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| Law 435C.001 | Personal Injury Advocacy | 2022 Term 2 |
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**WEEK 3, January 24, 2022: CAUSATION**

* 1. **Teaching Objectives / Overview**

**Please read in advance of class:**

* 1. ***Athey v. Leonati*** [**[1996] 3 SCR 458**](https://www.canlii.org/en/ca/scc/doc/1996/1996canlii183/1996canlii183.html?autocompleteStr=1996%203%20SCR%20458%20&autocompletePos=1)
	2. ***Resurfice Corp. v. Hanke,*** [**2007 1 SCR 333**](https://www.canlii.org/en/ca/scc/doc/2007/2007scc7/2007scc7.html?resultIndex=1)
	3. ***Clements v. Clements*,** [**2012 SCC 32**](https://www.canlii.org/en/ca/scc/doc/2012/2012scc32/2012scc32.html?autocompleteStr=2012%20SCC%2032&autocompletePos=1)
	4. ***Shongu v Jing*,** [**2016 BCSC 901**](http://canlii.ca/t/grsdh)
	5. ***Anderson v. Molon,*** [**2020 BCSC 1247**](https://canlii.ca/t/j9c1f)

To succeed in a personal injury claim, the plaintiff must prove the tortious conduct caused his or her compensable injury.

Not as simple as it seems:

*“Much judicial and academic ink has been spilled over the proper test for causation in cases of negligence. It is neither necessary nor helpful to catalogue the various debates.”*

* The Honourable Chief Justice Beverly McLachlin
(as she then was) in *Resurfice, infra*

Defining causation in the Supreme Court of Canada:

* + *Athey v. Leonati* [[1996] 3 SCR 458](https://www.canlii.org/en/ca/scc/doc/1996/1996canlii183/1996canlii183.html?autocompleteStr=1996%203%20SCR%20458%20&autocompletePos=1)
	+ *Resurfice Corp. v. Hanke,* [2007 1 SCR 333](https://www.canlii.org/en/ca/scc/doc/2007/2007scc7/2007scc7.html?resultIndex=1)
	+ *Clements v. Clements,* [2012 SCC 32](https://www.canlii.org/en/ca/scc/doc/2012/2012scc32/2012scc32.html?autocompleteStr=2012%20SCC%2032&autocompletePos=1)

Defining the test for causation: the “but for” test versus the “material contribution test”

* THE GENERAL RULE: the plaintiff must demonstrate that “but for” the defendant’s negligence, the injury would not have occurred.
* Only in certain, exceptional circumstances, the “material contribution” test permits the plaintiff to prove only that the negligent action “materially contributed to the risk of harm”.

Identifying complex causation issues in personal injury:

* The challenge of medical science;
* Pre-existing injuries or health conditions;
* Multiple tortious and non-tortious events;
* Divisible and indivisible injuries.

The psychology of persuasion: proving causation in a complex chronic pain case– ***Shongu v Jing*,** [**2016 BCSC 901**](http://canlii.ca/t/grsdh)

Causation in medical malpractice claims:*Baglot v. Fourie,* [2019 BCSC 122](http://canlii.ca/t/hxc20)

Causation in historical sexual assault and battery: ***Anderson v. Molon,*** [**2020 BCSC 1247**](https://canlii.ca/t/j9c1f)

Psychological injuries as a special case (legal causation): *Mustapha v. Culligan of Canada Ltd.*, [2008 SCC 27](https://www.canlii.org/en/ca/scc/doc/2008/2008scc27/2008scc27.html?autocompleteStr=2008%20SCC%2027%20&autocompletePos=1) and its applications.

* 1. **The Supreme Court of Canada on causation**

There are three cases that you need to know for causation – they come up repeatedly and they are the cornerstones of any contentious case involving causation:

* + *Athey v. Leonati* [[1996] 3 SCR 458](https://www.canlii.org/en/ca/scc/doc/1996/1996canlii183/1996canlii183.html?autocompleteStr=1996%203%20SCR%20458%20&autocompletePos=1)
	+ *Resurfice Corp. v. Hanke,* [2007 1 SCR 333](https://www.canlii.org/en/ca/scc/doc/2007/2007scc7/2007scc7.html?resultIndex=1)
	+ *Clements v. Clements,* [2012 SCC 32](https://www.canlii.org/en/ca/scc/doc/2012/2012scc32/2012scc32.html?autocompleteStr=2012%20SCC%2032&autocompletePos=1)

These three cases are read together – meaning you have to know all three to properly understand the causation analysis. The fact that we have an appeal to the SCC every ten years on the topic of causation tells you that this is a contentious issue.

What do we mean by causation? For a defendant to be found negligent, the law requires a causal link between the defendant’s act or omission and the harm suffered by the plaintiff.

What is the “but for” test?

*The plaintiff must show on a balance of probabilities that* ***“but for” the defendant’s act or omission, the injury would not have occurred****. Inherent in the phrase “but for” is the requirement that the defendant’s negligence was necessary to bring about the injury ― in other words that the injury would not have occurred without the defendant’s negligence. This is a factual determination and the onus remains on the plaintiff to prove this.*

**1.2.1 *Athey v. Leonati*** [**[1996] 3 SCR 458**](https://www.canlii.org/en/ca/scc/doc/1996/1996canlii183/1996canlii183.html?autocompleteStr=%5B1996%5D%203%20SCR%20458&autocompletePos=1)

Let’s review the facts in *Athey v. Leonati:*

* Jon Athey was a 43 year old autobody repairman and bodyshop manager with a predisposition to back problems.
* In February of 1991, he was involved in a motor vehicle accident that left him with a stiff back and neck. He missed four days from work as a result, and returned to work in a less strenuous position. He was involved in a second motor vehicle accident two months later, but was able to return to work the next day, doing less physical work and more managerial duties.
* On his doctor's advice, he attended a gym and, during some warm-up exercises, he felt a sudden "pop" in his low back. He experienced severe pain and was hospitalized for three weeks.
* He underwent surgery for disc herniation. He had a good recovery but could not return to his former occupation as an autobody repairman and shop manager, and was required to take other employment at a lower rate of pay.
* The trial judge, Boyd J., found that the disc herniation was causally related only in a minor way to the motor vehicle accidents and found that the defendants in the two motor vehicle accidents should pay only 25% of the plaintiff's damages.
* The plaintiff's appeal to the British Columbia Court of Appeal was dismissed by Southin, JA.
* The plaintiff appealed to the Supreme Court of Canada which allowed Athey to recover 100% of his damages. Major J., writing for a unanimous court, reviewed the fundamental rules of causation and damages.

The test for causation arising from *Athey*:

* To succeed in a tort action, the plaintiff must prove causation on the balance of probabilities.
* Causation typically is established on the basis of the "but for" test. A sufficient causal connection exists if "but for" the defendant's wrong, the plaintiff would not have suffered the loss in question.
* The plaintiff need not prove that the wrong was the sole causal factor. It is sufficient to establish that the defendant's conduct "materially contributed" (beyond the *de minimis* range) to the creation of the injury. *Be cautious of this wording used by the SCC: this does not mean the test is ‘material contribution’.*
* Causation essentially is a matter of common sense; it need not be proved to a scientific standard and in some circumstances may be inferred on the basis of relatively little evidence.
* While the accidents only contributed 25% to the disc herniation and 75% was attributed to the plaintiff's latent weakness in his back, Major JA. had no difficulty in finding that the accidents caused the disc herniation and awarded the plaintiff 100% of his damages. But for the accidents, the plaintiff would not have suffered the disc herniation.
	+ 1. ***Resurfice Corp. v. Hanke,*** [**2007 1 SCR 333**](https://www.canlii.org/en/ca/scc/doc/2007/2007scc7/2007scc7.html?autocompleteStr=2007%201%20SCR%20333%20%20&autocompletePos=1)
* Let’s review the facts of *Resurfice Corp. v. Hanke*
* This case involved an ice resurfacing machine at an arena in Edmonton.
* The machine had both a gasoline tank and a water tank.
* Unfortunately, Hanke mistakenly placed the water hose into the machine’s gasoline tank.
* Hot water pouring into the gasoline tank made it overflow, resulting in the release of vaporized gasoline into the air, leading to an explosion and fire that caused severe burns to Hanke.
* The engineering experts testified that the auxiliary water tank and the gasoline tank were of the same shape, the same colour, manufactured of the same material, and the fill spouts were next to one another on the top of each tank.
* Evidence was also led that other manufacturers recognized the risk and designed their machines to prevent an operator from inadvertently placing a water hose in the gasoline tank.
* Hanke sued the manufacturer and distributor of the ice resurfacing machine on the basis that the placement of the water hose in the gasoline tank was a foreseeable consequence of the deficient design and manufacture of the machine.
* The trial judge found that the Appellant knew which tank was the gasoline tank and which was the water tank, and knew that hot water should not be introduced into the gasoline tank. He concluded that the Appellant made a “dreadful mistake”, that he “did not, for whatever reason, think about what he was doing”, and “[t]hat was careless and the cause of this event.” His training and experience was such that he should have known that it was in the wrong place and he carelessly and unthinkingly or absentmindedly, turned hot water into the gasoline tank. A ‘walk around’ procedure that was mandated for operators would have alerted him. It was not done.”
* Hanke’s action was dismissed at trial. On the issue of foreseeability and causation, the trial judge concluded that Hanke was not confused and that the design of the machine had not caused the accident. “First, he had not established that it was reasonably foreseeable that an operator of the ice-resurfacing machine would mistake the gas tank and the hot water tank. Second, he had not shown that the defendants caused the accident. The trial judge concluded that the accident had been caused by Mr. Hanke’s decision to turn the water on when he knew, or should have known, that the water hose was in the gasoline tank, knowing full well, by his own admission, the difference between the two tanks. He found as a fact that Mr. Hanke was not confused by the placement and character of the tanks, and consequently that this had not caused the accident.
* The Alberta Court of Appeal, however, decided that the trial judge had erred by failing to consider the ‘comparative blameworthiness’ of the plaintiff and the defendants and also by not applying a ‘material contribution’ test.
* The Supreme Court of Canada reversed the Alberta Court of Appeal’s decision and summarized the principles that have emerged from the cases on causation:
* First, the basic test for determining causation remains the "but for" test. The plaintiff bears the burden of showing that "but for" the negligent act or omission of each defendant, the injury would not have occurred. Having done this, contributory negligence may be apportioned, as permitted by statute.
* The court said that the ‘but for’ test is intended to ensure that a plaintiff will receive compensation for negligent conduct only where a ‘substantial connection’ exists between the injury and the defendant’s conduct.
* **The ‘material contribution’ test only applies in special circumstances and specifically where it is impossible for the plaintiff to prove that the defendant’s negligence caused the plaintiff’s injury using the ‘but for’ test**. **This impossibility must be due to factors that are outside the plaintiff’s control, such as the current limits of scientific knowledge.** In addition, the plaintiff must show a breach of duty that exposes the plaintiff to an unreasonable risk of injury. Causation may be relaxed only where both requirements are met.

**1.2.3 *Clements v. Clements,*** [**2012 SCC 32**](https://www.canlii.org/en/ca/scc/doc/2012/2012scc32/2012scc32.html?resultIndex=1)

Mr. and Mrs. Clements were involved in a motorcycle accident, with Mr. Clements operating the motorcycle and Mrs. Clements riding behind him as a passenger. The bike was approximately 100 pounds overloaded and, unknown to Mr. Clements, a nail had punctured the bike’s rear tire. As Mr. Clements accelerated to pass a car, the nail fell out causing the rear tire to deflate. Unable to bring the bike under control, Mr. Clements crashed the bike and, as a result, Mrs. Clements, the passenger, suffered a traumatic brain injury. Mrs. Clements then sued Mr. Clements claiming her injury was caused by his negligent operation of the bike.

