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| Law 435C.001 | Personal Injury Advocacy | 2020 Term 2 |
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**WEEK 3: CAUSATION**

* 1. **Teaching Objectives – Week 3**
* 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” and the application of each.
  + Generally, the plaintiff must demonstrate that “but for” the defendant’s negligence, the injury would not have occurred.
  + 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”.
* Complex causation issues in the personal injury context:
  + the challenge of medical science;
  + pre-existing injuries or health conditions;
  + multiple tortious and non-tortious events;
  + divisible and indivisible injuries (see James D, “Defending Claims Involving The Issue Of Divisible Versus Indivisible Injuries” Continuing Legal Education Society of British Columbia, Personal Injury Conference 2013.)
* Psychological injuries as a special case: [*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.
* Psychology of persuasion: proving causation in the complex chronic pain case – [*Foster v. Kindlan and Pineau*, 2012 BCSC 681](https://www.canlii.org/en/bc/bcsc/doc/2012/2012bcsc681/2012bcsc681.html?autocompleteStr=2012%20BCSC%20681&autocompletePos=1).
* Causation in the context of Workers’ Compensation – BC’s no-fault legislation lowers the threshold of causation to workplace being of “causative significance” or “more than a trivial or insignificant aspect”.
  1. **Supreme Court of Canada on Causation**
* There are three cases that you need to know for causation – they come up repeatedly and they form the cornerstone 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 10 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 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.*

* 1. ***Athey v. Leonati***
* 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 an action for negligence, 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 negligence, the plaintiff would not have suffered the loss in question.
* The plaintiff need not prove that such carelessness 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.
* 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.
  1. ***Resurfice Corp. v. Hanke***
* 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. ***Clements v. Clements***
* 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.
* 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 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”.
  + Chief Justice McLachlin, as she then was (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?

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

* 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 (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 *Edinger* at para 39).
  1. **Complex Causation Issues: Pre-existing injuries/condition, multiple tortious events, and indivisible Injuries**
* While the test for causation is easily articulated, the application of the test 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 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 slip and fall incident?
  + - The defence will often argue that the subsequent at-fault 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 slip and fall caused a minor/temporary aggravation of the plaintiff’s injuries and/or that the tortious injuries made them susceptible 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 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”. 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.

* The Supreme Court of Canada decision in [*Athey v. Leonati* [1996] S.C.J. No.102 (S.C.C.)](https://www.canlii.org/en/ca/scc/doc/1996/1996canlii183/1996canlii183.html) is the leading case on causation and apportionment of damages between multiple causes (not parties). At trial and in the subsequent appeals, there was no attempt made to apportion fault between the defendants in each accident. The main issue was apportionment between tortious and non-tortious causes of the injury. The following analysis 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.

* Finally, note there is an important distinction between determining causation of indivisible injuries and damages. In *Blackwater v. Plint*, 2005 SCC 58, [2005] 3 S.C.R., 2005 SCC 58 the Court stated:

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. …

* 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, Continuing Legal Education Society of British Columbia, Personal Injury Conference 2013.
  1. **Examples**
* [*Foster v. Kindlan*](https://www.canlii.org/en/bc/bcsc/doc/2012/2012bcsc681/2012bcsc681.html?autocompleteStr=foster%20v.%20kindlan&autocompletePos=1) *and Pineau,* 2012 BCSC 681
* The facts in *Foster v Kindlan*:
  + Tracy was 47 years old at the time of trial. She was injured in two motor vehicle accidents (2007 and 2009). Both accidents were minor and there was little material damage. Following the 2007 collision, Tracy complained of pain in her shoulder, neck, and low back. Following the 2009 collision, Tracy complained of pain in her hip and aggravation of her injuries from the 2007 Accident.
  + Between the 2007 and 2009 accidents, Tracy was involved in a workplace incident.
  + Tracy had been involved in two previous motor vehicle accidents (1999 and 2005) and had periodic complaints of buttock pain, neck pain, and shoulder pain in the years leading up to the 2007 Accident.
  + The defendants denied that the 2007 and 2009 Accidents caused any of her current complaints and argued that she had significant pre-accident injuries which were symptomatic at the time of the Accidents. The defendants argued that Tracy’s hip injury was caused by the 2008 workplace incident or by prior unrelated causes.
  + The primary issue at trial was causation.
* How did we address the pre-existing injuries:
  + Medical report from the GP confirming that Tracy was largely recovered from her 1999 and 2005 motor vehicle accident injuries but would be susceptible to future injuries (“thin skull”).
  + Work/collateral witnesses confirming that she was very active and had no restrictions in her activity. In particular, the witnesses confirmed that she was working as a fitness instructor while doing her nursing degree (which was inconsistent with significant ongoing injuries).
  + Clinical records showing that she had tapered treatment before the first accident and was on a maintenance program.
* How did we address the workplace incident
  + No mention of the incident in the GP records – if it was serious you would expect the plaintiff to see her doctor.
  + Walk-in-clinic records diagnose contusion to buttock and make no mention of any injury to the hip or groin.
  + Work records confirm that she took two days off and went back to full duties that included lots of walking, standing, etc… without any noted restrictions (this would be completely incongruous with a significant hip injury).
* How did we address the injuries resulting from the 2007 and 2009 accidents?
  + Medical report from the GP confirming that there was a material change in Tracy’s complaints and functioning after these accidents.
  + Medical reports from Dr. Gilbart (orthopaedic surgeon) and Dr. O’Connor (physiatrist) explaining the mechanism of injury, differential diagnosis, and how this applied to Tracy’s case.
* Good example of the practical aspects of proving causation in a complex case.
* In [*Ranahan v Oceguera,* 2019 BCSC 228](http://canlii.ca/t/hxpcz), ICBC (the third party) argued that the plaintiff’s psychological impairments were not all caused by the accident. The third party argued that the plaintiff’s reported changes were caused by unrelated factors, such as her husband’s serious health issues, parenting, and work responsibilities.

[145] … Although Ms. Ranahan admits that prior to the accident she was under significant stress as a result of her husband’s health issues, family and work responsibilities she was managing these stresses and was fully functioning at work and at home and was able to participate in a number of sports and social activities.

Based on the totality of the lay and expert evidence, the court found that, but for the accident, Ms. Ranahan would not be suffering from her current psychological/cognitive symptoms.

* 1. ***Mustapha* – Factual causation of psychological injuries and legal causation (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 Wh*ite 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 motor vehicle accident 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. The issue was one of causation. 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 [*Smith v. Both*, 2013 BCSC 1995](http://canlii.ca/t/g1ptw), the Court did not accept the defendant’s argument, relying on *Mustapha*, that causation and extent of the injuries alleged must be assessed on the whole of the evidence including the minimal impact. Russell J. found the evidence supported that although the impact was not particularly severe, the plaintiff demonstrated pain in her neck, shoulders, low back, and headaches were caused by the accident.
* 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 which appeared to have 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, 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.C. 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.
  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, Mr. Justice Sewell 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]

**Damages**

* 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.