The Advocates' Quarterly

Volume 41, Numbers 2 & 3 June 2013

# COPING WITH COMPLEX CAUSATION INFORMATION IN PERSONAL INJURY CASES

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Nowadays, everything is always someone else's fault. In the fault-based tort system in Canada, that often translates into injury cases exhibiting greater tendencies for presenting with complex information about how an injured victim's injuries were caused. In many instances, the additional causation information is unwanted, irrelevant and muddies the task of applying causation doctrine to the facts of a particular case. This unwanted information about causation that distracts from the application of causation law to case facts can be thought of as "causal noise". It needlessly complicates an already complicated process. Injured accident victims often have pre-existing injuries or health conditions that confound the causal inquiry necessary in order to bring a tort claim under negligence law. Some victims have the misfortune of experiencing multiple, successive accidents over time which affect end result injuries and the healing process. It can often seem impossible to sort out the multiple causal factors – both negligent and non-negligent – that result in an injured victim's total constellation of symptoms comprising his or her injury. These multiple competing and contributing causal factors can make up causal noise. Their very existence distracts the fact-finder and litigants with complicated legal doctrine and intricate factual scenarios when, in fact, the inquiry is supposed to be one about the effect of the defendant's at-fault behaviour on the plaintiff. This article attempts to offer some solutions to containing causal noise by simplifying the thinking about causation so as to maintain tort law's fault-based compensatory goals.

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Part I of this article is a causation primer, discussing the present development of causation doctrine in Canadian negligence law. This Part sets the backdrop for the normative discussion to follow. Part II of this article touches on a number of issues germane to personal injury cases including which doctrinal test to use – "but for" or material contribution – and how to compartmentalize the "but for" test into an understandable concept useful in cases exhibiting causal noise. Additionally, the article advocates for trial judges to revitalize the approach of drawing causal inferences in cases involving causal draws, which are cases where the evidence appears equally balanced, but insufficient, for both plaintiff and defendant to prove causation to the requisite degree. Finally, the article sketches a framework for sorting out causal noise in difficult cases involving multiple competing causal factors. The framework is applicable not only in terms of causation but also in terms of assessing a defendant's responsibility for the extent of a victim's harm and the responsibility to pay for that harm.

## PART I – A CAUSATION PRIMER

Negligence law operates as a fault-based system designed to compensate for injury and deter wrongful conduct.[1] Causation in negligence law is the doctrinal mechanism which links the at-fault conduct of a defendant to the harm suffered by the injured accident victim. It is the bridge which connects the wrongdoing to the injury. The defendant was wrong in harming the plaintiff, and so must pay the plaintiff for the harm.

### 1. The "But For" Test

The standard default test for causation is the counter-factual "but for" test.[2] The test asks: "but for" the defendant's breach of the applicable standard of care, would the plaintiff have suffered some

1. Lewis Klar, "The Role of Fault and Policy in Negligence Law" (1996), 35 Alta. L. Rev. 24; *Clements (Litigation Guardian of) v. Clements*, 2012 SCC 32, [2012] 2 S.C.R. 181, 346 D.L.R. (4th) 577 (S.C.C.), at paras. 7, 19-21, 41.
2. *Ediger (Guardian ad litem of) v. Johnston*, 2013 SCC 18, 2013 CarswellBC 791, 2013 CarswellBC 792 (S.C.C.), at paras. 28-29; *Clements v Clements*, *supra* at para. 8; *Hanke v. Resurfice Corp.*, 2007 SCC 7, [2007] 1 S.C.R. 333, 278 D.L.R. (4th) 643 (S.C.C.); and *Fullowka v. Royal Oak Ventures Inc.*, 2010 SCC 5, [2010] 1 S.C.R. 132, 315 D.L.R. (4th) 577 (S.C.C.). See also Erik S. Knutsen, "Clarifying Causation in Tort" (2010), 33 Dal. L.J. 153 ("Clarifying"), and Erik S. Knutsen, "Causal Draws and Causal Inferences: A Solution to *Clements v. Clements* (and Other Causation Cases)" (2011), 39 Adv. Q. 239 ("Causal Draws").

injury? The focus of the inquiry is on the breach of a societal standard of conduct, and the causal role played by that breach. The focus is not about "what happened" in the world. It is not about what facts lead up to the harm that befell the plaintiff. It is a very narrow inquiry surgically aimed at the defendant's breach of the standard of care as "a" potential cause of some harm. The breach does not have to be "the" only cause of the harm, it only has to be "a" cause of some of the harm.[3] The breach also does not have to be "a" cause of all of the harm. Other potentially harmful causal factors can certainly (and usually do) come into play in bringing about the totality of the harm suffered by the plaintiff. But the "but for" test is only focused on the role of the defendant's breach causing "some" harm to the plaintiff.

The "but for" test is not an easy test to apply. It asks litigants to discuss events as if they happened in a hypothetical world where some events did not occur, even though, in our own reality, we know those events really happened. To fulfill the causation requirement, the test forces us to ask: if the defendant had not breached the standard of care, would the plaintiff have suffered the specific harm she suffered that could be attributable to the defendant's at-fault behaviour? So we must think about a state of affairs where the defendant met the applicable standard of care, and then ask whether or not the plaintiff would still have suffered the particular brand of harm that may have flowed from the defendant's conduct. In today's world of complicated injury sequelae, pre-existing harms, and other independent causal factors operating simultaneously and post-accident, the answer to that counter-factual inquiry is often hard to determine. The reason is usually that it is difficult to separate out which part of the totality of the plaintiff's current suffering is caused, at least in part, by the at-fault conduct of a particular target defendant. It then becomes hard to ask the "but for" counter-factual question because of the other causal "noise" of those pre-existing, simultaneously occurring, and other post-accident factors. Nevertheless, at present, the "but for" test is what we have as the default test in Canadian negligence law.

## 2. The Alternative: Material Contribution Test

In very limited instances, where the "but for" test is unworkable, the court can reach for the alternative material contribution test for causation.[4] For example, in some cases, the presence of multiple tortfeasors makes causation impossible to sort out under the "but

3. *Clements*, *supra* note 1 at para. 13; *Athey v. Leonati*, [1996] 3 S.C.R. 458, 140 D.L.R. (4th) 235, 31 C.C.L.T. (2d) 113 (S.C.C.).

for" test because the identity of the actual wrongdoer is masked by the fact that the harm could have been caused by any one of a group of multiple potential target wrongdoers. This is a sort of causal identity crisis.[5] The material contribution test asks whether a particular target defendant's breach of the standard of care made a material contribution to the risk that at least some of the plaintiff's injury would transpire.[6] There have been exacting restrictions set as to when the alternative material contribution test for causation can be invoked in place of the "but for" test.[7] There is perhaps good reason for these restrictions, as the application of the material contribution test nearly always produces a result in favour of the plaintiff.[8]

The Supreme Court of Canada has held in *Hanke*[9] and confirmed in *Clements*[10] that, to use the material contribution test, it must be impossible for the plaintiff to prove, using the "but for" test, that the target defendant's negligence was a cause of some harm. The impossibility must be due to factors outside the control of the plaintiff. For example, it cannot be impossible to prove "but for" causation simply because the plaintiff did not elicit evidence from a witness about causation. Impossibility surely must mean a state of affairs where nobody – plaintiff or defendant – can get sufficient evidence to prove causation to satisfy the "but for" test.[11]

The only situation which to date the Supreme Court has indicated fits with these pre-conditions is an instance where there are multiple tortfeasors and it is impossible to prove which one of two or more tortfeasors is, in fact, a cause of the plaintiff's injury.[12] The "but for" test fails because it may be impossible to sort out the precise role of each individual tortfeasor's actions in bringing about the global harm to the plaintiff. "But for" Tortfeasor A's contributions, we cannot tell

4. *Clements*, *supra* note 1. See also *Hanke*, *supra* note 2. See also Knutsen, "Clarifying", *supra* note 2 and Knutsen, "Causal Draws", *supra* note 2.
5. For an examination of some of the unanswered questions inherent in the Supreme Court's analytic approach to causation in *Clements*, *ibid.*, see David Cheifetz, "Causation in Negligence: Material Contribution and But-For After *Clements*" (2012), 40 Adv. Q. 275 ("Causation in Negligence").
6. *Clements*, *supra* note 1 at paras. 13-15.
7. *Clements*, *supra* note 1 at para. 16; *Hanke*, *supra* note 2. See also Knutsen, "Clarifying", *supra* note 2 and Knutsen, "Causal Draws", *supra* note 2.
8. Knutsen, "Clarifying", *supra* note 2 at 162.
9. *Hanke*, *supra* note 2 at para. 25.
10. *Clements*, *supra* note 1 at paras. 13, 15, 35-39.
11. *Clements*, *supra* note 1 at paras. 35-39; Knutsen, "Clarifying", *supra* note 2 at 163-66.
12. *Clements*, *supra* note 1 at para. 40 (although the Supreme Court of Canada left open the notion that other future categories of case might also warrant the use of the material contribution test).

whether or not the plaintiff would have suffered some harm because Tortfeasor B's actions could also have been the cause of that same harm. All the plaintiff knows is that, in the presence of multiple potential tortfeasors, she suffered some harm. There is an identity crisis as to which tortfeasor's action was the one that caused the end result harm.