The Trial Judge found Mr. Clements’ negligence had contributed to Mrs. Clements’ injury. In finding liability, he used a “material contribution to risk” test for causation as opposed to the usual “but for” test.  He felt that on an evidentiary basis, Mrs. Clements could not establish that her injuries would not have occurred “but for” Mr. Clements’ negligence in overloading the motorcycle and driving too quickly.  As it was only “through no fault of her own” that Mrs. Clements was unable meet the “but for” standard of proof, the Trial Judge felt that exceptional circumstances existed warranting the application of the “material contribution” test. Mrs. Clements was therefore successful at trial.

The case was appealed to the British Columbia Court of Appeal where the judgment against Mr. Clements was set aside.  It was held that the “but for” test to establish causation had not been satisfied and that the “material contribution to risk” test did not apply because the exceptional circumstances allowing its use were not present. The case was then appealed to the Supreme Court of Canada.

The SCC affirmed a number of basic principles in *Clements* and sought to clarify in what circumstances the “material contribution” test should be resorted to.

* In Canadian law, the test for showing causation is the “but for” test. “The plaintiff must show on a balance of probabilities that “but for” the defendant’s negligent act, the injury would not have occurred. Inherent in the phrase “but for” is the requirement that the defendant’s negligence was *necessary* to bring about the injury ― in other words that the injury would not have occurred without the defendant’s negligence.” This is a factual determination and the onus remains on the plaintiff to prove this.
* The SCC was unanimous in ordering a new trial, concluding that the trial judge erred in using the “material contribution to the risk” test. Restating its comments in *Resurfice*, the SCC clarified that the “material contribution to risk” test may be appropriate only where:
	+ (1) it is “impossible” for the plaintiff to prove causation on the “but for” test; and
	+ (2) it is clear that the defendant breached its duty of care in a way that exposed the plaintiff to an unreasonable risk of injury.
* What is meant by “impossible”?
	+ The inability to provide factual proof sufficient for “but for” causation
	+ “But for” causation does not mean scientific precision.
		- *“Evidence connecting the breach of duty to the injury suffered may permit the judge, depending on the circumstances, to infer that the defendant’s negligence probably caused the loss.”*
		- *“Where “but for” causation is established by inference only, it is open to the defendant to argue or call evidence that the accident would have happened without the defendant’s negligence, i.e. that the negligence was not a necessary cause of the injury, which was, in any event, inevitable.”*
	+ **The “material contribution to risk” test is essentially reserved for those situations where there are multiple defendants, each contributing to the risk of harm, but it is impossible for the plaintiff to prove which of the defendants actually caused the injury = i.e. “multiple concurrent tortfeasors”.**
	+ McLachlin C.J., stated at para. 44:

*“This is not to say that new situations will not raise new considerations.  I leave for another day, for example, the scenario that might arise in mass toxic tort litigation with multiple plaintiffs, where it is established statistically that the defendant’s acts induced an injury on some members of the group, but it is impossible to know which ones.”*

* The Court also reaffirmed the goal of tort law at paragraph 41:

*“Compensation for injury is achieved.  Fairness is satisfied; the plaintiff has suffered a loss due to negligence, so it is fair that she turns to tort law for compensation. Further, each defendant failed to act with the care necessary to avoid potentially causing the plaintiff’s loss, and each may well have in fact caused the plaintiff’s loss. Deterrence is also furthered; potential tortfeasors will know that they cannot escape liability by pointing the finger at others. And these goals are furthered in a manner consistent with corrective justice; the deficit in the relationship between the plaintiff and the defendants viewed as a group that would exist if the plaintiff were denied recovery is corrected. The plaintiff has shown that she is in a correlative relationship of doer and sufferer of the same harm with the group of defendants as a whole, if not necessarily with each individual defendant.”*

**Questions to consider regarding causation:**

* + ***What does “cause” actually mean?***
	+ ***How many tests for causation do we have in Canada?***
	+ ***What degree of proof/certainty is required?***
	+ ***What happens if the state of science or the available evidence is not sufficient to prove the cause-effect relationship with certainty?***

For a critique of the “but for” test, and its interaction with medico-legal causality, see Nicholas Hooper, [*The Phenomenology of Medico-Legal Causation*](https://www.canlii.org/en/commentary/doc/2017CanLIIDocs3504?zoupio-debug#!fragment/zoupio-_Tocpdf_bk_5/(hash:(chunk:(anchorText:zoupio-_Tocpdf_bk_5),notesQuery:'',scrollChunk:!n,searchQuery:'',searchSortBy:RELEVANCE,tab:search))), 2017 40-2 *Dalhousie Law Journal* 579, 2017 CanLIIDocs 3504

* 1. **Complex Causation Issues: Pre-existing injuries/conditions, multiple consecutive tortious or non-tortious events, and divisible versus indivisible Injuries**

While the test for causation is easily articulated, the application of the test to the facts can be much more difficult.

How you prove causation varies and you have to be tactical in considering the best approach for the particular claim.

* Example 1. How do you prove causation in a case where the plaintiff has a long history of pre-existing back pain that is aggravated in a motor vehicle accident?
	+ Where the pre-existing injury and tortious injury are overlapping, you need to show that the tortious event has caused a significant change in the pre-existing injury with respect to pain, function, disability, etc. (any one of these will suffice to prove causation).
* Example 2. How do you prove causation when the plaintiff has been injured in a motor vehicle accident and then aggravates those injuries in a subsequent tortious or non-tortious slip and fall incident (or a post May 1, 2021 “no fault” MVA)?
	+ The defence will often argue that the subsequent event caused a material change in the plaintiff’s injuries and they are not responsible for any worsening of those injuries.
	+ The plaintiff would argue that the subsequent slip and fall caused a minor/temporary aggravation of the plaintiff’s injuries or that the tortious injuries made them susceptible or vulnerable to the serious consequences from the slip and fall.
* Example 3. How do you prove causation when the plaintiff is involved in two motor vehicle accidents that combine to cause soft tissue injuries that together result in chronic pain?
	+ The answer depends on whether the accidents caused overlapping/ indivisible injuries; whether the injuries are different but collectively cause disability, etc.

Courts considering the issue of pre-existing and/or subsequent injuries often use the term “Indivisible Injuries” and “Divisible Injuries”.

The following analysis in *Athey v. Leonati* [[1996] 3 SCR 458](https://www.canlii.org/en/ca/scc/doc/1996/1996canlii183/1996canlii183.html?autocompleteStr=1996%203%20SCR%20458%20&autocompletePos=1) ultimately became the foundation for the concept of “indivisible injury” as we understand it today:

*[22] The respondents argued that apportionment between tortious and non-tortious causes should be permitted just as it is where multiple tortfeasors cause the injury. The two situations are not analogous. Apportionment between tortious causes is expressly permitted by provincial negligence statutes and is consistent with the general principles of tort law. The plaintiff is still fully compensated and is placed in the position he or she would have been in but for the negligence of the defendants. Each defendant remains fully liable to the plaintiff for the injury, since each was a cause of the injury. The legislation simply permits defendants to seek contribution and indemnity from one another, according to the degree of responsibility for the injury. …*

*[24] The respondents submitted that apportionment is permitted where the injuries caused by two defendants are divisible (for example, one injuring the plaintiff's foot and the other the plaintiff's arm): Fleming, supra, at p. 201. Separation of distinct and divisible injuries is not truly apportionment; it is simply making each defendant liable only for the injury he or she has caused, according to the usual rule. The respondents are correct that separation is also permitted where some of the injuries have tortious causes and some of the injuries have non-tortious causes: Fleming, supra, at p. 202. Again, such cases merely recognize that the defendant is not liable for injuries which were not caused by his or her negligence.*

*[25] In the present case, there is a single indivisible injury, the disc herniation, so division is neither possible nor appropriate. The disc herniation and its consequences are one injury, and any defendant found to have negligently caused or contributed to the injury will be fully liable for it.*

Subsequently, the Court of Appeal explained the application of *Athey* in *Bradley v. Groves*, [2010 BCCA 361](http://canlii.ca/t/2btp2). The plaintiff in *Bradley* was involved in two car accidents several months apart. The injury was approximately 80% recovered when she was involved in a second accident causing an aggravation of her neck injury. The plaintiff’s injuries were 65% recovered at the time of trial. She claimed damages against the driver who caused the first accident. His insurer argued that the plaintiff's ongoing injuries were the result of the second accident. After hearing all the evidence, the judge was unable to parse out to what degree each accident had injured the plaintiff. He found that she had sustained an "indivisible" injury. Stemming from the finding, the judge ordered that the first defendant pay the entirety of the plaintiff's damages. On appeal, the Court found no error in this logic, stating:

*[32] There can be no question that Athey requires joint and several liability for indivisible injuries. Once a trial judge has concluded as a fact that an injury is indivisible, then the tortfeasors are jointly liable to the plaintiff. They can still seek apportionment (contribution and indemnity) from each other, but absent contributory negligence, the plaintiff can claim the entire amount from any of them.*

*[33] The approach to apportionment in Long v. Thiessen is therefore no longer applicable to indivisible injuries. The reason is that Long v. Thiessen pre-supposes divisibility: Long requires courts to take a single injury and divide it up into constituent causes or points in time, and assess damages twice; once on the day before the second tort, and once at trial. Each defendant is responsible only for their share of the injury and the plaintiff can recover only the appropriate portion from each tortfeasor.*

*[34] That approach is logically incompatible with the concept of an indivisible injury. If an injury cannot be divided into distinct parts, then joint liability to the plaintiff cannot be apportioned either. It is clear that tortfeasors causing or contributing to a single, indivisible injury are jointly liable to the plaintiff. This in no way restricts the tortfeasors' right to apportionment as between themselves under the Negligence Act, but it is a matter of indifference to the plaintiff, who may claim the entire amount from any defendant.*

*[35] This is not a case of this Court overturning itself, because aspects of Long v. Thiessen were necessarily overruled by the Supreme Court of Canada's decisions in Athey, E.D.G., and Blackwater. Other courts have also come to this same conclusion: see Misko v. Doe, 2007 ONCA 660, 286 D.L.R. (4th) 304 at para. 17.*

*[36] It may be that this represents an extension of pecuniary liability for consecutive or concurrent tortfeasors who contribute to an indivisible injury. We do not think it can be said that the Supreme Court of Canada was unmindful of that consequence. Moreover, apportionment legislation can potentially remedy injustice to defendants by letting them claim contribution and indemnity as against one another.*

