independently, judgment was given against both of them for the full amount of the plaintiff's damages because "if each contributed to the injury, that is enough to bind both". A similar case is *Arneil v. Paterson*,[98] where two dogs attacked

---

93 See generally, Cheifetz, *Apportionment of Fault in Tort* (Canada Law Book, 1981). As to whether a single action or separate actions are required, see *Cohen v. S. McCord & Co.*, [1944] O.R. 568, [1944] 4 D.L.R. 753 (C.A.); *cf.*, *Inglis v. South Shore Sales & Service Ltd.*, [1979] N.S.J. No. 543, 104 D.L.R. (3d) 507 (C.A.); *R. v. Thomas Fuller Construction Co. (1958) Ltd.*, [1979] S.C.J. No. 124, [1980] 1 S.C.R. 695, 106 D.L.R. (3d) 193; Klar, *supra*, n. 80, explaining the recent cases.

94 See *Prosser and Keeton on The Law of Torts*, 5th ed. (1984), p. 354. See also *Anderson v. Minneapolis, etc., R. Co.* (1920), 146 Minn. 430, 179 N.W. 45; *Restatement, Torts, Second*, §432(2); *Pride of Derby & Derbyshire Angling Assoc. Ltd. v. British Celanese*, [1952] 1 All E.R. 1326; affd [1953] 1 All E.R. 179 (C.A.).

95 *Athey*, *supra*, n. 58, at p. 120, C.C.L.T. (*per* Major J.).

96 [1894] 3 Ch. 163, at p. 166 (*per* Chitty J.).

97 (1920), 182 Mass. 250.

98 [1931] A.C. 560. See also *Cowan v. Duke of Buccleuch* (1876), 2 App. Cas. 344; *Blair and Sumner v. Deakin* (1887), 57 L.T. 522, 3 T.L.R. 757.

Pollard v. Makarchuk,[18] a mother, who was slightly injured in a car accident, won damages for shock suffered when she saw her daughter, who had been injured in the same accident, lying on the pavement and believed her to be dead. In fact, her daughter had been only slightly injured. The court relied on directness theory, but there is little doubt that the decision is equally defensible on foresight reasoning.

The impact requirement was eventually debased to such an extent that it was found to have occurred when dust got in someone's eye,[19] when smoke was inhaled,[20] and incredibly, when a horse at a circus "evacuated his bowels" on someone.[21] It soon became apparent that this rule could not survive.

3. BREAKTHROUGH AND TEMPORARY BOUNDARIES

The initial breakthrough was *Dulieu v. White & Sons*[22] where, despite the absence of any impact, damages were awarded for "nervous shock". The plaintiff, who was pregnant, was standing behind the bar in her husband's public house when the defendant's horse-van was negligently driven into the room. She suffered a severe shock which led to illness and a miscarriage. Mr. Justice Kennedy, in finally opening the door to nervous shock claims, was careful not to open it too far. He suggested that "the shock, where it operates through the mind, must be a shock which arises from a reasonable fear of immediate personal injury to oneself".[23] Someone who suffers shock from fear of imminent injury to her- or himself is still allowed to succeed, as where a plaintiff is shocked on discovering a mouse in a bag of flour,[24] or metal and blue mold in bread.[25] It is still the case that, where physical injury is foreseen by the conduct of the defendant, it is not necessary to foresee psychiatric damage, so if psychiatric damage results to one who is physically in foreseeable danger that will suffice, for that person is a "primary victim". It is different for "secondary victims", who must establish foresight of psychiatric damage in order to collect.[26]

Having smashed the impact theory, therefore, the courts began to search for other ways to limit "nervous shock" liability to prevent it from getting out of control. The Kennedy limitation was only the first of several guidelines, which have been described as "empirical" and "pragmatical" rather than "logical application[s] of principles".[27] It was soon overthrown by *Hambrook v. Stokes*

---

18 (1958), 16 D.L.R. (2d) 225, at p. 230 (Alta. S.C.A.D.).

19 *Porter v. Delaware L. & W.R. Co.* (1906), 63 Atl. 860 (N.J.).

20 *Morton v. Stack* (1930), 170 N.E. 869 (Ohio).

21 *Christie Bros. Circus v. Turnage* (1928), 144 S.E. 680 (Ga.).

22 [1901] 2 K.B. 669. See also *Austin v. Mascarin*, [1942] O.R. 165 (H.C.J.).

23 *Ibid.*, at p. 681.

24 *Curll v. Robin Hood Multifoods Ltd.*, [1974] N.S.J. No. 315, 56 D.L.R. (3d) 129 (S.C.T.D.) (*per* Cowan C.J.T.D.).

25 *Taylor v. Weston Bakeries*, [1976] S.J. No. 285, 1 C.C.L.T. 158 (Dist. Ct.).

26 *Page v. Smith*, [1995] 2 All E.R. 736, at p. 761 (H.L.) (*per* Lord Lloyd).

27 Windeyer J. in *Mount Isa Mines Ltd. v. Pusey* (1971), 45 A.L.J.R. 88, at p. 97.