The key to the material contribution test is that there must be an impossibility in using the "but for" test in a multi-tortfeasor scenario where, globally, a plaintiff can at least prove that the defendant group taken as a whole caused her injuries on a more likely than not basis. So that means that the plaintiff must be able to prove that her injuries were more likely caused by some act(s) of the defendant tortfeasors than by some other, natural or unrelated cause(s). The problem in proving "but for" causation must stem from the finger-pointing among multiple defendants. It is a "which one?" or "either/or" problem.[13] The "but for" test breaks down because it is impossible to prove, on an individual defendant tortfeasor basis, that an individual target defendant's negligent actions did or did not cause the plaintiff's injury. The plaintiff is unable to show which act from which precise defendant caused her injuries.

Nothing in the *Clements* case's approach to the material contribution test alters traditional damages and contribution doctrinal analyses whereby multiple tortfeasor defendants may be partially responsible for some of a plaintiff's injury, but not all of it (*i.e.*, divisible and indivisible injuries) after they have been proven to be a cause of some of the plaintiff's harm. The *Clements* analysis concentrates entirely on the causation threshold question – did the defendants cause the plaintiff's injury, yes or no. It does not target the "how much" question. That is a damages question, not causation, and left for later on in the negligence analysis (along with joint and several liability issues about responsibility to pay for the harm).

The *Clements* case's approach to the material contribution test solves the causation situations where there is an identity crisis as to which of two or more possible tortfeasors caused *the* harm. The Supreme Court appears to be saying it is only appropriate at present to apply the material contribution test where there is an identity

13. Or, as Shantona Chaudhury puts it, the test is reserved for when the "but for" test fails when applied separately to each defendant, as each defendant could say "you can't prove it was me because it could just as well have been him". See Shantona Chaudhury, "Causation in the Law of Negligence: Where Are We Now? Where Are We Going? *Clements v. Clements; Ediger v. Johnston*" (2012), 40 Adv. Q. 257 at 264 ("Causation in the Law of Negligence").

question about which defendant(s) in a group played a causal role in bringing about the entirety of the plaintiff's total global injury claimed – an indivisible injury.[14] Either Tortfeasor A or Tortfeasor B's negligence resulted in the plaintiff's total indivisible harm.

This makes sense, because if the plaintiff's injury was divisible among the various tortfeasor defendants, then the "but for" test could be satisfied. For example, if Tortfeasor A's negligent conduct resulted in a broken wrist and Tortfeasor B's negligent conduct resulted in an exacerbation of that broken wrist, there is no causal identity crisis requiring resort to the material contribution test. Both Tortfeasor A and B's negligence resulted in some divisible harm to the plaintiff and that harm can be divided. They are just both responsible to pay for different discrete portions of that harm. Causation is not the challenge. But if it was impossible to prove which of Tortfeasor A *or* B's negligent conduct actually resulted in the broken wrist in the first place, but we know that both Tortfeasor A or B's negligence materially increased the risk of that broken wrist, then this might be a candidate for the material contribution test, depending on the facts of the case.

That is not to say that every indivisible injury case involving multiple tortfeasors requires resort to the material contribution test – far from it. In nearly all instances, it will be possible for the plaintiff to apply the "but for" test in proving that the target tortfeasors' negligent conduct was a cause of some of the global total harm. If the question is about "how much" of that harm each target tortfeasor is responsible for, that is not a causation question but one of extent and damages, dealt with later in the negligence analysis. The fact that the injury is indivisible does not affect the workability of the causation test. The "but for" test works. The only instance where resort to the material contribution test can be had is where there is a problem answering whether, "but for" Tortfeasor A or Tortfeasor B's negligence taken separately, there either is or is not any harm at all. Taken separately, it becomes impossible to use "but for" on a single target defendant because of the defendant finger-pointing in an indivisible injury scenario. To use the material contribution test, there needs to be that finger-pointing, there needs to be an indivisible injury, and the "but for" test needs to lead to that "either-or" identity crisis about which of one or more defendants was a cause of the total global injury.

A causal identity crisis in a multi-tortfeasor scenario could stem from at least two types of factual possibilities. First, in instances

14. David Cheifetz also makes this point in "Causation in Negligence", *supra* note 5 at 286-87.

where both tortfeasors did the same type of potentially loss-causing behaviour, there may be an identity crisis as to which tortfeasor, in fact, caused the plaintiff's ultimate injury. This is the *Cook v Lewis*[15] example the Supreme Court of Canada uses in *Hanke* and *Clements*. In that case, two hunters negligently fire their shotguns. One hunter's buckshot injures a third person, the plaintiff. There is thus an identity crisis as to which hunter was the one whose negligent firearms discharge was actually responsible for injuring the plaintiff. Both hunters engaged in the identical type of loss-causing behaviour. They both pulled the trigger when they should not have. The finger-pointing between each hunter creates an impossibility that makes applying the "but for" test unworkable.

Another factual possibility for a causal identity crisis in which resort to the material contribution test may be appropriate is in instances where the tortfeasors in question engaged in different types of potentially loss-causing behaviour but there is an identity crisis as to which tortfeasor's loss-causing behaviour caused the plaintiff's ultimate injury.[16] This factual possibility is also compatible with the language in *Hanke* and *Clements*. In addition to the unknown identity of the tortfeasors, like in *Cook v Lewis*, there is another unknown here: which of the different potentially loss-causing behaviours was the actual cause of the plaintiff's injury. In other words, each tortfeasor's negligent behaviour was different (unlike in *Cook v Lewis*), but each different act could itself have been a cause of the plaintiff's ultimate injury. The identity crisis is created because the evidence reveals a "which one" and "either/or" situation among different competing acts of negligence. The finger-pointing among multiple tortfeasors still occurs but the tortfeasors committed different negligent acts, each which could have caused the plaintiff's injury.

For example, most medical settings operate in a team approach with a variety of medical practitioners involved in caring for a patient. Each member of the team has a different task to do. If a patient has an adverse outcome as a result of negligent behaviour, it may not be possible to pinpoint precisely which negligent defendant's behaviour among the team resulted in the patient's adverse outcome. For instance, the evidence may indicate that a cause of the plaintiff's injury could be either a nurse's negligent failure to administer

15. *Lewis v. Cook*, [1951] S.C.R. 830, [1952] 1 D.L.R. 1, 1951 CarswellBC 180 (S.C.C.).

16. Shantona Chaudhury also raises the possibility of this sort of factual scenario requiring resort to the material contribution test. See Chaudhury, "Causation in the Law of Negligence", *supra* note 13 at 265.

medication on time or a physician's negligent failure to perform a medical procedure during surgery. A cause could also be another nurse's failure to properly chart important medical information in the patient's records such that both the medication nurse and physician who were negligent in doing their tasks also relied on the negligent charting nurse's incorrect information about the patient. Because these team-based approaches to medical care make it exceedingly difficult for a plaintiff patient to pinpoint which behaviour by which particular tortfeasor was a cause of her harm, it is possible that the evidence may point to multiple negligent acts as potential causes.

In cases where one cause stands out among the multiple negligent acts as a more compelling explanation for the end result injury, a court can use a common sense inference to determine causation by taking a "robust and pragmatic approach to the facts" and inferring one cause is the more likely cause.[17]

But what if the evidence puts none of the competing causes as one more likely causative of the harm than another, such that an inference one way or the other is not possible? There may be a causal identity crisis as to the specific role played by each negligent act in bringing about the end result harm. This kind of factual scenario also results in just the type of "finger pointing" among defendants the Supreme Court of Canada foresaw in *Clements*. Each negligent defendant's actions materially increased the risk that the plaintiff would suffer from the type of harm that occurred. The "but for" test becomes unworkable because there are multiple potential causes of the harm but the plaintiff patient, through no fault of her own, is unable to prove one particular cause tipped the balance in her medical injury. She can, however, prove that, as a group, the team's collective negligence was a cause of her harm. It is just impossible to sort out the spaghetti-strands of multi-tortfeasor negligence to prove causation. The material contribution test may then be the only applicable test to solve these scenarios.