*[37] We are also unable to accept the appellant's submission that "aggravation" and "indivisibility" are qualitatively different, and require different legal approaches. If a trial judge finds on the facts of a particular case that subsequent tortious action has merged with prior tortious action to create an injury that is not attributable to one particular tortfeasor, then a finding of indivisibility is inevitable. That one tort made worse what another tort created does not automatically implicate a thin or crumbling skull approach (as in Blackwater), if the injuries cannot be distinguished from one another on the facts. Those doctrines deal with finding the plaintiff's original position, not with apportioning liability. The first accident remains a cause of the entire indivisible injury suffered by the plaintiff under the "but for" approach to causation endorsed by the Supreme Court of Canada in Resurfice Corp. v. Hanke, 2007 SCC 7, [2007] 1 S.C.R. 333. As noted by McLachlin C.J.C. in that case, showing that there are multiple causes for an injury will not excuse any particular tortfeasor found to have caused an injury on a "but-for" test, as "there is more than one potential cause in virtually all litigated cases of negligence" (at para. 19). It may be that in some cases, earlier injury and later injury to the same region of the body are divisible. While it will lie for the trial judge to decide in the circumstances of each case, it is difficult to see how the worsening of a single injury could be divided up.*

This distinction is articulated in *Estable v. New*, [2011 BCSC 1556](https://www.canlii.org/en/bc/bcsc/doc/2011/2011bcsc1556/2011bcsc1556.html?autocompleteStr=Estable%20v.%20New&autocompletePos=1). In *Estable,* the plaintiff was injured in a 2003 motor vehicle accident. However, she also had pre-existing conditions from a number of prior traumas. The Court found that while not the sole cause, the collision was a cause of the plaintiff’s various soft tissue injuries. The plaintiff was compensated for these and in doing so Justice Gropper provided the following short and helpful summary of the law of indivisible injury compensation:

*[53] Divisible injuries are those which are capable of being separated out, such as injuries to different body parts or injuries to which the defendant has not contributed: Bradley, at para. 20; see also Athey, at paras. 22-25. Whether damage derived from multiple sources is divisible for the purpose of determining the extent of the liability of one defendant is a question of fact: Hutchings v. Dow, 2007 BCCA 148 at para. 13.*

*[54] If the injuries are divisible, the devaluation approach from Long v. Thiessen (1968), 65 W.W.R. 577 at 591 (B.C.C.A) is the appropriate method for determining the amount of damages that can be attributed to the defendant. This was discussed in Bradley at para. 33:*

*“The approach to apportionment in Long v. Thiessen is therefore no longer applicable to indivisible injuries. The reason is that Long v. Thiessen pre-supposes divisibility: Long requires courts to take a single injury and divide it up into constituent causes or points in time, and assess damages twice; once on the day before the second tort, and once at trial. Each defendant is responsible only for their share of the injury and the plaintiff can recover only the appropriate portion from each tortfeasor.”*

*[55] Indivisible injuries are those that cannot be separated, such as aggravation or exacerbation of an earlier injury, an injury to the same area of the body, or global symptoms that are impossible to separate: Bradley, at para. 20; see also Athey, at paras. 22-25.*

*[56] If the injuries are indivisible, the court must apply the “but for” test in respect of the defendant’s act. Even though there may be several tortuous or non-tortuous causes of injury, so long as the defendant’s act is a cause, the defendant is fully liable for that damage: Bradley, at paras. 32-37; see also Resurfice Corp. v. Hanke, 2007 SCC 7 at paras. 19-23.*

In *Scoates v. Dermott*, [2012 BCSC 485](http://canlii.ca/t/fqvq8), the plaintiff was involved in four motor vehicle accidents. The first accident was a serious accident causing numerous injuries, including a fractured wrist and pelvis. The second accident was also quite serious and was held to have been a causal factor (along with the first accident) resulting in a herniated lumbar disc. The third and fourth accidents were relatively minor. The Court found that the third and fourth accidents caused temporary aggravation of some of the injuries sustained in the first and second accidents but did not play any role in causing the plaintiff’s loss of income.

*[164] Bradley discusses the concept of indivisibility in a physical sense – injuries to the same part of the body that cannot be divided into distinct parts. But there appears to be no reason in principle that a physically indivisible injury may not be divisible for the purpose of specific heads of damage. The basic rule remains that defendants cannot be held liable for losses they played no part in causing.*

*[165] The third and fourth accidents temporarily increased the plaintiff’s pain and suffering and must be seen as contributing to an indivisible injury for purposes of assessing non-pecuniary damages. But those accidents played no part in the plaintiff’s loss of income, inability to return to his former occupation or his loss of earning capacity.…*

*[168] Accordingly, I find that the plaintiff’s income loss and loss of earning capacity are divisible in regard to the second and third accident. Similarly, there is no evidence that the last two accidents have played any causative role in the plaintiff’s need for future therapies and other items that will be considered under the cost of future care.*

Some have criticized the decision in *Bradley v. Groves* on the basis that it conflates the distinction between causation (whether the impugned legal injury caused the plaintiff a factual and legal harm) and assessment of damages (the quantum of legally compensable damages resulting from the harm): see James D, [*Defending Claims Involving The Issue Of Divisible Versus Indivisible Injuries*](https://www.kazlaw.ca/wp-content/uploads/2019/10/cd08b4_6670cdd591514028a5d031897a854e40.pdf), Continuing Legal Education Society of British Columbia, Personal Injury Conference 2013.

In the very recent decision of the BC Court of Appeal of ***Neufeldt v. Insurance Corporation of British Columbia*,** [**2021 BCCA 327**](https://www.canlii.org/en/bc/bcca/doc/2021/2021bcca327/2021bcca327.html?autocompleteStr=neufeldt&autocompletePos=1), Wilcock J.A., writing for a unanimous court, discussed the legal test for establishing causation in relation to divisible injuries.

In *Neufeldt,* the plaintiff was a police officer who sustained neck and back injuries in his first accident while he was on duty driving a police vehicle. In his second accident, the plaintiff sustained neck and back injuries, concussion, and mild traumatic brain injury. The plaintiff was able to return to work after the first accident, but was unable to work after the second accident. At first instance (*Neufeldt v. Marcellus*, [2020 BCSC 427](https://www.canlii.org/en/bc/bcsc/doc/2020/2020bcsc427/2020bcsc427.html)) the plaintiff was successful in his claim for damages against defendants for injuries sustained in both accidents. The trial judge found that the defendants were jointly and severally liable for the plaintiff’s injuries, and awarded the plaintiff $2,400,000 in damages for future loss of income based on his inability to work in any capacity and on the assumption he would have advanced through police ranks and earned overtime.

On appeal, a unanimous Court of Appeal found that the trial judge erred in finding the plaintiff’s mild traumatic brain injury was an indivisible injury caused by both accidents. Wilcock J.A., writing for the Court, found that the trial judge reached this conclusion after erroneously permitting an expert to testify beyond the opinions included in the expert report, and then denying the appellants an opportunity for cross‑examination. Wilcock, J.A. restated the principle that when awarding damages, a trial judge must consider the overall fairness and reasonableness of the award and address both positive and negative contingencies. The matter was sent back for a retrial.

Below is the analysis that Wilcock J.A. undertook on the issue of divisibility.

***Divisibility of Damages***

*[79] The appellants contend that, regardless of whether the respondent’s concussion symptoms were divisible from his other injuries, the trial judge’s failure to analyse the divisibility of his loss of earning capacity constituted error in principle.*

*[80] It is clear on the record that both the respondent’s continuing symptoms of a back and neck injury, and the constellation of symptoms associated with his mild traumatic brain injury, contributed to his loss of income earning capacity.* ***Where divisible injuries combine to cause damages, even damages that overlap, the court must engage in the difficult task of assessing the damages associated with each injury.*** *For that reason, in the case at bar, the trial judge ought to have assessed the damages occasioned by the traumatic brain injury, if it was divisible.*

*[81] Where injuries are divisible, resort may still be had to the analytic approach described in Long v. Thiessen (1968), 1968 CanLII 889 (BC CA), 65 W.W.R. 577 at 591 (B.C.C.A.), which presupposes divisibility. That approach calls for damages to be assessed notionally twice: once on the day before the second tort, and once at trial. The Long analysis was held to be inapplicable to indivisible injuries in Bradley, but expressly was not overruled generally for divisible injuries.*

*[82] The approach described in Long must be modified where a plaintiff suffers multiple injuries in sequential accidents, only some of which are indivisible.* ***Damages must still be assessed notionally twice: once in relation to the initial injury, as aggravated by the second accident, without accounting for the damages solely attributable to the second accident injury (assessed at the trial date); and again in relation to the divisible second injury (also at the trial date).***

*[83]* ***Injuries are not indivisible simply because they jointly contribute to a particular head of damages, such as loss of earning capacity or the cost of future care****.*

*[84] Indivisibility is helpfully canvassed in Dingle v. Associated Newspapers Ltd., [1961] 2 Q.B. 162 at 189 (C.A.), cited with approval by this court in B.P.B. In that defamation case, the court considered the damage to a party’s reputation, arising from multiple libels, to be indivisible. Lord Justice Devlin gave an example of an indivisible injury that has been often referred to but should be carefully considered (at 188–89):*

*If four men, acting severally and not in concert, strike the plaintiff one after another and as a result of his injuries he suffers shock and is detained in hospital and loses a month's wages, each wrongdoer is liable to compensate for the whole loss of earnings.*

*Lord Justice Devlin continued (at 189):*

*If there were four distinct physical injuries, each man would be liable only for the consequences peculiar to the injury he inflicted, but in the example I have given the loss of earnings is one injury caused in part by all four defendants.*

*[Emphasis added.]*

*[85] It is the injury that is indivisible in the example, the shock resulting from the collective assaults. The tortfeasors are not jointly liable simply because there is but one indivisible loss of income. They are jointly liable because the income loss is a consequence of one injury, the beating that required hospitalization, and the injury cannot be attributed to one wrongdoer alone.*

*[86] That is made clear by the second of Lord Justice Devlin’s examples (at 189):*

*If, for example, a ship is damaged in two separate collisions by two wrongdoers and consequently is in dry dock for a month for repairs and claims for loss of earnings, it is usually possible to say how many days’ detention is attributable to the damage done by each collision and divide the loss of earnings accordingly.*

*[87] So in Khudabux, Stromberg‑Stein for the Court wrote (at para. 32): “Divisible injuries are those that can be separated so that their damages can be assessed independently: Bradley v. Groves, 2010 BCCA 361, at para. 20.” (Emphasis added.)*

*[88] Damages arising from indivisible injuries cannot be apportioned to one or the other wrongdoer. (With the obvious exception that all damages occasioned before the second, aggravating injury are attributable only to the first injury.) For that reason, I would not accede to the distinct argument that the trial judge’s failure to address the divisibility of a particular head of damages, here the respondent’s post‑second accident loss of earning capacity, constituted an error in principle.*

*[89] The appellants, in support of their argument, direct us to Justice Marzari’s summary description of divisible injuries in Conarroe v. Tallack, 2020 BCSC 626:*

*[132] The principle of divisibility can apply most obviously to injuries to different parts of the body. Divisibility may also be possible where injuries are to the same part of the body where the evidence is sufficient to establish distinct causes of each aspect of the injury: Khudabux v. McClary, 2018 BCCA 234at para. 34; Deol v. Sheikh, 2016 BCSC 2404at para. 19; Fleming v. McAllister, 2017 BCSC 753. It can also be possible in relation to sequential injuries, where the evidence is sufficient to establish a baseline: Uppal v. Judge, 2016 BCSC 642at para. 86; Dunne v. Sharma, 2014 BCSC 1106at para. 99. Finally, even where a physical injury is indivisible, specific heads of damages may still be divisible where the evidence permits such a division: Scoates v. Dermott, 2012 BCSC 485at paras. 164–169; Rajan v Hudon, 2014 BCSC 1678; Lakatos v. Lakatos, 2017 BCSC 1990.*

*[Emphasis added.]*

*[90]* ***In my view, the final proposition in this passage must be treated with caution. It must refer only to damages arising before the second accident “where the evidence permits such a division”. If injuries are truly indivisible, then it will be impossible to attribute specific heads of cumulative (post‑second accident) damages to one injury or the other****.* [Emphasis added.]

