

DETERMINING CAUSATION

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In recently turning down an application for leave to appeal a decision of the British Columbia Court of Appeal, the Supreme Court of Canada has confirmed that the English law of relative probabilities is not part of the common law of British Columbia. Consequently, in circumstances where there are many potential causes of damage, the onus remains on a plaintiff to prove a defendant was at fault; the courts will not accept a comparison between the relative likelihood of possible causes.

In *McPhee v. Mainroad Contracting Ltd.*, the plaintiff was seriously injured when his vehicle left the road and overturned in an adjacent field on January 31, 1998; there were no witnesses to the accident, of which the plaintiff has no recollection. The defendant company had a contract with the Province of British Columbia to provide road maintenance services for the area where the accident occurred. The plaintiff presented two alternative scenarios as the most likely causes for losing control of his vehicle: the first was black ice that the defendant had failed to clear from the road surface, the second an animal on the highway.

The circumstances in which the plaintiff's vehicle left the road were much in contention at trial. The trial judge considered expert evidence about weather and road conditions when the accident occurred as well as testimony from lay witnesses who arrived shortly after the accident. The question on which the case was decided was: "Was there black ice present at the site?" The court decided that the plaintiff failed to prove on the balance of probabilities the facts necessary to establish his claim. It stated that "the evidence does not support a conclusion that it is more probable than not that black ice was present on the road" at the time of the accident.

On appeal, the plaintiff argued that the trial judge erred by failing to consider the relative probability of the two possible explanations for the accident — black ice or an animal on the highway. He based his argument on English authorities. The English approach to causation requires a judge to "balance one possibility against the other" when faced with multiple explanations of cause. The plaintiff reasoned that, if the trial judge had performed this analysis, he would have found "that the only plausible explanation for the accident was black ice, and thus that he would have found black ice to be more likely than an animal on the highway."

The B.C. Court of Appeal disagreed and rejected the English approach, reasoning that “actual probability follows from relative probability only where there are but two possible alternatives.” There were several possible explanations for an accident such as the plaintiff’s, the Court of Appeal said, and choosing the most plausible explanation is insufficient to establish cause. The burden remained on the plaintiff to establish cause to the requisite standard.

The result of this case is that British Columbia courts, when faced with competing theories of causation, are not obliged to balance one possibility against the other. Rather, the plaintiff must prove causation on a balance of probabilities, not the most plausible cause taken from a range of possibilities.