Resort to the material contribution to risk test is therefore a true departure from the "but for" test for causation and essentially finds liability based on policy grounds, where it would be unfair to have multiple defendants escape from liability when we know all were at fault but at least one of them caused the plaintiff's harm.[18] Ultimately, departure from the "but for" test is permissible only when negligence law's goals of "compensation, fairness, and deterrence" demand. While that may leave a somewhat open

17. *Snell v. Farrell*, [1990] 2 S.C.R. 311, 72 D.L.R. (4th) 289, 4 C.C.L.T. (2d) 229 (S.C.C.). Causal inferences are discussed more fully below in Part 4.
18. *Clements*, *supra* note 1 at paras. 14-16, 40-46.

question as to the category of case where resort to the material contribution test can be had, at present the only example is the multi-tortfeasor causal identity crisis type of case involving indivisible injuries.

### 3. Extent of Harm is Not Causation

Successive and cumulative multi-cause accidents can still be solved by the "but for" test because these questions often do not become complex at the causation stage but instead at the remoteness and damages stage, after causation is proven. These cases also encompass the thin and crumbling skull plaintiff concepts. These are questions about a negligent defendant's responsibility for the extent of harm, not whether the defendant caused the harm or not.

In the thin skull scenario, as long as the defendant's breach of the standard of care caused some harm, the extent of that harm has no bearing on whether or not "but for" causation can be satisfied.[19] It can. The thin skull principle is invoked when a plaintiff suffers harm to an extent which is not typically expected.[20] The law holds that it does not matter that the defendant injured a plaintiff who had a "thin skull" and was injured to a greater degree than expected. For example, a negligent shove to the shoulder in a schoolyard results in a serious wound, because the plaintiff had previously injured that shoulder. The negligent defendant seeks to avoid responsibility to pay for the unexpected extent to which the injury transpired. The defendant may think it unfair to have imposed on him or her the responsibility to pay for the unexpected extent of the harm flowing from a normally innocuous act, a schoolyard shove. However, the thin skull rule puts the cost of the accident on the negligent defendant, not the sensitive victim. The negligent defendant takes his victim as he finds her and is responsible to pay for the full extent of her harm, even if that extent is unforeseeable at the time of the negligent action causing the harm.

At the causation stage in a thin skull case, the defendant does not get to carve up which parts of the harm he may have caused. Causation is a yes or no question. If the extent of the harm is greater than a defendant would have expected because the plaintiff is more susceptible to injury, the defendant takes his victim as he finds her and is responsible to pay for that greater-than-expected extent.[21] But there is no question that that defendant "caused" some harm. In cases

19. *Athey*, *supra* note 3.
20. See Knutsen, "Clarifying", *supra* note 2.
21. *Athey*, *supra* note 3; *Blackwater v. Plint*, 2005 SCC 58, [2005] 3 S.C.R. 3, 258

of responsibility for extent of harm involving purely psychiatric injury with no physical component, the plaintiff's injury must be reasonably foreseeable as happening to a person of ordinary fortitude.[22]

In the crumbling skull scenario, the plaintiff had some pre-existing infirmity that was already brewing and causing deterioration of health before the accident.[23] Perhaps it is a disease. Perhaps there was a prior accident in which the plaintiff was harmed and her health was worsening. Unlike the thin skull plaintiff, the debate with the crumbling skull plaintiff is about whether aspects of the plaintiff's harm would have transpired in any event, without the involvement of the defendant. It is thin skull in reverse. The skull was already crumbling before the negligent defendant arrived on the scene. The crumbling skull scenario, too, is an extent question – the defendant is only responsible to pay for the damages caused by his negligent behaviour. A court must determine the extent of the harm attributable to that defendant's particular behaviour by inquiring whether the plaintiff's pre-existing infirmity would have put the plaintiff in the same or similar place in any event, without the involvement of the negligent defendant. The defendant is only responsible to pay for that extent of the plaintiff's harm which is attributable to his negligent behaviour. Thus, the defendant is only responsible to pay for the "difference" in eventualities resulting from his negligence, discounting the separate effect of the pre-existing debilitating infirmity. This assessment takes place at the damages phase, not at the causation stage.

## 4. Causal Draws and Causal Inferences

The tort system requires causation be proven on a balance of probabilities. It must be more likely than not that the defendant's negligence caused the plaintiff some harm. However, the system also recognizes there are some instances where proof at such a level is unfair to demand of litigants or alternatively impossible for litigants to obtain. Therefore, in certain circumstances, a trial judge is entitled

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D.L.R. (4th) 275 (S.C.C.); and *G. (E.D.) v. Hammer*, 2003 SCC 52, [2003] 2 S.C.R. 459, 230 D.L.R. (4th) 554 (S.C.C.).

22. *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27, [2008] 2 S.C.R. 114, 293 D.L.R. (4th) 29 (S.C.C.); *Frazer v. Haukioja*, 2010 ONCA 249, 317 D.L.R. (4th) 688, 73 C.C.L.T. (3d) 167 (Ont. C.A.). Of course, these cases beg the question: what is a "person of ordinary fortitude"? Does not everyone have some sensitivities and oddities which skirt the line of that threshold? What is the cost to the litigation system of proving "normalcy"? Is that even possible?

23. *Athey*, *supra* note 3, *Blackwater*, *supra* note 21.

to make a causal inference about the evidence on causation.[24] If a party adduces some evidence of causation, but not enough to prove or disprove it on a balance of probabilities such that there is a stalemate about the causal question, this "causal draw" can be solved through the trial judge inferring causation based on a common sense "robust and pragmatic approach to the facts".[25] The key to the causal inference is that the party requesting the inference must at least adduce "very little affirmative evidence" on causation[26] and there must not be more probative evidence to the contrary (otherwise, there is no causal draw). Causation need not be proven with "scientific precision".[27] There may be an absence of specific causal evidence proving the defendant's breach as a cause of some harm, on a balance of probabilities. Rather than relying on an overly technical or scientific approach to causation, a trial judge can infer causation in those instances where there is at least some general causal evidence (*i.e.*, perhaps circumstantial) that can lead to an inference that the breach was a cause of some harm.[28] The trial judge is also entitled to take into account the relative positions of each party to adduce evidence.[29] These causal inferences are entitled to deference on appeal and reviewable only as questions of fact.[30]

For example, in *Snell v Farrell*,[31] the plaintiff patient who went blind after an eye operation was able to prove that the negligence of her surgeon could have been a cause of her harm. However, she could not rule out an alternative non-negligent cause of the same harm – a pre-existing diabetic condition. The defendant surgeon could not proffer evidence disproving his role in the harm other than offering

24. *Ediger*, *supra* note 2 at para. 36, reaffirms the trial judge's option to draw an inference about causation "against a defendant who does not introduce sufficient evidence contrary to that which supports the plaintiff's theory of causation. In determining whether the defendant has introduced sufficient evidence, the trier of fact should take into account the relative position of each party to adduce evidence." See also *Clements*, *supra* note 1 at paras. 10-11, 23, 38. See also Russell Brown, "The Possibility of 'Inference Causation': Inferring Cause-in-Fact and the Nature of Legal Fact-Finding" (2010), 55 McGill L.J. 1 ("Inference Causation") (detailing the nature of how causal inferences are, and should be, drawn in tort cases).
25. *Snell*, *supra* note 17 at para. 34. See also Knutsen, "Clarifying", *supra* note 2 at 173-81, Knutsen, "Causal Draws", *supra* note 2 at 244-48.
26. *Snell*, *ibid.* at para. 31.
27. *Ediger*, *supra* note 2 at para. 36; *Clements*, *supra* note 1 at paras. 10-11; *Snell*, *ibid.* at para. 40.
28. Knutsen, "Causal Draws", *supra* note 2 at 244-45.
29. *Ediger*, *supra* note 2 at para. 36.
30. On the "palpable and over-riding error standard", as opposed to "correctness" for questions of law. *Ediger*, *supra* note 2 at para. 29.
31. *Supra* note 17.

the possible alternative. Faced with a choice between two competing, exclusive possible causes and only general but not specific evidence about which one was more likely the offending cause, the Supreme Court of Canada inferred that common sense would lead to the surgeon's negligence being the more likely cause. In theory, what the causal inference does, then, is boost "very little affirmative evidence" of causation in a general sense to the level of specific proof of causation on a balance of probabilities.