*[91] In Scoates v. Dermott, 2012 BCSC 485, the first case referred to in Conarroe, the plaintiff was injured in a series of accidents. Some injuries were considered to be indivisible; others were not. The trial judge held:*

*[158] Clearly, some aspects of the plaintiff’s condition are divisible. There is, for example, no evidence that the subsequent accidents worsened the plaintiff’s wrist injury, which is a source of significant pain and disability in itself. But I have found that the second accident contributed to the worsening or acceleration of the low back injury the plaintiff suffered as a result of the first accident. In Bradley, the Court of Appeal said, at para. 37:*

*It may be that in some cases, earlier injury and later injury to the same region of the body are divisible. While it will lie for the trial judge to decide in the circumstances of each case, it is difficult to see how the worsening of a single injury could be divided up.*

*[92] In Rajan v. Hudon, 2014 BCSC 1678, the plaintiff suffered a series of injuries in motor vehicle accidents. The first accident caused back and neck pain that was aggravated in later accidents. Eventually the plaintiff suffered depression. The trial judge, following the decision in Scoates and this Court’s judgment in Moore v. Kyba, 2012 BCCA 361, held that the back injuries were indivisible, but the plaintiff’s depression was caused by the latest accident alone. In doing so, he heeded the admonition in Blackwater (at para. 74):*

*… Untangling the different sources of damage and loss may be nigh impossible. Yet the law requires that it be done, since at law a plaintiff is entitled only to be compensated for loss caused by the actionable wrong.*

*[93] That, in my view, is an appropriate approach to causation of distinct injuries. The fact that some injuries suffered in serial accidents are indivisible does not mean that every injury is indivisible.*

*[94] The third case, Lakatos v. Lakatos, 2017 BCSC 1990, also involved two motor vehicle accidents, in which the initial injuries were aggravated by the subsequent accident; the trial judge found the injuries to be indivisible but did not attribute any loss of future income earning capacity to the first accident. In my view, that result is difficult to reconcile in principle with a finding that there is only one injury.*

*[95] The appellants contend the approach in Lakatos should be taken in this case. The appellants say the evidence was that the respondent was on full active duty for months before the second accident. He agreed that his work as a constable would have been precluded by his brain injuries alone. In November 2016, he reported that he felt physically capable of performing his job duties, but was primarily concerned about his ability to manage the cognitive demands of his job. In my opinion, however, if the respondent’s injuries (including the mild traumatic brain injury) are indeed indivisible, that is the end of the causation analysis, insofar as liability is concerned. He is disabled by one injury contributed to by two events. Both tortfeasors are then jointly and severally liable for all consequential damages.*

*[96] The appellants’ argument, like the argument that aggravation of damages cannot give rise to one indivisible injury, is an attack on the concept of indivisibility and the approach taken in Athey v. Leonati, 1996 CanLII 183 (SCC), [1996] 3 S.C.R. 458. Like the argument rejected in Bradley, it is an invitation to divide an indivisible loss and to re-introduce through the backdoor the approach to apportionment in Long that is no longer applicable to indivisible injuries.*

*[97] The causation analysis in this case required consideration of the following questions: (a) were the back and neck injury (and associated headaches) on one hand, and the mild traumatic brain injury, on the other hand, distinct injuries; if so (b) but for each accident, would the respondent not have suffered the back and neck injury (as it presented at trial); and (c) but for each accident, would the respondent not have suffered a mild traumatic brain injury leading to the constellation of associated symptoms? If it was correct to find the accidents caused indivisible injury, there was no need to consider whether damages arising from those injuries could be attributed to one or the other accident, and it would have been an error to do so.*

*[98] The evidence was undisputed that the mild traumatic brain injury was causally related to the second accident, and unrelated to the first. But for the second accident, the respondent would not have suffered the disabling constellation of symptoms associated with that injury. It was an error to find the first tortfeasor liable for that distinct injury, and an error not to engage in the complicated task of assessing the damages attributable to each distinct injury.*

On a practical level, **why** was the divisibility versus indivisibility of the injuries arising from the first and second collisions important?

1. The second collision involved a hit-and-run, where ICBC was responding by statute on behalf of the unidentified driver who fled the scene, and by statute the limits of ICBC’s liability for hit-and-run collisions are just $200,000.
2. If the injuries, and the losses flowing therefrom, were ‘indivisible’, then joint and several liability applied under s. 4 of the *Negligence Act,* and the plaintiff could look to the first defendant’s insurance policy limits (presumably much higher) to cover the whole of the judgment.
3. If the injuries, and specifically the lost earning capacity award, were “divisible”, then joint and several liability did not apply, and the plaintiff would not be made whole for the awards arising from the second collision.
	1. **Case Study – *Shongu v Jing*,** [**2016 BCSC 901**](http://canlii.ca/t/grsdh)

In *Shongu*, the plaintiff sustained physical and psychiatric injuries in a motor vehicle accident in July 2012. The plaintiff was unable to return to work following the accident. The defence argued that most of the plaintiff’s psychiatric symptoms were attributable to his pre-existing conditions and were not caused by the accident.

It was the plaintiff’s position that this was a “thin skull” case. The defence argued that it was a “crumbling skull” case.

The plaintiff relied on expert opinions from his a psychiatrist (Dr. Lu) and a physiatrist (Dr. Koo), as well as his treating physician (Dr. Marr) and his treating psychiatrist (Dr. Koritar).

Drs. Marr, Koritar, and Lu opined that the plaintiff was “vulnerable to recurring disabling symptoms of PTSD and that the trauma of the crash and the persistence of chronic pain from his physical injuries have reactivated his PTSD.” These doctors attributed the plaintiff’s disabling psychiatric symptoms to the PTSD.

It was the defence’s position that the plaintiff suffered from schizophrenia “which had been activated before the accident and that would have inevitably disabled him within a short period of time of the accident in any event”. This position was supported by the defence psychiatrist, Dr. Tomita. Dr. Tomita examined the plaintiff and diagnosed schizophrenia and PTSD, leading to cognitive difficulties with concentration, memory and slowed mental processing.

All of the doctors agreed that the plaintiff was not capable of working and that his condition was likely permanent.

The plaintiff’s expert reports supported the conclusion that the plaintiff’s injuries were a necessary cause of his current difficulties because they reactivated his PTSD symptoms. Conversely, Dr. Tomita opined that the accident did not play a direct role in the development of the plaintiff’s PTSD and schizophrenia.

At paragraph 61, Sewell J. set out: “In particular, I must decide whether Mr. Shongu’s present condition is the natural progression of pre-existing psychiatric illness or whether there is a substantial connection between his present psychological condition and the injuries he suffered in the accident.”

At paragraph 64, Sewell J. summarized the applicable legal principles with respect to causation. He relied on *Brewster v Li,* [2013 BCSC 774](http://canlii.ca/t/fxb29), *Athey,* and *Farrant v Latkin,* [2011 BCCA 336](http://canlii.ca/t/fmhtb).

In *Farrant,* the court of appeal set out at paragraph 11:

*“Thus, in applying the ‘but for’ test, the trial judge was required to consider not just whether the defendant’s conduct was the sole cause of the plaintiff’s disabling pain, but also whether the plaintiff had established a substantial connection between the accident and the pain, beyond the de minimus level.”*

Sewell J. summarized at paragraph 67: “These authorities require me to determine Mr. Shongu’s pre-accident condition and his post-accident condition, then to determine whether the injuries he suffered in the accident caused or contributed to his post-accident condition.”

After conducting a thorough review of the evidence regarding the plaintiff’s pre-accident condition, Sewell J. concluded at paragraph 106:

*“On the balance of probabilities, I find that the mild pre-accident symptoms that Mr. Shongu reported to Dr. Marr were caused by a reactivation of his PTSD resulting from having to revisit his horrendous experiences in the Congo in connection with his application for BC government housing assistance, and that those symptoms had resolved prior to the accident.”*

However, Sewell J. went on to note that “*the fact that Mr. Shongu’s PTSD was under control and that he was not suffering from schizophrenia prior to the accident is not determinative of the question of whether there is a substantial connection between the accident and the symptoms he developed in the beginning of the summer of 2012.*”

In reviewing Dr. Tomita’s opinion, Sewell J. noted at paragraph 16:

*“My major concern with Dr. Tomita’s conclusion that it is unlikely that the accident aggravated Mr. Shongu’s pre-existing condition is that he does not appear to take into consideration the effect of the chronic pain caused by the accident in reaching that conclusion.”*

He went on to explain:

*[117] Dr. Tomita restricted his analysis of the interrelationship between the accident and the psychiatric symptoms to a consideration of any possible trauma from the events of the accident itself. Dr. Tomita did state that the accident may have had an indirect effect on Mr. Shongu’s psychiatric symptoms but did not elaborate on what that effect might have been. The context of his answer does, however, suggest that he considered that the chronic pain from the injuries might, at a minimum, have accelerated what he considered to be an inevitable decline of Mr. Shongu’s health.*

*…*

*[**119]     I also note that Dr. Tomita goes no further than saying that it is more likely than not that Mr. Shongu’s psychiatric condition would have declined. I infer from the way this opinion was expressed that Dr. Tomita cannot rule out the substantial possibility that Mr. Shongu’s condition would not have declined but would, in fact, have improved. In this regard, I note the evidence of improvement in Mr. Shongu’s symptoms in the six weeks between May 30 and the date of the accident.*

At paragraphs 120-130, Sewell J. explained why he preferred Dr. Koritar’s diagnosis over Dr. Tomita’s diagnosis.

Sewell J. concluded that there was a substantial connection between the plaintiff’s injuries and his loss and that the defendant was therefore liable for the full extent of the plaintiff’s damages:

*[**132]     I have concluded that Mr. Shongu’s present disability is the result of a combination of his pre-existing psychiatric vulnerability, the chronic pain from his physical injuries, and the effect of the medications he is taking to control his symptoms. I find it more likely than not that it is the interaction of all three factors that have caused Mr. Shongu’s disability. I am satisfied that there is a substantial connection between the injuries he suffered in the accident and his present symptoms. That substantial connection is sufficient to impose liability on Ms. Li.*

*[**133]     Subject to adjustment for contingencies I, therefore, find that Ms. Li is liable for the full extent of Mr. Shongu’s damages in this case. In my view, the factors addressed by Dr. Tomita may be relevant to assessing the contingencies that must be applied to the assessment of Mr. Shongu’s damages, but do not negate the defendant’s liability for those losses.*

[Emphasis added]

Sewell J. then applied the findings on causation to the assessment of damages.

With regards to non-pecuniary damages, the defence relied on cases in which the court made significantly lower awards because of the plaintiff’s pre-existing difficulties (see paragraph 159). Sewell J. noted:

[160]     The cases relied on by the defendant apply the principle that the purpose of an award of damages in a personal injury case is to restore the plaintiff to his or her original position. In each of those cases, the court found that the plaintiff had significant pre-accident difficulties that formed a part of his or her original position.

[161]     I have already found that there is a substantial connection between Mr. Shongu’s physical injuries and his psychiatric symptoms and he is, therefore, entitled to be compensated for them.

Sewell J. set out at paragraphs 162 that the correct approach on this issue is set out in *Yoshikawa v Yu* [(1996), 1996 CanLII 3104 (BCCA)](http://canlii.ca/t/1cvp8).

*[**163]     With respect to the question of the relationship of the original position of the plaintiff to the assessment of damages, Lambert J. A. in Yoshikawa also states:*

*32       It seems to me that there are two different types of psychological symptoms that may be covered by the principles that are here being discussed. There are those where the psychological symptoms have their origin entirely in the defendant's wrongful act. Clearly they are compensable. And there are those psychological symptoms where the defendant's wrongful act triggers a pre-existing psychological condition so that both the defendant's wrongful act and the pre-existing condition are causes-in-fact of the psychological injury. In the latter cases the psychological injury will be compensable on the basis of a pre-existing thin skull, except only in cases where the psychological problem is so dominant as a pre-existing condition and the injuries sustained in the accident are so trivial that the accident can no longer be said to be a sufficient cause in law to support an award of damages on the basis of proximate cause.*

Sewell J. concluded that both the plaintiff’s pre-accident condition and the injuries he suffered in the accident were “cause in fact” of his present difficulties and his injuries were thus fully compensable. He noted that this finding made the cases relied upon by the defendant distinguishable in this case.

With regards to loss of past earning capacity, Sewell J. noted:

*[**172]     However, I do find that there was a substantial possibility that Mr. Shongu may have experienced some recurrence of his PTSD symptoms even if he had not been involved in the accident. I consider it necessary to make some allowance for that possibility in assessing the award for loss of past earning capacity.*

With regards to loss of future income earning capacity, Sewell J. set out:

*[**176]     For the reasons I gave with respect to causation generally, I am satisfied that there is a substantial connection between the accident and Mr. Shongu’s loss of income earning capacity. However, I am also of the view that there is a substantial possibility that Mr. Shongu would have experienced one or more disabling recurrences of his PTSD symptoms even if he had not been involved in the accident at issue in this case.*

Sewell J. then applied the negative and positive contingencies to the plaintiff’s loss of future income earning capacity:

*[**194]     In this case, there are numerous negative and positive contingencies that I take into account. The first is that there was a real and substantial possibility that Mr. Shongu would have experienced at least one flare up of his PTSD symptoms in that period. As I have already indicated, there are also labour market contingencies, as evidenced by Mr. Shongu’s period of unemployment in 2008.*

*[**195]     On the other hand, Mr. Carson’s calculation does not include any allowance for whatever additional benefits Mr. Shongu would have received, such as employer CPP contributions. In addition, there is evidence showing a real and substantial possibility that Mr. Shongu would have been promoted to a supervisory position and would have continued to work substantial overtime and may have worked to age 70.*

*[**196]     Because Mr. Shongu is permanently unemployable, his claim for loss of capacity must be based on the full amount of his anticipated earnings after adjustment for contingencies.*

*[**197]     Taking both negative and positive contingencies into account, and based on the present value of an income of $33,000 per year, I assess Mr. Shongu’s damages for loss of income earning capacity at $600,000.*

With regard to special damages, the defence took the position that the medication costs would likely have been incurred regardless of the accident given the plaintiff’s pre-accident psychiatric decline. Sewell J. awarded the full amount of special damages claimed based on his findings on the issue of causation.

* 1. **Causation in medical malpractice claims**

Courts have recognized that plaintiffs can encounter practical difficulties in proving causation under the “but for” test in medical malpractice cases.

The test for causation does not demand scientific precision and should not be applied too rigidly. There is a difference between medical and legal causation. “*Medical experts ordinarily determine causation in terms of certainties whereas a lesser standard is demanded by law*.” (citing *Snell v. Farrell,* [[1990] 2 SCR 311](https://www.canlii.org/en/ca/scc/doc/1990/1990canlii70/1990canlii70.html?autocompleteStr=%5B1990%5D%202%20SCR%20311%20&autocompletePos=1) (SCC)at para 34).

A trial judge can find causation in circumstances where the precise mechanism leading to injury cannot be known with certainty (citing [*Ediger v. Johnston*](https://www.canlii.org/en/ca/scc/doc/2013/2013scc18/2013scc18.html), 2013 SCC 18 (CanLII), [2013] 2 SCR 98, at para 39).

***Baglot v. Fourie,*** [**2019 BCSC 122**](http://canlii.ca/t/hxc20)

[1]           This is a complex medical malpractice action arising from a prescribing error by the defendant, Dr. Clasina Fourie, a general practitioner who works at Abbotsford Regional Hospital (“ARH”).

[2]           The plaintiff, Jeffrey Clarke Baglot, was admitted to ARH on July 22, 2011, for symptoms relating to his Crohn’s disease. Rather than improve over the course of the hospital treatment, the plaintiff’s symptoms worsened. Mr. Baglot alleges that the decline occurred because the defendant prescribed a powerful non-steroidal anti-inflammatory drug (“NSAID”) called ketorolac, also known as Toradol. The ketorolac caused a large duodenal ulcer (the “ulcer”) that eventually perforated and required surgery to be repaired. A long hospitalization ensued (the “hospitalization”).

[3]           The defendant admitted the prescription error and that it breached the applicable standard of care. She also admitted that the ketorolac caused a duodenal ulcer for which surgery was required and that the plaintiff ought to be compensated for this discrete injury.

[4]           The remaining issues in the case regard whether Dr. Fourie’s negligence caused any further injuries and damages. I must determine which injuries, if any, resulted from the perforated ulcer, the surgery to repair the perforation, and the subsequent hospitalization.

[5]           The plaintiff’s theory of the case is that the prescribing error and the resultant duodenal ulcer, surgery, and lengthy hospitalization left the plaintiff with scar tissue and chronic pain requiring high doses of opioids. This has increased his fatigue and has resulted in significant bowel problems for the plaintiff. Consequently, the plaintiff developed severe depression, post-traumatic stress disorder (“PTSD”), and visceral hypersensitivity, all of which have had a devastating impact on the plaintiff’s life. He is currently totally disabled.

[6]           The defendant’s theory of the case is that the plaintiff is entitled to damages resulting from the perforated ulcer, surgery, and hospitalization. The defendant takes the position that there have been no lasting injuries resulting from the defendant’s breach of her standard of care. There is no causal connection between the perforated ulcer and the long-term course of the plaintiff’s Crohn’s disease and/or his psychiatric conditions.The defendant argues that the ulcer was an isolated event in the plaintiff’s under-treated Crohn’s disease and his history of injuries sustained in several motor vehicle accidents.

The Court’s summary of the law as it pertains to medical malpractice claims:

[272]     **Courts have recognized that plaintiffs can encounter practical difficulties in proving causation under the but for test in medical malpractice cases**. In the seminal decision of *Snell v. Farrell*, [1990 CanLII 70 (SCC)](https://www.canlii.org/en/ca/scc/doc/1990/1990canlii70/1990canlii70.html), [1990] 2 S.C.R. 311 [*Snell*], the Supreme Court of Canada set out the test for causation at 324, the hallmark of which is “a robust and pragmatic approach to the facts to enable an inference of negligence to be drawn even though medical or scientific expertise cannot arrive at a definitive conclusion.” The causation test does not demand scientific precision and should not be applied too rigidly. While proof of causation will inevitably require expert evidence, common sense applies: *Athey* at 467.

[273]     **There is a difference between medical and legal causation.** In *Snell* at para. [34](https://www.canlii.org/en/ca/scc/doc/1990/1990canlii70/1990canlii70.html#par34), the Court articulated this point as follows:

It is not therefore essential that the medical experts provide a firm opinion supporting the plaintiff's theory of causation. Medical experts ordinarily determine causation in terms of certainties whereas a lesser standard is demanded by the law…

[274]     **A trial judge can find causation in circumstances where the precise mechanism leading to injury cannot be known with certainty**: *Ediger* – SCC at para. 39. The Supreme Court of Canada described this principle in *Clements v. Clements*, [2012 SCC 32](https://www.canlii.org/en/ca/scc/doc/2012/2012scc32/2012scc32.html) [*Clements*]at para. [10](https://www.canlii.org/en/ca/scc/doc/2012/2012scc32/2012scc32.html#par10): “[e]vidence connecting the breach of duty to the injury suffered may permit the judge, depending on the circumstances, to infer that the defendant’s negligence probably caused the loss.”

[275]     **The court can reach a common sense inference of causation even when the parties have both adduced expert evidence**. The British Columbia Court of Appeal in *Ediger (Guardian ad litem of) v. Johnston*, [2011 BCCA 253](https://www.canlii.org/en/bc/bcca/doc/2011/2011bcca253/2011bcca253.html), held that a court cannot draw a common sense inference where there is expert evidence on causation adduced. The Supreme Court of Canada disagreed. The court held that the trial judge appropriately followed *Snell* by drawing a common sense inference despite the fact that the defendant called expert evidence….

…

[277]     **The classic but for test is flexible. Although it must be applied with caution, causation may be inferred by reference to a temporal sequence of events**: *Ediger –*SCC at paras. 39-40.  As set out by Justice Ballance in *Chen v. Ross,*[2014 BCSC 374](https://www.canlii.org/en/bc/bcsc/doc/2014/2014bcsc374/2014bcsc374.html) [*Chen*], aff’d [2015 BCCA 250](https://www.canlii.org/en/bc/bcca/doc/2015/2015bcca250/2015bcca250.html)….

[278]     Chief Justice McLachlin, as she then was, summarized the less onerous material contribution test developed in *Resurfice Corp*. *v*. *Hanke*, [2007 SCC 7](https://www.canlii.org/en/ca/scc/doc/2007/2007scc7/2007scc7.html), in *Clements* at para. [46](https://www.canlii.org/en/ca/scc/doc/2012/2012scc32/2012scc32.html#par46). This test may be used when it is impossible for the plaintiff to prove the defendant’s negligence caused the plaintiff’s injuries under the but for test. The material contribution test is exceptional and has limited applicability. I agree with the defendant that, to date, it has been used when there are multiple defendants and the plaintiff finds it difficult or impossible to determine which party caused his or her injuries under the but for approach. **The but for test remains the primary test for determining causation in medical malpractice cases.**

…

[280]     **I agree that the plaintiff is not required to prove that the defendant’s negligence was the sole cause of his injuries**. …

[281]     The plaintiff must establish a **substantial connection** between the tortious conduct and the injury: *Farrant* at para. [11](https://www.canlii.org/en/bc/bcca/doc/2011/2011bcca336/2011bcca336.html#par11). However, **the robust and pragmatic approach under the but for test allows for there to be more than one cause of an injury**. As long at the defendant caused or contributed to the injury in a material way (i.e., beyond the *de* *minimis* range), the defendant is liable: *Chappell v. Loyie*, [2016 BCSC 1722](https://www.canlii.org/en/bc/bcsc/doc/2016/2016bcsc1722/2016bcsc1722.html) at para. [5](https://www.canlii.org/en/bc/bcsc/doc/2016/2016bcsc1722/2016bcsc1722.html#par5).

The decision then goes into a summary of the thin skull and crumbling skulls rules.

Her decision on causation commences at para. 296, and painstakingly goes through causation with regard to each injury / condition the plaintiff suffers from:

## General

[296]     There are a number of different issues regarding causation. Since the defendant has admitted that the prescribing error caused the ulcer, the issue before me is the extent of injury resulting from the ulcer, the surgery to repair the perforated ulcer, and the effect of the lengthy hospitalization on Mr. Baglot. The defendant takes the position that the perforated ulcer is a discrete event and that the plaintiff would be in his current condition regardless of the injury. The plaintiff strongly disagrees.