## PART II – TAKING THE MYSTERY OUT OF CAUSAL NOISE

Causation is the element in negligence law on which courts and commentators spend the most time and effort. Appellate courts regularly overturn trial courts based on incorrect applications of the legal test for factual causation. Lower courts continue to attempt to apply the material contribution test for causation, despite this. The jurisprudence attempting to explain which test to use is often written very cryptically. The academic commentary about causal doctrine is voluminous and seems endless.[32]

The answer to questions about causation doctrine should really not be about which test to use but instead about what the tort system itself is trying to do by using causation as an analytic tool. One must be careful not to get caught up in the system's doctrinal trappings. Remember: causation is a human-made construct. Courts overly

32. For some recent academic commentary on causation see, *i.e.*, Russell Brown, "Inference Causation", *supra* note 24; Knutsen, "Clarifying", *supra* note 2; Knutsen, "Causal Draws", *supra*, note 2; Allan Beever, "Cause-in-Fact: Two Steps out of the Mire" (2001), 51 U. Toronto L.J. 327; Russell Brown, "Material Contribution's Expending Hegemony: Factual Causation After *Hanke v. Resurfice*" (2007), 45 C.B.L.J. 432; Vaughan Black and David Cheifetz, "Through the Looking Glass Darkly: *Resurfice Corp. v. Hanke*" (2007), 45 Alta. L. Rev. 241; David Cheifetz and Vaughan Black, "Material Contribution and Quantum Uncertainty: *Hanke v. Resurfice Corp.*" (2006), 43 C.B.L.J. 155; David Cheifetz, "The *Snell* Inference and Material Contribution: Defining the Indefinable and Hunting the Causative Snark" (2005), 30 Adv. Q. 1; Lynda M. Collins, "Causation, Contribution and *Clements*: Revisiting the Material Contribution Test in Canadian Tort Law" (2011), 19 Tort L. Rev. 86; Lynda M. Collins and Heather McLeod-Kilmurray, "Material Contribution to Justice: Toxic Causation after *Resurfice Corp. v. Hanke*" (2010), 48 Osgoode Hall L.J. 411; David Cheifetz, "Causation in Negligence", *supra* note 5; Shantona Chaudhury, "Causation in the Law of Negligence", *supra* note 13; and Russell Brown and David Cheifetz, "The Bounds of 'Common Sense' Inferences of Causation: *Clements v. Clements* and the Art of Motorcycle Factum Maintenance" (2012), 40 Adv. Q. 129.

fixate on which test to use and whether the special circumstances arise to apply the alternative, material contribution test for causation. The goal of the causal inquiry is to be a rough-and-ready tool for evidentiary assessment linking fault-based conduct to harm. Instead, the inquiry often degenerates to an abstract and far less productive goal of slicing and dicing generalizable legal constructs for their own sake. Judges stop sorting through facts and weighing evidence and instead start playing with what test will drive the result that the evidence and justice demand. This is goal displacement at its best. That needs to change.[33]

## 1. Keep Causation Simple

These causal constructs we have created get in the way of the facts, the evidence, and common sense justice. For examples, one need look no further than the number of cases that have found the plaintiff proved causation at trial using the material contribution test, only to be reversed on appeal when the "but for" test is applied.[34] The appellate cases focus on the incorrectness of the material contribution test in the circumstances of the case, not on whether or not, regardless of which causal test is used, the result should rightfully remain the same.[35] A number of trial judges also regularly "appeal proof" judgments in the causation analysis by applying both the "but for" and material contribution tests and demonstrating that they would get the same result no matter what test was used.[36] This is a remarkable waste of judicial resources but perhaps a sensible thing to do when puzzled about which test to use.

It probably does not matter what one views as the correct analytic tool to use for causation. This answer will upset many a court and academic but please many a litigant (and possibly their lawyers) who

33. This may have been the message the Supreme Court of Canada was attempting to send with *Ediger*, *supra* note 2, where the Court upheld the trial judge's inferences about causation. The Court stressed that causal inferences are findings of fact, entitled to deference.
34. One example is the trial and appellate decisions in *Clements*, *supra* note 1. See *Clements (Litigation Guardian of) v. Clements*, 2009 BCSC 112, 175 A.C.W.S. (3d) 592, 2009 CarswellBC 202 (B.C. S.C.), reversed 2010 BCCA 581, 327 D.L.R. (4th) 1, 79 C.C.L.T. (3d) 6 (B.C. C.A.), reversed 2012 SCC 32, [2012] 2 S.C.R. 181, 346 D.L.R. (4th) 577 (S.C.C.).
35. *Ibid.*
36. See, *i.e.*, *Degennaro v. Oakville Trafalgar Memorial Hospital* (2009), 67 C.C.L.T. (3d) 294, 2009 CarswellOnt 3882, [2009] O.J. No. 2780 (Ont. S.C.J.), additional reasons (2009), 67 C.C.L.T. (3d) 319, 2009 CarswellOnt 4809 (Ont. S.C.J.), varied 2011 ONCA 319, 81 C.C.L.T. (3d) 165, 278 O.A.C. 147 (Ont. C.A.).

crave fairness, not doctrine. It is the evidence in the case that should drive the tort analysis, and not the nuances of the particular wording of a doctrinal test. The "alternative" causation tests of material contribution, causal inferences, and (at one time) reversing the burden of proof[37] can all get to the same answer, but they all need evidence to do it. The only difference is in the nomenclature and how structured the judicial reasoning is behind the result. The simpler the analytic tool and the more robust a discussion of the evidence in the case by the trial judge, the more predictable and understandable is the case's end result.

It is helpful to dismantle the "but for" test and chunk it into an inquiry about two bites of information. First, it is a check on whether or not a defendant's at-fault behaviour played some role in bringing about some harm to a plaintiff. If defendant had not embarked on some negligent behaviour, plaintiff would not have suffered that harm. Second, and more implicitly, the test sets a counter-factual threshold for determining at what point that particular type of loss-causing behaviour is supposed to trigger the tort system's response. "But for" means someone's conduct made a difference to someone else – that is the threshold or the degree which the conduct must reach before tort law responds. The behaviour may have played some role, but to be considered a cause in tort, it has to be a role that makes a probable difference in some outcome.[38]

Courts and litigants can use a permutation of Professor Jane Stapleton's construct of causal involvement to help think about cases where the "but for" test seems insurmountable to apply.[39] Professor Stapleton surmises that tort causation should be thought of as a sort of two-stage thought process. The first stage assesses whether or not the cause in question was somehow "involved" in bringing about the loss. Involvement is a broad and inclusive lens that asks a simple question: based on the physical laws of nature and what we know about the world, was this cause somehow involved in the loss? At the second stage of the causal inquiry, after determining whether or not

37. The five short-lived Canadian progeny of *McGhee v. National Coal Board*, [1972] 3 All E.R. 1008, [1973] 1 W.L.R. 1 (U.K. H.L.), as detailed in note 50 in Erik S. Knutsen, "Ambiguous Cause in Fact and Structured Causation: A Multi-Jurisdictional Approach" (2003), 38 Texas Int'l L.J. 249 at 262.
38. This is akin to what Richard Wright is alluding to in his NESS test. A NESS cause is a "Necessary Element of a Sufficient Set" of circumstances leading to a loss. See, *e.g.*, Richard Wright, "Causation, Responsibility, Risk, Probability, Naked Statistics and Proof: Pruning the Bramble Bush by Clarifying the Concepts" (1988), 73 Iowa L. Rev. 1001.
39. Jane Stapleton, "Choosing What We Mean By 'Causation' In the Law" (2008), 73 Missouri L. Rev. 433.

the cause in question was "involved" in the loss, one applies various legal constructs to determine whether or not that involvement meets certain legal criteria to deem the cause relevant for tort purposes. In a similar vein, the "but for" is nothing more than a mnemonic for causal involvement except that "but for" seems to imply both causal involvement and a threshold for assessing the appropriate level of that involvement. Thinking of the "but for" test in terms of causal involvement works this way. First, is the defendant's breach of the standard of care somehow involved in bringing about some harm to the plaintiff? Did it play any role at all? This is a factual question. Second, if so, to what degree is the defendant's breach involved, and do legal consequences attach because of that degree of involvement? This is a normative, or value-based, question. Was the breach substantially involved in the loss? Tangentially involved in the loss? Breaking the "but for" test down into those two constituent parts may make for a more doctrinally predictable application of the test in even difficult cases.

The first involvement question will often not be difficult to answer. Involvement seems like a lower hurdle than "but for", and it is – but it is only half of the "but for" equation. Once one knows that a defendant's breach is somehow "involved" in bringing about some harm to a victim, the next question forces an overt discussion as to the degree of involvement and the response (or not) of the legal system. A court will have to determine whether or not that involved cause is involved enough to attract tort liability. That prompts a court to examine the actual effect of the targeted behaviour on the set of circumstances in the case. The at-fault defendant's behaviour must have, on a balance of probabilities, made some causal difference in some aspect of the plaintiff's injury.