[297]     Since there are a number of events which occurred, I will address each contested issue of causation in turn.

Her summary of her findings on causation are at paras. 349-351:

## Summary

[349]     Mr. Baglot did not prove that Dr. Fourie’s negligence resulted in dumping syndrome, as I found he does not suffer from the condition. **Mr. Baglot proved causation on a balance of probabilities for the remaining injuries he claims, except his ongoing battle with Crohn’s disease.**

[350]     The lengthy hospitalization and the second bleed caused Mr. Baglot significant trauma. This in turn caused PTSD and visceral hypersensitivity, which intensify the pain now suffered by the plaintiff. The surgery also left the plaintiff with additional adhesions, which contribute to the plaintiff’s pain. Mr. Baglot was prescribed opioids directly following the first surgery for the perforated ulcer. He continues to be reliant on opioids to manage his constellation of health issues.

[351]     **The defendant’s negligence has had a devastating impact on Mr. Baglot’s life. Today Mr. Baglot is totally disabled, homebound, and isolated. Without the prescribing error, I find that it is more likely than not that Mr. Baglot would have continued to have Crohn’s disease but that he would have worked and been a contributing member of society**.

* 1. **Causation in sexual assault claims**

These cases are challenging because most survivors of historical sexual abuse suffer from psychological injuries that have been co-contributed to by other tortious and non-tortious causes. Many survivors were already vulnerable when they were selected by their predator (pre-existing neglect or familial abuse is an easy target for grooming), and many victims are also prone to further victimization by subsequent predators as a result of their social conditioning and submissiveness. Unravelling causation in these cases is usually an inherently complex exercise.

More than twenty years ago, the BC Law Institute commissioned a report, *Civil Remedies for Sexual Assault,* available [online](https://www.bcli.org/sites/default/files/CivilRemRep.pdf). The authors of that report specifically acknowledged the complexity of proving causation in sexual assault claims, and advocated for resort to the material contribution test in matters of sexual assault. At page 31, the authors engage in the analysis:

The issue of multiple causes is of particular significance in sexual assault cases where defendants may allege that there are other explanations for the plaintiff’s injuries, thereby seeking to excuse their obligation to pay damages, or to reduce the quantum of damages for which they are liable. There are a number of different scenarios to consider. First, the injuries for which the plaintiff is seeking damages may have been caused by both the conduct of the defendant, and another, non-tortious (non-wrongful) event or events. Second, the injuries for which the plaintiff is seeking damages may have been caused by more than one instance of tortious conduct, involving more than one tort-feasor. In both of these situations, the nature and timing of the conduct is critical.

In the case of injuries which are caused by both tortious and non-tortious events, the general rule is that the plaintiff will recover fully from the defendant who committed the tort. According to the Supreme Court,111 Apportionment between tortious and non-tortious causes is contrary to the principles of tort law, because the defendant would escape full liability even though he or she caused or contributed to the plaintiff’s entire injuries. The plaintiff would not be adequately compensated,since the plaintiff would not be placed in the position he or she would have been in absent the defendant’s negligence. This approach has been followed in the sexual assault context. In *M.(M.) v. F.(R.),* the BC Court of Appeal held that despite the existence of “other traumatic events” in the plaintiff’s life, the sexual abuse of the defendant materially contributed to her injuries, and he was thus liable to compensate her for all of her injuries. In another BC case, it was found that where prior non-tortious events make a plaintiff more vulnerable to being sexually assaulted, again, the defendant is liable to compensate the plaintiff for all of his injuries.…

The issues become more complicated where a plaintiff’s injuries were caused in part by prior or subsequent wrongful acts on the part of someone other than the defendant, which is often the experience of survivors of sexual abuse. The general principle here is that where the injuries can be separated out, the defendant’s responsibility to pay damages relates purely to the injuries caused by his own tortious act. The courts will calculate the damages that flow from the first tortious act as if the second one had not occurred, and then determine the measure of aggravation caused to the plaintiff by the second act. … In cases where the plaintiff has suffered sexual abuse at the hands of more than one perpetrator over a period of time, it is likely to be difficult to separate out different aspects of the largely psychological harm sustained by the plaintiff. Moreover, it is often the case that sexual abuse will make a survivor vulnerable to further acts of sexual assault. For a plaintiff who was sexually assaulted prior to the wrongful conduct of the defendant, it is reasonable to assume that the defendant would have taken advantage of the plaintiff’s vulnerability, even in a subconscious way. For a plaintiff who was sexually assaulted after the wrongful conduct of the defendant, it is reasonable to assume that the defendant played a role in creating the plaintiff’s vulnerability to future abuse.

…

In the view of the Committee, the crumbling skull approach to multiple instances of sexual assault is problematic. We believe that those cases where a plaintiff was sexually assaulted prior to the tortious conduct of the defendant are better viewed as thin skull cases. It should not be open for a defendant to avoid paying full damages because the plaintiff’s condition prior to the assault in question was caused by a history of sexual abuse by other actors. In these scenarios, not only does the defendant take his victim as he finds her, but he actually exploits the plaintiff’s pre- existing condition. This is categorically different from the case where the plaintiff’s pre-existing condition is not exploited by the defendant, for instance, where the plaintiff already has a tortiously caused leg injury, and the defendant’s conduct aggravates it. An intentional tortfeasor who takes advantage of a pre-existing condition for his own personal gain should not then be permitted to argue that the existence of this condition relieves him of full responsibility for paying damages.

Based on the foregoing, it is the view of the Committee that the proper interpretation of the principles of causation from *Athey* is that where multiple actors have committed sexual assault against a plaintiff, either taking advantage of or increasing the plaintiff’s vulnerability to sexual assault, the tortfeasors should be held to have materially contributed to the plaintiff’s injuries. Each party who has sexually assaulted the plaintiff should be viewed as liable for 100% of the plaintiff’s damages, unless they can persuade a court that in the circumstances the elements of the harm are severable. In our view, it is reasonable to resolve any doubt in favour of the plaintiff, given that liability for sexual assault has been established at this stage. This is in keeping with the deterrence aspect of the tort system, and will promote care being taken not to create, or take advantage of, a plaintiff’s vulnerability to sexual assault.

The trial decision in *Blackwater v. Plint,* [2001 BCSC 997](https://canlii.ca/t/4x3t) was released the month after the BCLI’s report was published, by then-Chief Justice Don Brenner.

*Blackwater v. Plint* involved multiple plaintiff complainants bringing action against the United Church of Canada and the federal government for sexual, physical, and emotional abuse they suffered while students at a residential school. The UCC and the government were found vicariously liable for the abuse in an earlier decision. The July, 2001 decision addressed remaining issues including direct negligence, and the assessment of damages. Brenner, C.J.’s analysis of causation and the “crumbling skull” and “thin skull” rules begins at para. 360:

CAUSATION - PRINCIPLES

[360]                       In ***Athey*** at paras. [13-15, 23](https://www.canlii.org/en/ca/scc/doc/1996/1996canlii183/1996canlii183.html#par13), the Supreme Court set out the following principles to be applied in determining causation:

Causation is established where the plaintiff proves to the civil standard on a balance of probabilities that the defendant caused or contributed to the injury;

     …

The general, but not conclusive, test for causation is the “but for” test, which requires the plaintiff to show that the injury would not have occurred but for the negligence of the defendant;

     …

The “but for” test is unworkable in some circumstances, so the courts have recognized that causation is established where the defendant’s negligence “materially contributed” to the occurrence of the injury;

…

Apportionment between tortious and non-tortious causes is contrary to the principles of tort law, because the defendant would escape full liability even though he or she caused or contributed to the plaintiff’s entire injuries.  The plaintiff would not be adequately compensated, since the plaintiff would not be placed in the position he or she would have been in absent the defendant’s negligence.

[361]                       A pre-disposition to a problem is not sufficient to diminish liability.  The Court continued at paragraph 34-35 to note that the “thin skull” rule makes:

The tortfeasor liable for the plaintiff’s injuries even if the injuries are unexpectedly severe owing to a pre-existing condition.

[362]                       In contrast, the “crumbling skull” rule recognizes that:

The defendant is liable for the injuries caused, even if they are extreme, but need not compensate the plaintiff for any debilitating effects of the pre-existing condition which the plaintiff would have experienced anyway.  The defendant is liable for the additional damage but not the pre-existing damage …  Likewise, if there is a measurable risk that the pre-existing condition would have detrimentally affected the plaintiff in the future, regardless of the defendant’s negligence, then this can be taken into account in reducing the overall award.

[363]                       How are these principles to be applied in this case? Once a sexual assault has been proven, the court must consider (a) the extent to which that act has caused the plaintiff an injury and, further, (b) whether that injury has caused the plaintiff a loss.  The former is concerned with establishing the existence of liability; the latter with the extent of that liability.

[364]                       For this classification, “injury” refers to the initial physical or mental impairment of the plaintiff’s person as a result of the sexual assault, while “loss” refers to the pecuniary or non-pecuniary consequences of that impairment.  In other words, the issue of causation applies both to considerations of establishing liability for a specific injury and to considerations of establishing damages for that injury.

[365]                       In cases of historical sexual assault, the plaintiff is likely to be claiming for chronic injuries, often psychological in nature.  It is not uncommon for the life history of a victim of a historical sexual assault to include numerous stressful, unpleasant experiences unrelated to the sexual assault.  Individuals, such as the plaintiffs in these matters, come before the courts with diagnoses of post-traumatic stress disorder, depression, substance abuse and other psychological conditions.  **Unravelling the question of causation in these cases arising as they do from torts committed so long ago is a daunting task**.

...

[373]                       But often these injuries are not such discrete events in the plaintiff’s life history. Particularly in cases of this nature such compartmentalization often cannot be achieved. **It is frequently virtually impossible to differentiate specific psychological ailments caused by sexual abuse from specific psychological ailments caused by other life events**. This is especially so when the time period under consideration spans decades.

...

[376]                       All parties in the case at bar agree that the plaintiffs' original positions were significantly compromised position by reason of their compulsory attendance at A.[…] Residential School.

[377]                       In their submissions Canada and the Church stressed all of the traumatic, non-sexual experiences the plaintiffs went through while at A.[…] Residential School. While it may seem anomalous that the parties which ran A.[…] Residential School would come to court and emphasize all of the negative aspects of the residential school(excluding the sexual abuse), such is the result of the plaintiffs’ non-sexual abuse claims being statute barred.  The defendants also stress the plaintiffs’ background and life experiences before and after attending A.[…] Residential School.

[378]                       An analysis, which simply compares the plaintiffs before and after A.[…] Residential School, would ignore the impact of the non-compensable trauma they suffered at the residential school. However, as noted above, that trauma, even if non-compensable, may properly be considered when assessing the impact of the acts of sexual abuse inflicted upon the plaintiffs.

...

[381]                       ***Athey*** also addresses the relevance of pre-existing conditions.  In British Columbia the “thin skull” and “crumbling skull” principles have traditionally addressed the issue of a pre-existing condition.  Although the two principles are related, they differ in terms of the assessment of damages.