This avoids the often goofy hypothetical thinking that the "but for" test often incites about whether or not, if defendant did something and then plaintiff did something and then defendant did something else, the harm would have resulted. For example, many discussions about causation degenerate into asking something like whether, "but for" the defendant's alarm clock not going off, the defendant would not have been rushing and hence would not have been in traffic at the time the plaintiff victim happened to be driving down the same road at the same moment.

While one might think the defendant's alarm clock was involved in some tangential fashion in bringing about the harm to the plaintiff, that involvement is not enough to attract tort liability.

A more striking example of how causal constructs have become distractingly abstract is the collection of medical malpractice delay in

treatment cases.[40] In these cases, physicians are sued for inaction -- something they did not do. In failing to provide timely treatment for the plaintiff patient, the physicians allegedly caused the plaintiff some harm. Yet presently, courts demand that plaintiff patients prove double negative hypotheticals involving matters beyond the plaintiff and defendant, a near impossibility to prove.

Take the recent *Salter*[41] case, for example. There, the Court of Appeal for Ontario expected the patient plaintiff to prove that, but for his physician's negligence in failing to diagnose his condition in a timely fashion, the patient would have been able to receive timely treatment that would have made a difference in the outcome. It sounds sensible in the abstract, but think about what evidence and inter-dependent conjectures that would entail. The patient was expected to prove not only that delay in treatment could cause him some medical harm (separate and apart from the fact that he presented at the hospital in the first place with life-threatening harm bubbling within him) but that the proper diagnostics and medical

40. See, *e.g.*, *Aristorenas v. Comcare Health Services* (2006), 274 D.L.R. (4th) 304, 42 C.C.L.T. (3d) 220, 83 O.R. (3d) 282 (Ont. C.A.), additional reasons 2006 CarswellOnt 7257 (Ont. C.A.), additional reasons 2007 ONCA 99, 2007 CarswellOnt 742, [2007] O.J. No. 522 (Ont. C.A.), leave to appeal refused (2007), 233 O.A.C. 398 (note), 368 N.R. 394 (note), 2007 CarswellOnt 1878 (S.C.C.); *Cottrelle v. Gerrard* (2003), 233 D.L.R. (4th) 45, 20 C.C.L.T. (3d) 1, 67 O.R. (3d) 737 (Ont. C.A.), leave to appeal refused [2004] 1 S.C.R. vii, 236 D.L.R. (4th) vii, 70 O.R. (3d) xvii (S.C.C.); *Barker v. Montfort Hospital*, 2007 ONCA 282, 278 D.L.R. (4th) 215, 223 O.A.C. 201 (Ont. C.A.), leave to appeal refused (2007), 246 O.A.C. 398 (note), 379 N.R. 395 (note), 2007 CarswellOnt 6323 (S.C.C.); *Fisher (Litigation Guardian of) v. Atack*, 2008 ONCA 759), 62 C.C.L.T. (3d) 1, 242 O.A.C. 164 (Ont. C.A.); *Grass (Litigation Guardian of) v. Women's College Hospital* (2005), 30 C.C.L.T. (3d) 100, 75 O.R. (3d) 85, 196 O.A.C. 201 (Ont. C.A.), additional reasons 2005 CarswellOnt 1701, [2005] O.J. No. 1719 (Ont. C.A.), leave to appeal refused (2005), 215 O.A.C. 393 (note), 348 N.R. 197 (note), 2005 CarswellOnt 5330 (S.C.C.); *Vuong (Litigation Guardian of) v. Morton*, 2010 ONCA 638, 2010 CarswellOnt 7327, [2010] O.J. No. 4128 (Ont. C.A.); *Gutbir (Litigation Guardian of) v. University Health Network*, 2012 ONCA 66, 287 O.A.C. 223, 2012 CarswellOnt 1256 (Ont. C.A.); and *Salter v. Hirst*, 2011 ONCA 609, 341 D.L.R. (4th) 231, 88 C.C.L.T. (3d) 169 (Ont. C.A.), leave to appeal refused (2012), 438 N.R. 395 (note), 2012 CarswellOnt 8956, 2012 CarswellOnt 8957 (S.C.C.) (all cases finding there was "no evidence" of causation, despite lower court findings to the contrary). See also *Goodman v. Viljoen*, 2012 ONCA 896, 99 C.C.L.T. (3d) 85, 2012 CarswellOnt 17146 (Ont. C.A.) (split court reasoning on complex causal analysis about whether or not failure to provide pregnant mother with antenatal drugs led to twins developing cerebral palsy). See also Knutsen, "Clarifying", *supra* note 2 at 177-81 and Knutsen, "Causal Draws", *supra* note 2 at 245-47.

41. *Supra*.

specialties would have been available to him within the given time frame had the physician not been negligent. There is something odd about this. Is the physician on trial here or is the public medicare system?

Should not the question be far simpler: did the physician's negligence worsen the patient's condition – full stop? If the physician was negligent in failing to treat in a timely fashion, such usually does not do a patient any good.[42] Causation for some harm may be provable. The analysis should then move on to extent – a remoteness and damages question that those doctrinal concepts are far better at handling. Forcing the plaintiff patient to prove a series of interdependent "what ifs" just to establish factual causation simply proves that the present approach of some courts to causation is incapable of handling this sort of question in a fair fashion. This needs to change.

We do know that "but for" just does not work for a very few matters. One is prevented from assessing causal involvement/"but for" in multi-tortfeasor cases where there is an identity crisis as to which of two or more tortfeasors caused the plaintiff's injury, for example. Knowing the limits of the "but for" test is thus important. By the same token, "but for" works for most other factual scenarios, especially if it is thought of as a two part inquiry assessing causal involvement and the sensible threshold for that involvement.

## 2. Regularize Causal Inferences as the Trial Judge's Tool

The "but for" test, as the default test for causation that works for nearly all cases, proves or disproves causation with evidence. The weighing of that evidence lies within the purview of the trial judge. An overly rigid approach to causation doctrine can perpetuate a myth that there are buckets of evidence which one can weigh and to which one can attach numbers and probability. This is untrue, which explains why an unhealthy focus on which causal test is applicable is often a misleading exercise. Instead, there should be a far greater focus on what to do with the actual evidence led about causation.

Refining and regularizing the practice of making causal inferences is the solution. This is likely the message behind the Supreme Court of Canada's constant repetition in *Clements* that causal inferences can be utilized to satisfy the "but for" test, and do not require evidence of scientific precision.[43] This is also likely the message in the *Ediger* case

42. *Clements*, *supra* note 1 at paras. 9-10.
43. A view shared by Shantona Chaudhury, "Causation in the Law of Neglignece", *supra* note 13.

where the trial judge's causal inference was upheld. Inferences actually get litigants and courts thinking about evidence. By contrast, a focus on alternative, competing doctrinal tests for causation gets litigants and courts thinking about doctrine and tests. That can be distracting, and leads one to start wondering what caused this or what caused that, without some logical anchoring in why those questions are being asked. The causation question in a tort case should really be about how the evidence satisfies the doctrinal test for causation.

There is precious little doctrinal guidance from cases as to just what evidence about causation is required to prove it. We do know that while there needs to be some evidence, that evidence need only be "very little".[44] We also know that, in causal draw situations, the trial judge is entitled to make an inference about causation and may take into account the relative positions of each party to adduce evidence.[45] But apart from that, the evidentiary threshold is fuzzy. Each case turns on its own nuances of facts and credibility. Tort law is not, and should not be, reliant on purely scientific inquiry.[46]

In a number of instances in medical malpractice cases, cases are overturned on appeal because, in the eyes of the appellate court, there was "no evidence" led about causation at trial, despite the trial judge having found (or inferred) causation for the plaintiff.[47] The question must be asked: what litigant would attempt to prove a tort case with no evidence of causation? Who would risk the cost of a medical malpractice trial without evidence of causation? Even more to the point, what judge would be convinced of the causal result on "no

44. *Snell*, *supra* note 17.
45. *Ibid.* See also *Ediger*, *supra* note 2 at para. 36; *Clements*, *supra* note 1 at paras. 10-11, 38.
46. See *Ediger*, *supra* note 2, at para. 36; *Clements*, *supra* note 1 at paras. 9, 11, 38, 46 (scientific proof of causation not required). I part company with those who call for a scientific, probabilistic, and statistical approach to causation, wherein one would theoretically prove causation based on increasing statistical risk of the possibility of injury. See, *e.g.*, Lynda M. Collins, "Causation, Contribution and *Clements*", *supra* note 32, and Craig Jones, "Reasoning Through Probabilistic Causation in Individual and Aggregate Claims: The Struggle Continues" (2011), 39 Adv. Q. 18. Such an approach may have the consequence of turning tort trials into expert battles. The system would become more complex, more costly, and less predictable. Also, lawyers would have to learn math (and many a lawyer went to law school probably to escape precisely that). Russell Brown, "Inference Causation", *supra* note 24, makes an eloquent case for the problems inherent in an overly technical approach to legal inference-drawing. See also *Goodman v. Viljoen*, *supra* note 40 (problems with courts assessing statistical possibilities of twins developing cerebral palsy if mother had been given antenatal drug).
47. See, *e.g.*, *Salter*, *supra* note 40, *Barker*, *supra* note 40, *Cottrelle*, *supra* note 40, *Aristorenas*, *supra* note 40, and *Guthir*, *supra* note 40.