[382]                       In a thin skull case, a plaintiff will recover full damages for the injuries suffered.  In a crumbling skull case, a reduction in the quantum of damages will be made to account for the plaintiff’s pre-existing condition (***Whitfield***at para. [94](https://www.canlii.org/en/ab/abqb/doc/1999/1999abqb244/1999abqb244.html#par94)).

[Emphasis added]

*Blackwater* went all the way to the Supreme Court of Canada. One of the grounds of appeal was this very issue, whether unrelated traumas should be considered by the trial judge in assessing damages for sexual abuse.

In its decision ([2005 SCC 58](https://www.canlii.org/en/ca/scc/doc/2005/2005scc58/2005scc58.html?autocompleteStr=2005%20SCC%2058%20&autocompletePos=1)) the Court confirmed Brenner, CJ’s approach at trial, and in doing so, concisely articulated the key difference between causation and the thin/crumbling skull rules (at para. 78):

*It is important to distinguish between causation as the source of the loss and the rules of damage assessment in tort. The rules of causation consider generally whether “but for” the defendant’s acts, the plaintiff’s damages would have been incurred on a balance of probabilities. Even though there may be several tortious and non-tortious causes of injury, so long as the defendant’s act is a cause of the plaintiff’s damage, the defendant is fully liable for that damage. The rules of damages then consider what the original position of the plaintiff would have been. The governing principle is that the defendant need not put the plaintiff in a better position than his original position and should not compensate the plaintiff for any damages he would have suffered anyway: Athey. …*

***Anderson v. Molon,*** [**2020 BCSC 1247**](https://canlii.ca/t/j9c1f)

[192]     The jurisprudence concerning the relationship between causation and the assessment of damages appears, at least to me, sometimes challenging to reconcile. Simply put, every compensable harm has a dual nature: it is simultaneously an “injury” — the physical or mental effect of the tort in question — and a “loss” — a consequent diminishment in the plaintiff’s life relative to what it would have been had the tort not occurred. Injuries are harm manifested in the real world. Loss, on the other hand, is perceptible only by reference to a hypothetical, injury-free world. It is the difference between the plaintiff’s “original position” and her “injured position”*.*Both are necessary to found an award of damages.

[193]     Of course, different standards of proof apply to real, as opposed to hypothetical events. Real events — that is, events that have already occurred in the past — are subject to proof on a balance of probabilities, like any other fact in a civil proceeding. This includes the question of causation. Hypothetical events, by contrast, need not be proven at all. Instead, they are simply given weight according to their relative likelihood, provided they are shown to be a “real and substantial possibility”: *Athey v. Leonati*, [1996 CanLII 183 (SCC)](https://www.canlii.org/en/ca/scc/doc/1996/1996canlii183/1996canlii183.html), [1996] 3 S.C.R. 458 at para. [27](https://www.canlii.org/en/ca/scc/doc/1996/1996canlii183/1996canlii183.html#par27).

[194]     Unlike the assessment of future losses, which deals only in hypotheticals, the assessment of past losses, as the case at bar demands, involves a consideration of both hypothetical and real events. On the one hand, the court must determine whether the plaintiff has proven, on a balance of probabilities, that the tort in question caused her injuries, and what exactly those injuries were. On the other, the court must consider whether, and to what extent, the life of the plaintiff would have turned out differently without these injuries. This is necessarily a hypothetical exercise. Both standards of proof are therefore applicable.

[195]     In this case the plaintiff alleges that she suffered severe mental injuries, including low self-esteem, anxiety, depression, feelings of worthlessness, and PTSD as a result of Fr. Molon’s conduct. These injuries, she submits, diminished her quality of life, and, as well, deprived her of the chance of a successful career as a doctor or an educator with a Ph.D. The former gives rise to a claim in non-pecuniary damages; the latter to a claim for loss of past income, as well as special damages and a claim for the cost of future care. In addition, she claims punitive damages against both Fr. Molon and the Diocese.

[196]     Assessing these claims requires a consideration of both actual and hypothetical events, and the application of both the “balance of probabilities” and the “real and substantial possibility” standard.

[197]     It is apparent the first step must be to determine what injuries, if any, are attributable to Fr. Molon’s conduct.

[198]     There is no doubt Fr. Molon’s conduct caused psychological harm to the plaintiff, nor do I understand the defendant to suggest otherwise. As the plaintiff argues, it is not necessary to attach a specific label to her emotional injuries, or provide evidence of a specific diagnosis to establish causation: *Baglot v. Fourie*, [2019 BCSC 122](https://www.canlii.org/en/bc/bcsc/doc/2019/2019bcsc122/2019bcsc122.html) at para. [282](https://www.canlii.org/en/bc/bcsc/doc/2019/2019bcsc122/2019bcsc122.html#par282). There is a clear connection between the plaintiff’s struggles with mental health after her time in Kamloops, and the abuse itself.

[199]     The real question is the extent of the injuries attributable to the abuse. On this point, the parties differ primarily with respect to the significance of the plaintiff’s pre-existing conditions. As previously referenced, the plaintiff suffered from feelings of depression, thoughts of suicide, and low self-esteem since she was a teenager. The plaintiff continued to suffer from depression, and in fact attempted suicide, as a young woman. These symptoms are similar in kind, if not degree, to the symptoms the plaintiff attributes to Fr. Molon’s abuse.

[200]     The defendant argues the quantum of damages should be reduced to reflect the impact of this pre-existing condition. In effect, the defendant advances a “crumbling skull” argument: that is, although Fr. Molon’s abuse injured the plaintiff, her pre-existing psychological condition would have caused her to suffer similar harm in any case.

[201]     In response, the plaintiff invokes the “thin skull” rule. She claims that her pre-existing conditions merely rendered her more vulnerable to Fr. Molon’s abuse. The defendants, accordingly, are liable for the entirety of her injuries, since they must take the plaintiff as they find her. In addition, she cites *Ashcroft v. Dhaliwal*, [2008 BCCA 352](https://www.canlii.org/en/bc/bcca/doc/2008/2008bcca352/2008bcca352.html) for the proposition that where a tort indivisibly aggravates a pre-existing injury, the defendant is liable for the entirety of the consequent harm.

[202]     Justice Major explained the difference between the “thin skull” and “crumbling skull” doctrines in *Athey*at paras. [34–35](https://www.canlii.org/en/ca/scc/doc/1996/1996canlii183/1996canlii183.html#par34):

34           The respondents argued that the plaintiff was predisposed to disc herniation and that this is therefore a case where the "crumbling skull" rule applies. The “crumbling skull” doctrine is an awkward label for a fairly simple idea. It is named after the well-known “thin skull” rule, which makes the tortfeasor liable for the plaintiff's injuries even if the injuries are unexpectedly severe owing to a pre-existing condition. The tortfeasor must take his or her victim as the tortfeasor finds the victim, and is therefore liable even though the plaintiff’s losses are more dramatic than they would be for the average person.

35           The so-called “crumbling skull” rule simply recognizes that the pre-existing condition was inherent in the plaintiff’s “original position”. The defendant need not put the plaintiff in a position better than his or her original position. The defendant is liable for the injuries caused, even if they are extreme, but need not compensate the plaintiff for any debilitating effects of the pre-existing condition which the plaintiff would have experienced anyway. The defendant is liable for the additional damage but not the pre-existing damage:  Cooper-Stephenson, *supra*, at pp. 779-780 and John Munkman, *Damages for Personal Injuries and Death* (9th ed. 1993), at pp. 39-40. Likewise, if there is a measurable risk that the pre-existing condition would have detrimentally affected the plaintiff in the future, regardless of the defendant’s negligence, then this can be taken into account in reducing the overall award:  *Graham v. Rourke*, *supra*; *Malec v. J. C. Hutton Proprietary Ltd.*, *supra*; Cooper-Stephenson, *supra*, at pp. 851-852. This is consistent with the general rule that the plaintiff must be returned to the position he would have been in, with all of its attendant risks and shortcomings, and not a better position.

[203]     I take this to mean the tortfeasor is responsible for any injury their wrongdoing causes, however unexpectedly severe (the thin skull rule), but bears no responsibility for harm that would have occurred anyway because of a pre-existing condition (the crumbling skull rule). Both rules are, in effect, elaborations on the underlying principle that “[d]amages are always to be assessed by reference to the situation the plaintiff would be in but for the wrongdoing”: *Gordon v. Ahn,*[2017 BCCA 221](https://www.canlii.org/en/bc/bcca/doc/2017/2017bcca221/2017bcca221.html) at para. [33](https://www.canlii.org/en/bc/bcca/doc/2017/2017bcca221/2017bcca221.html#par33).

[204]     The crumbling skull rule deals in hypotheticals; consequently it applies whenever there is a real and substantial possibility a pre-existing condition would have affected the plaintiff’s “original” position. For this reason, I cannot accede to the plaintiff’s submission that the defendants are necessarily liable for the entirety of her damages regardless of her pre-existing condition. *Ashcroft*was a case about apportioning responsibility between different tortfeasors. This case is about the relationship between a pre-existing condition, unrelated to any tort, and the plaintiff’s subsequent injuries.

[205]     In my view, the plaintiff’s pre-existing condition must be taken into account if there is a realistic possibility it would have caused the plaintiff to suffer some or all of the harm for which she seeks compensation, regardless of whether the tort had occurred. The law applicable in these circumstances was set out by the Court of Appeal in *Zacharias v. Leys*, [2005 BCCA 560](https://www.canlii.org/en/bc/bcca/doc/2005/2005bcca560/2005bcca560.html). In that case, the court relied on its previous judgment in *Hooiveld v. Biert* (1993), [1993 CanLII 1753 (BC CA)](https://www.canlii.org/en/bc/bcca/doc/1993/1993canlii1753/1993canlii1753.html), 87 B.C.L.R. (2d) 160 (C.A.) as follows:

[25] … The plaintiff in [*Hooiveld*] suffered from numerous back problems before injuring it further in a car accident. The evidence was that the plaintiff suffered back pain since childhood, had injured her back five times in the previous five years, and was being treated for chronic back pain during the two months prior to the accident. Nonetheless, the trial judge found that the plaintiff's pre-existing problems merely increased her susceptibility to further injuries. The trial judge therefore applied the "thin skull" rule. In reaching a different conclusion, the Court said, at paragraphs 31-33:

We are of the view that the finding that the accident "exacerbated the previous condition" could lead to application of the "thin skull" rule only if the plaintiff's previous condition was one from which it was not to be expected that she would otherwise ever have suffered again in the future. The judge does not say that this was so nor, in our view, could he, on the evidence before him, have made such a finding.

On the basis of the findings of the trial judge it was thus necessary for him to apportion responsibility for the plaintiff's back condition as between the disability which she had before the accident and the exacerbation, or aggravation, of that condition brought about by the accident.

This is what we must now do.

[206]     Here, I am satisfied on a balance of probabilities that Fr. Molon’s conduct caused severe trauma and clearly aggravated the plaintiff’s pre-existing condition. However, I cannot say this condition was one from which it was not to be expected she would otherwise ever have suffered from, at least to a certain degree. In other words, there is a real and substantial possibility that the plaintiff would have suffered, or was already suffering from, at least some of the psychological harm she ultimately suffered.

[207]     Accordingly, I have taken the plaintiff’s pre-existing psychological conditions into account in assessing the quantum of damages. The fact is, however, in my view this makes comparatively little difference. In this regard, I would attribute a small deduction in or around 10 to 15%, to reflect the possible impact of the pre-existing condition. This is necessarily an imprecise exercise, but the principle remains the same; the measure of damages is the difference between the plaintiff’s injured position and her original position; which includes any pre-existing conditions. I have factored this deduction into my calculation of damages.