evidence"? The answer is probably that this difference of opinion results from the radical difference in perspectives between trial judge and appellate court. The litigants and judge, in the context of that trial, likely made some logical, possibly impressionistic and perhaps unsaid inferences about the evidence as adduced in that courtroom that made a solid difference on the causation analysis. It is perhaps then more honest to say that there was just not the "right kind" of evidence[48] of causation catalogued in the judgment or record that an appellate court, sitting after the fact, could identify. It would be most welcome to have some helpful guidance as to what that evidentiary threshold should be, so trial judges can acceptably sort the evidence at trial, or note the lack of evidence, and record their analysis in the judgment.[49]

It is often a waste of costly judicial resources to re-try on appeal cases that rise and fall on causal inferences, particularly when the standard of review for causal inferences is the same high standard for reviewing questions of fact. Moreover, it may produce unjust results. Something in the trial prompted the trial judge to make the causal inference.[50] It may have been credibility, demeanor of witnesses, or the way the facts played out through the narrative of the evidence. None of these factors are in front of the appellate court, which is left with only the lifeless trial transcript to review. In fact, the appellate court is not privy to the very factors that may have driven the trial judge's inference in the first place. It is disconcerting to base an appellate result on unobtainable informational conjectures. The very nature of an inference is that it is not a fact. It is a conclusion drawn from the facts. To appeal it is to get inside the head of the fact-finder, recreate the scene and logics, and essentially challenge the whole ordeal.[51] Now, in some cases that may be necessary, but those cases should be clearly earmarked as obviously problematic.

To that end, one refinement about the practice of making causal inferences should be to make the reasoning behind those inferences

48. As opposed to "no evidence".
49. See Knutsen, "Causal Draws", *supra* note 2.
50. Russell Brown outlines the complex, nuanced and sometimes normative processes behind causal inferences in law, in "Inference Causation", *supra* note 24. See also Russell Brown and David Cheifetz, *supra* note 32.
51. Which says nothing of the sanctity of the role of fact-finder, the deployment of scarce judicial resources, and basic principles of *res judicata*. This is precisely why there is a strict standard of review for appealing facts and inferences of facts. See *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, 211 D.L.R. (4th) 577 (S.C.C.) (standard is "palpable and over-riding error"), and also *Ediger*, *supra* note 2 at para. 29 (causation is reviewable as a question of fact on a "palpable and over-riding error" standard).

explicit in trial judgments.[52] What drove the inference? What was the causal draw, precisely? Why did the trial court choose to find causation when there otherwise was not enough evidence on a balance of probabilities to prove this element? What was the "very little affirmative evidence" on which the court relied to make the causal inference? Identifying these simple things and making that reasoning overt in trial judgments would go a long way to developing greater predictability and reliability for the helpful use of causal inferences.

### 3. Sorting Causal Noise: Underlying Injuries, Successive Injuries and Multiple Causal Inputs

In cases where the plaintiff exhibits underlying medical issues, has suffered successive injuries, or where there are multiple potential causal inputs, separating causal involvement from the degree of involvement for a target cause will often avoid the causal noise. Ask first: was the target defendant's at-fault behaviour somehow causally involved in bringing about this loss? Did that wrongdoer do "something" to make things worse? Asking that question will then prompt a discussion about the behaviour's degree of involvement. Separating out that extent issue focuses the discussion. Some at-fault behaviour may have been involved in a loss, but did it make some difference in bringing it about? That is the "but for" counter-factual question. Did the at-fault behaviour make a difference to such a level that the tort system should respond?

This is easier to do if one proceeds from the premise that the "but for" test works for nearly all cases. Most important, the causal question the "but for" test asks must also be kept simple. The question is: but for the defendant's negligence, would the plaintiff have suffered some injury? Here is where most litigants and courts trip up and go astray. The question is not "what happened" or "what is the etiology of this mess" or "which one of these multiple causal inputs hurt this person"? The question is more refined. The focus is the target defendant's fault-based conduct. Was there harm that resulted because the defendant did something wrong? That is the question. It links the fault-based conduct to the bringing about of the harm.

One reason for the confusion in cases with significant causal noise is that courts are far from consistent in their use of tort law terminology to describe what they are doing. Courts speak of

52. David Cheifetz discusses the dangers of courts merely using the shorthand of appealing to "common sense" when making causation determinations, *supra* note 5 at 298-302. See also Russell Brown and David Cheifetz, *supra* note 32.

defendants "liable for" a cause, harm as "caused by" a defendant, injuries "attributable to" a defendant, or harm "apportioned with" co-defendants or "liability" for causing harm as being "joint and several". However, the main reason for confusion in these cases is that, while multiple causal inputs may have acted in some sequence upon the injured accident victim, the victim is a whole person who is left with the totality of the constellation of symptoms that make up the injury in question. Figuring out which causal source is responsible to pay for which specific part within the constellation of a person's total injury can be nightmarish. But the "but for" test still works. It is just easy to get distracted by both tortious and non-tortious causal noise plus doctrinal concepts of causation, damages, and joint and several liability.

For example, in a 10 car pile-up on the highway, one can still ask "but for" the negligence of driver #7 who was texting while driving and was in the pileup of cars, would the plaintiff who was the first car hit by car #2 have suffered some harm? The answer to the "but for" question for driver #7 may appear to be impossible to sort out, because there were nine other drivers involved. However, the "but for" test does not fail here. Chunk the causal information about driver #7's involvement in the accident. If driver #7's at-fault behaviour in texting and driving led to some resulting loss in some fashion, by making some aspect of the injury more likely to happen on a balance of probabilities, causation is proven. There is causal involvement to a requisite degree. Driver #7's behaviour does not have to result in the whole injury occurring – just some portion of the injury. This is a pure evidence-based question, not a doctrinal question. What driver #7 pays, or what his fault-based contribution is, is a question of damages, not causation.

The key is to keep the steps in the negligence inquiry doctrinally separate: the step that is about causation (responsibility for some harm), the step that is about damages (responsibility to pay for some specific harm), and the step that is about cost-sharing payment issues (responsibility to share payment of damages). To do that, first conceptually think backward from the present state of the injured accident victim's total constellation of injuries. Why backward? Because the plaintiff will be suing based upon the totality of her present injured position. Establish the end result total loss first, then establish a tortfeasor's causal role in some constituent part of the injury, and finally attempt to carve up responsibility to pay for the loss. Causation does not carve up responsibility to pay – that is a damages question.

### (1) Divisible and Indivisible Injuries

Once the "but for" test establishes causal involvement of a defendant's breach of a standard of care, the question immediately shifts to responsibility to pay – damages. The judge must then consider if the damages can be divisible among the various responsible factors or if the damages are indivisible and not attributable to certain specific tortfeasors or factors.[53] If portions of the victim's injury in question are divisible among the various responsible tortfeasors, the various portions of the injury need to be separated out so that each tortfeasor pays for only that portion resulting from his at-fault behaviour.[54] However, it may be that the plaintiff's end result constellation of symptoms comprising her total injury cannot be divided up as to which tortfeasor's at-fault behaviour is responsible for which part of the injury. In this instance, all tortfeasors who have been determined to be a cause of some of the plaintiff's harm are jointly and severally liable for the entire end result injury in totality.[55] This analysis is easier said than done. But it, too, is a question relying strictly on evidence and damages doctrine, not on any complicated causation doctrine.