[208]     The measure of damages here is the difference between a plaintiff with some experiences of depression, suicidal ideation, and low self-esteem as a teenager and young woman, and the plaintiff as she is: a person suffering from serious psychological trauma.

**We’ll revisit this in the week on pecuniary damages, but Crossin, J.’s determination of the causal link between the abuse and Ms. Anderson’s decision to marry was a critical causal decision to the claim for lost earning capacity arising from her lost career in medicine:**

[239]     In this case, I am not persuaded that Fr. Molon’s abuse was a cause of the plaintiff’s marriage on a balance of probabilities. I find the plaintiff’s position and logic on this point is not sufficiently supported by the evidence. The evidence simply does not support the suggestion the decision of the plaintiff to accept the marriage proposal was impulsive, or driven by the plaintiff’s psychological injuries. In particular, it is not supported to the requisite threshold by the medical evidence; nor, in fact, the evidence of the plaintiff.

[240]     I find there is not a sufficient causal connection between the abuse and the plaintiff’s decision to get married. Accordingly, her decision to get married must be considered an independent intervening event, which does not in itself give rise to any compensable damages, but forms part of her “original position”. To the extent the plaintiff’s claim for loss of past income flows from this decision, I would dismiss it accordingly.

* 1. ***Mustapha* – *Factual* causation versus *legal* causation (principles of remoteness / foreseeability)**

Who can explain the facts in *Mustapha v. Culligan of Canada Ltd.*, [2008 SCC 27](http://canlii.ca/t/1wz6f):

What was the issue in this case?

*[14] The remoteness inquiry depends not only upon the degree of probability required to meet the reasonable foreseeability requirement, but also upon whether or not the plaintiff is considered objectively or subjectively. One of the questions that arose in this case was whether, in judging whether the personal injury was foreseeable, one looks at a person of “ordinary fortitude” or at a particular plaintiff with his or her particular vulnerabilities. This question may be acute in claims for mental injury, since there is a wide variation in how particular people respond to particular stressors. The law has consistently held — albeit within the duty of care analysis — that the question is what a person of ordinary fortitude would suffer: see White v. Chief Constable of South Yorkshire Police, [1998] 3 W.L.R. 1509 (H.L.); Devji v. Burnaby (District) 1999 BCCA 599 (CanLII), (1999), 180 D.L.R. (4th) 205, 1999 BCCA 599; Vanek. As stated in White, at p. 1512: “The law expects reasonable fortitude and robustness of its citizens and will not impose liability for the exceptional frailty of certain individuals.”*

*…*

*[16] To say this is not to marginalize or penalize those particularly vulnerable to mental injury. It is merely to confirm that the law of tort imposes an obligation to compensate for any harm done on the basis of reasonable foresight, not as insurance. The law of negligence seeks to impose a result that is fair to both plaintiffs and defendants, and that is socially useful. In this quest, it draws the line for compensability of damage, not at perfection, but at reasonable foreseeability. Once a plaintiff establishes the foreseeability that a mental injury would occur in a person of ordinary fortitude, by contrast, the defendant must take the plaintiff as it finds him for purposes of damages. As stated in White, at p. 1512, focusing on the person of ordinary fortitude for the purposes of determining foreseeability “is not to be confused with the ‘eggshell skull’ situation, where as a result of a breach of duty the damage inflicted proves to be more serious than expected”. Rather, it is a threshold test for establishing compensability of damage at law.*

*…*

*[18] It follows that in order to show that the damage suffered is not too remote to be viewed as legally caused by Culligan’s negligence, Mr. Mustapha must show that it was foreseeable that a person of ordinary fortitude would suffer serious injury from seeing the flies in the bottle of water he was about to install. This he failed to do. The only evidence was about his own reactions, which were described by the medical experts as “highly unusual” and “very individual” (C.A. judgment, at para. 52). There is no evidence that a person of ordinary fortitude would have suffered injury from seeing the flies in the bottle; indeed the expert witnesses were not asked this question. Instead of asking whether it was foreseeable that the defendant’s conduct would have injured a person of ordinary fortitude, the trial judge applied a subjective standard, taking into account Mr. Mustapha’s “previous history” and “particular circumstances” (para. 227), including a number of “cultural factors” such as his unusual concern over cleanliness, and the health and well-being of his family. This was an error. Mr. Mustapha having failed to establish that it was reasonably foreseeable that a person of ordinary fortitude would have suffered personal injury, it follows that his claim must fail.*

The Mustapha principles relating to causation and foreseeability of damages have been applied in the following cases:

* *Milliken v. Rowe,* [2012 BCCA 490](http://canlii.ca/t/fv33q): The plaintiff sustained serious injuries in a MVA (right shoulder). The issue on appeal was foreseeability & remoteness specifically in relation to an award of $30,000 for future care costs for the care of her husband, care she could no longer perform.

*[22] I agree with the position of the appellant that the subject damages are too remote.*

*…*

*[28] In this case, the trial judge stated at para. 168: ... on a foreseeability analysis it is immaterial whether the services that the injured party is required to perform for a disabled spouse did not materialize until after the defendant’s negligent act, provided that the need to provide such services manifests before trial. In my view, in the context of the need to care for a disabled spouse, these comments equate possibility with foreseeability at law. This led the judge to apply the reasoning of Rowan J. in Lynn on the basis that it did not matter that the need for care was not extant at the time of the tort in this case. …*

*[31] With respect, I disagree that the loss in this case reasonably could be foreseeable even under that standard. At its core, the award here is based merely on the fact that, at the time of the tort, the respondent and her husband were married with a possibility that at some future date the husband might require care of some kind. This did not make such care reasonably foreseeable at law. It might never occur: the respondent could die before care was required; the need for care might never arise; her surgery could eliminate the problem or diminish it significantly; or, her full-time employment may have eliminated or diminished her ability to provide care regardless of the accident. While plainly foreseeable as a theoretical, factual outcome in hindsight, this possibility was not a “real risk” in “the mind of a reasonable man in the position of the defendan[t]”.*

*[32] In my view, the costs associated with caring for the respondent’s husband are too remote to be recoverable. As aptly stated by the Chief Justice in Mustapha, recoverability is based on reasonable foresight, not insurance.*

* In *Degennaro v. Oakville Trafalgary Memorial Hospital*, [2009 CanLII 34035 (Ont. SC)](http://canlii.ca/t/257js): the plaintiff sustained injuries visiting her son in hospital. A bed she had pulled to his crib to sit on collapsed and she fell. There were a series of subsequent injuries, including a MVA in 2002. The plaintiff alleged chronic pain and fibromyalgia. Causation was contested. Applying the “but for” test from *Resurfice, t*he Court found that the plaintiff’s injuries were caused by the bed incident. The judge discussed the difference between thin skull and a person of ordinary fortitude. [Note, the Ontario Court of Appeal upheld the trial judge’s ruling on foreseaability (at paras. 25-27: [2011 ONCA 319](http://canlii.ca/t/fl4r0))].

*[161] In my view, it is foreseeable that chronic pain may result from a physical injury. While the actual cause of chronic pain is not known, it is known that some people will develop chronic pain after physical trauma. Thus, chronic pain is foreseeable as falling within a range of consequences that may flow from a physical injury. This is a foreseeable consequence in a person of ordinary fortitude. Thus, in my view, the defendants must take the plaintiff as they find her. As noted by McLachlin C.J.C. at para. 16 of Mustapha, supra, this is simply a case where the damage inflicted has proven to be more serious than expected.*

*[162] There is obviously a subtle distinction between a person of less than ordinary fortitude who suffers damage that is not foreseeable, and a person of ordinary fortitude who suffers damage that is more serious than expected. However, in view of the analysis in Mustapha, the distinction is real and must be respected. I have no doubt that Ms. Degennaro falls into the category of a person who is a person of ordinary fortitude who has suffered damage that is more serious than expected.*

* In *Mezo v. Malcolm*, [2013 BCSC 1793](http://canlii.ca/t/g0r91) (Russell J.), the plaintiff was injured in a MVA. She was born with one leg shorter than the other and had occasional low back pain for which she occasionally sought chiropractic adjustments. She also had pre-existing joint pain that resolved before the MVA. Her injuries from the MVA were physical (soft tissue injuries, headaches, sleep disruption caused by pain) but she also complained of reduced energy and mood changes. The Court confirmed the law on causation as set out in *Clements* in paras. 121- 122. The Court found that the plaintiff had proven factual and legal causation:

*[123] The plaintiff must also establish legal causation, which arises once factual causation is proved. Legal causation is examined at the damages stage of the analysis. The plaintiff’s injury must be a reasonably foreseeable consequence of the defendant’s negligence. Reasonableness is assessed by examining whether it was foreseeable that a person of ordinary fortitude would suffer the injury at issue: Mustapha v. Culligan of Canada Ltd., 2008 SCC 27, 2008 SCC 27 at paras. 12, 18. It is a basic principle of damages in tort law that the defendant need not put the plaintiff in a better position than his original position and should not compensate the plaintiff for any damages he would have suffered anyway (the crumbling skull rule): Blackwater v. Plint, 2005 SCC 58 (CanLII). At the same time, the defendant must take his victim as he finds him (the thin skull rule): Blackwater at para 27.*

*[125] The issue on causation focuses on whether the defendants are liable for the extent and duration of the injuries she suffered.*

*[128] The plaintiff has proved both factual and legal causation: but for the Accident she would not have suffered the injuries she did. […]*

* In *Zawadzki v. Calimoso*, [2011 BCSC 45](http://canlii.ca/t/2fbts), the plaintiff alleged alcoholism as well as physical injuries caused by a motor vehicle accident in which he was rear-ended by a U-haul. Mr. Justice Voith distinguished the application of *Mustapha* from the circumstances of this case for three reasons (at paras 106-116):
	+ 1) The principles in *Mustapha* were directed to psychiatric harm unaccompanied by physical injury (however, Voith J. also acknowledged that the principles emanating from *Mustapha* have been applied in some broader contexts). As discussed in *Devji v District of Burnaby,* [1999 BCCA 599](https://www.canlii.org/en/bc/bcca/doc/1999/1999bcca599/1999bcca599.html?autocompleteStr=1999%20BCCA%20599&autocompletePos=1), this distinction is drawn because the psychiatric injury alleged is an extra step removed from the negligence of the defendant, and difficult questions of proximity and duty of care arise.
	+ 2) *Mustapha* dealt with a plaintiff whose psychiatric response to the defendant’s wrongdoing was extraordinary. In this case, there was no evidence which suggested that the plaintiff’s response to his physical and psychological injuries reflected a lack of “ordinary fortitude”.
	+ 3) In *Mustapha*, McLachlin C.J. confirmed that the propositions being advanced in relation to foreseeability did not erode or dilute the legal consequences of causing harm to an “eggshell skull” plaintiff. The “thin skull” rule establishes that a tortfeasor must take his or her victim as the tortfeasor finds the victim, and is therefore liable even though the plaintiff’s losses are more dramatic than they would be for the average person.
* Mr. Justice Voith found the plaintiff’s original physical injuries were foreseeable as was his depression and anxiety (this was conceded). The alcoholism arose from the combination of pain and mood. The plaintiff also had a genetic predisposition to alcohol abuse by virtue of his parents’ alcoholism. Thus, he fell into the “thin skull” rule.