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53. *Athey*, *supra* note 3 (assessing contribution of two successive motor vehicle accidents plus a pre-existing degenerative disc disease); *Blackwater*, *supra* note 21 (assessing contribution of prior physical, psychological and sexual abuse in residential school survivor); *Bradley v. Groves*, 2010 BCCA 361, 326 D.L.R. (4th) 732, 75 C.C.L.T. (3d) 197 (B.C. C.A.), leave to appeal refused (2011), 515 W.A.C. 317 (note), 305 B.C.A.C. 317 (note), 422 N.R. 384 (note) (S.C.C.) (plaintiff involved in two successive motor vehicle accidents); *Ruscheinski v. Biln*, 2011 BCSC 1263, 207 A.C.W.S. (3d) 269, 2011 CarswellBC 2594 (B.C. S.C.) (plaintiff involved in three successive motor vehicle accidents); *Scoates v. Dermott*, 2012 BCSC 485, 96 C.C.L.T. (3d) 269, 2012 CarswellBC 970 (B.C. S.C.) (plaintiff involved in four successive motor vehicle accidents); *B. (M.) v. 2014052 Ontario Ltd.*, 2012 ONCA 135, 97 C.C.E.L. (3d) 322, 109 O.R. (3d) 351 (Ont. C.A.), leave to appeal refused 2012 CarswellOnt 11945, 2012 CarswellOnt 11944 (S.C.C.) (assessing contribution of prior life traumas after plaintiff involved in motor vehicle accident); *Lawson v. Viersen*, 2012 ONCA 25, 346 D.L.R. (4th) 518, 15 C.P.C. (7th) 275 (Ont. C.A.) (assessing contribution and indemnity issues between tortfeasors in successive motor vehicle accidents); and *McArthur v. Hudson*, 2012 BCSC 1293, 38 M.V.R. (6th) 246, 2012 CarswellBC 2624 (B.C. S.C.) (defendant only responsible to pay for divisible symptoms flowing from motor vehicle accident, and not pre-existing unrelated symptoms).

54. As in *McArthur*, *supra*.

55. As in *Bradley*, *supra* note 53. See also *Lawson*, *supra* note 53 (concepts of joint and several liability for concurrent tortfeasors; tortfeasors' negligence does not need to be contemporaneous).

### (2) Two Successive Accidents and a Divisible Injury

Take a case where a plaintiff sues two drivers whose negligence each resulted in two separate auto accidents, one year apart. The plaintiff currently suffers from an injured elbow and injured left knee. It is the job of the trial judge to attempt to determine both causation and responsibility to pay on the part of each negligent defendant driver. If both defendant drivers in two completely different accidents sped past a stop sign and struck the parked plaintiff, "but for" causation is easily proved. "But for" the negligence of driver #1, the plaintiff would not have suffered some harm. The same goes for driver #2. The causation analysis is complete. It cannot be said that either driver's negligence did not have some harmful effect, in some way, on the plaintiff's health. Extent of harm does not enter the picture.

The trial judge must then move on to the damages analysis. Here, the plaintiff needs to establish the totality of the constellation of symptoms comprising her injury. She has an injured knee and injured elbow. If the evidence shows that Auto Accident #1 hurt only the plaintiff's elbow and one year later Auto Accident #2 hurt only the plaintiff's left knee, then the at-fault driver in Accident #1 pays for the damages relating to the injured elbow and the at-fault driver in Accident #2 pays for the damages relating to the injured knee. The damages are divisible. Note that the judge does not separate out causation between defendants. This is a damages question: separation of responsibility to pay for losses arising from certain aspects of the total constellation of symptoms.

### (3) Two Successive Accidents and an Indivisible Injury

In many instances, however, a plaintiff's injuries will be indivisible among the various responsible tortfeasors. Return to the fact scenario above, where there are two separate accidents one year apart in which both drivers fail to stop for a stop sign and collide with the plaintiff's vehicle. The plaintiff establishes that both drivers were "but for" causes of some of her harm. There is no causal identity crisis here about which of either tortfeasor caused all the harm. She just does not know to what extent each individual accident injured her. That does not matter for the causation step. The plaintiff establishes the totality of the constellation of symptoms presently comprising her injuries: an injured elbow and knee. However, if the evidence cannot show on a balance of probabilities which accident resulted in which aspects of the total constellation of symptoms comprising her injury,

then her total injury (disabilities from knee + elbow) is indivisible among the at-fault tortfeasors. Their breach of the standard of care was each a "but for" cause of the totality of her harm. This means that both driver #1 and driver #2 are equally responsible to pay for the plaintiff's whole loss, even though the accidents were not contemporaneous and separated by a year's time. The damages analysis is complete.

However, provinces operate a system of comparative negligence, where joint and several liability assists co-tortfeasors and plaintiffs in payment issues.[56] Several liability allows the plaintiff to choose from which defendant she will request the entire amount of damages owing to her. She does not have to be in a position to chase both tortfeasors at once for her money – she can pick one to pay the full bill. Joint liability allows the co-tortfeasors to seek contribution and indemnity from each other to ensure that the tortfeasor who does pay the plaintiff the total bill can then chase the other non-paying tortfeasor to recoup the cost of the non-paying tortfeasor's attributable share of the damages that were supposed to have been paid to the plaintiff. Simultaneously, tort law demands that a plaintiff is to be returned to her pre-accident position – no more and no less. These two concepts of joint and several liability plus the notion of full indemnity recovery operate together to sort out the issues for co-defendants about cost-sharing the responsibility to pay for the plaintiff's damages. This is not a causation question nor is it a damages entitlement question. It is simply about money transfer at this point.

So, in the case of an indivisible injury in the multiple but separate successive accidents case, the result is that both tortfeasors must pay the plaintiff an equal share of the total money owing for the total injury. If, for some reason, one tortfeasor is insolvent, the solvent tortfeasor must pay 100% of the money for the injury.

### (4) Injury Aggravation

Injury aggravation can often equate to an indivisible injury situation. This makes sense because it is simply a reification of the thin skull principle – an extent question. The second tortfeasor has injured a victim who is already hurt but in some state of healing from some prior accident.[57] Separating out the plaintiff's original pre-accident

56. See, *i.e.*, Ontario, *Negligence Act*, R.S.O. 1990 c. N-1; Alberta, *Contributory Negligence Act*, R.S.A. 2000, c. C-27; *Waterloo Region District School Board v. CRD Construction Ltd.*, 2010 ONCA 838, 327 D.L.R. (4th) 611, 97 C.L.R. (3d) 274 (Ont. C.A.), *Lawson v. Vierson*, *supra* note 53, and *B. (M.) v. 2014052 Ontario Ltd.*, *supra* note 53.

57. See, for example, *Cantin v. Petersen*, 2012 BCSC 549, 216 A.C.W.S. (3d) 94,

position for the second successive tortfeasor can be an impossible evidentiary task because the plaintiff is in some amorphous state of recovery from the first accident. This is that limbo period between the end result total present injury and something worse than the plaintiff's original position before any accidents at all. At the same time, separating out the plaintiff's end result totality of the injury attributable to the first accident may also be an impossible evidentiary task. The result can be an indivisible injury demanding that both tortfeasors are responsible to pay for the entire harm.[58]

In the double auto accident example, assume both Accident #1 and Accident #2 injured the same knee. In Accident #1, the plaintiff's knee was injured to a certain unknown but serious degree. The plaintiff was getting better after surgery and her knee symptoms were improving. One year later, Accident #2 occurs and injures the same knee, making the injury that was healing now far worse than it originally was, and would have been, after Accident #2. "But for" causation can be proven because both tortfeasors' at-fault behaviour somehow worsened the condition of that knee. The question is then one of extent, not causation.

The plaintiff must establish the end result totality of her knee injury. She must also attempt to establish her original position before any accidents, and her position immediately before Accident #2 but after Accident #1. The judge must then determine whether or not any aspect of the constellation of her symptoms comprising her injury can be attributable to the at-fault behaviour of one specific tortfeasor or the other. In most cases, this will be impossible to sort out, so the totality of the knee injury is indivisible among tortfeasors. Because the injury is indivisible, both tortfeasor drivers will be responsible to pay for the full extent of her knee injury (subject to joint cost sharing among the co-defendants). The second driver's responsibility to pay for the entire injury stems from the fact that, although his accident only resulted in an already injured knee becoming even more injured, it is impossible to determine which aspects of the plaintiff's end result injury are solely attributable to driver #2's at-fault behaviour. It is like driver #2 struck a thin-skulled plaintiff. The plaintiff was already suffering, and in the process of healing, so the burden to pay for the entire extent is placed on driver #1 and driver #2 in the indivisible injury scenario. To do otherwise is to instead place on the injured

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2012 CarswellBC 1404 (B.C. S.C.) (plaintiff involved in motor vehicle accident was already suffering from chronic pain syndrome; accident aggravated symptoms and defendant fully liable for aggravation).

58. Subject, of course, to joint and several liability rules.

plaintiff the burden of suffering an indivisible injury as a result of someone else's fault. That is something the tort system does not do.

There are many "what ifs" in these types of scenarios that are entirely dependent upon the evidence in each specific case. Perhaps the plaintiff would be in the present position with her knee injury entirely from Accident #2 alone, even if Accident #1 had never happened. Both accidents could have thus independently or together in some combination resulted in the same level of harm. Perhaps instead the plaintiff would have gotten better from Accident #1 in time, if left alone, and Accident #2 reset the plaintiff's injury to the same or worse state as in Accident #1 again. Regardless, it cannot be said that Accident #1 did her no harm. Driver #1 would be responsible to pay for some aspect of the harm. If that attributable aspect within the constellation of symptoms comprising the totality of her knee injury cannot be identified, the injury is indivisible and both tortfeasors are jointly responsible to pay for the entire harm to the knee.

## (5) Pre-existing Infirmity and the Thin and Crumbling Skull

Accident scenarios with multiple successive accidents are complex enough without the addition of the plaintiff's pre-existing, unrelated infirmities in the mix. But real life being what it is, most plaintiffs will have some pre-accident health issue bubbling underneath, which interacts with the new tort-related injuries at issue. This pre-existing infirmity could be the result of some prior accident which is not the subject of the present lawsuit (*i.e.*, the limitation period expired, the plaintiff had already been compensated for that accident, or the accident was not the result of any fault).[59] The pre-existing infirmity could also be the result of some completely independent and unrelated iatrogenic cause, like a prior physical or psychiatric infirmity from natural causes. It is important to keep in mind that the target defendant's at-fault behaviour may not be the cause of these pre-existing infirmities. So no causal analysis need take place as to what relationship the negligent behaviour had on the original onset of the prior existing condition.

However, that is not to say that the pre-existing infirmity is not considered. It is an extent question of damages. Recall that a defendant is only responsible to pay for the damage resulting from his negligent behaviour. Therefore, the judge must consider the plaintiff's pre-accident condition. For example, if the plaintiff had debilitating arthritis before the accident, that condition must be

59. See, *i.e.*, *Waterloo Region*, *supra* note 56.

accounted for in terms of the at-fault defendant's responsibility to pay. Again, the divisible-indivisible dichotomy is used. If the plaintiff had debilitating arthritis before the accident, and the accident resulted in some harm unrelated to any symptomatology involving the arthritis even though the arthritis was still problematic, the harm is divisible. It can be separated out and the at-fault defendant driver is responsible to pay for damages arising from that separated aspect of the total constellation of symptoms from which the plaintiff currently suffers. The at-fault driver is not responsible to pay for the arthritis-related harm. His negligence did not result in that. This is the crumbling skull notion. The plaintiff had that infirmity already and it was not attributable to the defendant's at-fault behaviour. It becomes the plaintiff's responsibility to bear the cost of this infirmity as she would have had to do anyway, even if she had not experienced the accident with the present target at-fault defendant.

However, if the plaintiff had debilitating arthritis before the accident, and after the accident continues to have the same or worsened arthritis in addition to other injury symptoms which blend into the arthritis, resulting in a totality of end result symptoms, it may be that it is not possible to prove whether or not the target defendant driver's negligence had any role to play in worsening or prolonging the arthritis. The arthritis may be indivisible as one of the elements in the constellation of the total end result injury. If a judge determines that the at-fault target defendant behaviour's effect on the symptomatology of the arthritis is indivisible from the total end result injury, the defendant is responsible to pay for the present ensuing arthritis symptomatology in addition to the new symptoms in the constellation. Why? Because it is impossible to separate out what effect that accident had on this victim's arthritic condition. The injury is indivisible, as if it were a thin skull plaintiff issue. It becomes the defendant's responsibility to absorb the cost of extent, even though that extent may have been unforeseeable to that defendant.

These concepts apply equally whether or not the pre-existing infirmity is static and manifest or will possibly appear and degenerate in the future. The only difference is about how the end result damages are calculated. If the injury is hypothetical and will degenerate in the future but is not presently existing (as opposed to a realized present injury), then a contingency reduction in the end result damages award to represent the role of the future debilitation is appropriate.[60]

The pre-existing injury analysis turns on the ability to prove whether or not the defendant's negligence had an effect on certain

60. *Athey*, *supra* note 3 at paras. 26-30.

aspects of the constellation of symptoms comprising the end result injury. If there is no effect, the defendant is not responsible to pay. If there is a divisible, attributable effect, the defendant is responsible to pay for that attributable portion. If there is an indivisible effect, the defendant is responsible to pay for the entire cost of the total end result injury even though some aspects of the injury arose pre-accident and may have been improving or alternatively degenerating.

## CONCLUSION

It is helpful to think of the standard "but for" test for causation as consisting of two parts: causal involvement and the threshold for involvement. Here, it is key to make explicit the evidentiary reasoning behind determining both involvement and whether or not the particular behaviour passed the threshold for involvement. The material contribution test is rarely an appropriate substitute for the "but for" test. At present, it is only applicable where there is a causal identity crisis among multiple tortfeasors when a plaintiff suffers an indivisible injury. This identity crisis makes it impossible to use the "but for" test to determine which tortfeasor's negligence caused the indivisible injury. This is because, although the plaintiff can prove causation globally against the group of involved defendants, the "but for" test produces a circular result when applied to each individual defendant.

Causal inferences for causal draws should become more regularized and the reasoning behind them made more explicit in trial judgments. This should enhance predictability for all litigants, especially at the appellate stages, as the jurisprudence will develop on a fuller and more explicit record of judicial conclusions in cases exhibiting causal noise.

Finally, in cases involving complex causal noise, it is helpful to separate out responsibility for cause (causation), responsibility for extent (damages: thin and crumbling skulls), and responsibility to pay (damages and joint and several liability) as individual sub-inquiries. Following this structured process may assist in cases involving multiple successive injuries:

1. Establish the plaintiff's end result present loss as a total constellation of symptoms.
2. Establish whether or not the defendant's breach of the applicable standard of care was a cause of some of the plaintiff's harm (causation).

3. Determine whether or not the total constellation of symptoms is a loss that is divisible or indivisible among the various tortfeasors involved in causing some aspect of the loss (extent). To do that:
   a. establish the plaintiff's original position before any accidents;
   b. establish the plaintiff's position immediately before Accident #2 but after Accident #1;
   c. determine whether any aspects of the injury can sensibly be attributed to the fault of one or the other tortfeasor;
   d. if the injury is divisible among the tortfeasors, each is responsible to pay for what aspects of the injury resulted from his or her negligence;
   e. if indivisible, all tortfeasors must pay for the total loss. Their responsibility to pay is governed under joint and several liability such that the plaintiff is to be made whole and defendants are to contribute accordingly.

If the plaintiff suffered a pre-existing disability unrelated to the negligence of any defendants, follow a similar process to account for the pre-existing disability:

1. Establish the plaintiff's end result present loss as a total constellation of symptoms and include the symptoms presently experienced which are derived from the pre-existing disability.
2. Establish whether or not the defendant's breach of the applicable standard of care was a cause of some of the plaintiff's harm (causation).
3. Determine whether or not the effect of the tortfeasors' negligence on the pre-existing symptomatology can be separated out (extent). To do that:
   a. establish the plaintiff's original position before any accidents and include the symptoms from the pre-existing disability;
   b. establish the plaintiff's position after the accident. Were the original pre-existing symptoms better, the same, or worse?
   c. determine whether any aspects of the present injury can sensibly be attributed to the fault of the tortfeasor;
   d. if the injury is indivisible as between what resulted from the tortfeasor's negligence and what resulted from the original pre-existing disability, the tortfeasor is respon-

aspects of the constellation of symptoms comprising the end result injury. If there is no effect, the defendant is not responsible to pay. If there is a divisible, attributable effect, the defendant is responsible to pay for that attributable portion. If there is an indivisible effect, the defendant is responsible to pay for the entire cost of the total end result injury even though some aspects of the injury arose pre-accident and may have been improving or alternatively degenerating.

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   c. determine whether any aspects of the present injury can sensibly be attributed to the fault of the tortfeasor;
   d. if the injury is indivisible as between what resulted from the tortfeasor's negligence and what resulted from the original pre-existing disability, the tortfeasor is respon-

sible to pay for the cost of the entire injury (as if the plaintiff were a thin skulled plaintiff);

e. if the injury is divisible as between what resulted from the tortfeasor's negligence and what was going to occur anyway as a result of the pre-existing disability, the tortfeasor is only responsible to pay for the aspects of the injury that resulted from his or her negligence (the plaintiff was a crumbling skull plaintiff who would have experienced some loss in any event, due to the pre-existing disability).

Cases involving multiple accidents and pre-existing injuries do not have to be overly complicated merely because causal noise exists. Establishing the plaintiff's end result total constellation of present symptoms as a first step, and then working backward from that, can help to simplify the analytic process. Litigants and courts must be mindful of the evidence about whether or not an injury truly is divisible or indivisible, and the consequences of such a finding. With a more systematized approach to causal noise, it is possible to achieve greater predictability in the fault-based tort system, which benefits plaintiffs and defendants alike.