CAUSATION AND STANDARD OF PROOF FOR A HYPOTHETICAL PRE-TRIAL LOSS

Table of Contents **Page**

Introduction

This paper addresses two issues: (a) whether the same principles regarding the "real and substantial possibility" standard of proof apply to a hypothetical *past* loss claim as they do to a hypothetical *future* loss claim, and (b) the interplay between the two standards of proof applicable to hypothetical claims: balance of probabilities for the "but for" causation test, and "real and substantial possibility" for damages.

The first is a narrow and, other than in BC, underconsidered issue, but one which is relevant in all common law jurisdictions and is a matter of importance to all litigators. There is no shortage

of authority for the proposition that the damages in a tort claim for a hypothetical *future* loss can be proved on the basis of the "real and substantial possibility" standard of proof (although the assessment of damages for such losses will be reduced in accordance with the lower likelihood of loss). But do the same principles apply to a *past* (meaning a pre-trial) loss? Surprisingly, this issue has not been considered in any great detail other than in BC courts. The recent Ontario decision in *West v Knowles*[1] deals with it, although only briefly. As a general observation, why should the same type of claim - one whose existence and/or measure cannot, for one reason or another, be proved on a balance of probabilities – be treated differently merely because in one case it involves a past loss, while in another it involves a future loss? It is the impossibility, because of the hypothetical nature of the claim, of adducing evidence that would satisfy the normal standard of proof, not the temporal factor, which constitutes the governing consideration when determining which standard of proof should apply.

The second issue has not yet been fully and transparently developed in the case law. It too can be a matter of critical importance, and we offer our review and analysis of two methods for maintaining harmony between potentially clashing principles.

A. APPLICATION OF THE REAL AND SUBSTANTIAL POSSIBILITY STANDARD TO PAST LOSS CLAIMS

Hypothetical events

As this whole area revolves around the notion of hypothetical events, it is useful to ask: Just what is a "hypothetical event" for the purposes of this discussion? Some answers to that question are contained in the following comments:

> Hypothetical events (such as how the plaintiff's life would have proceeded without the tortious injury) or future events need not be proven on a balance of probabilities.[2]

> The rationale for these distinct standards is simple: what would have happened in the past, but for an injury, is no more knowable than what will happen in the future. The balance of probabilities standard is appropriate for past events which have actually occurred. However, it is too rigid when assessing, hypothetically, what would have occurred in the past if not for some tortious conduct. Instead, in such circumstances a lower, more flexible standard of "real and substantial possibility" applies.

> The income the [plaintiff] would have earned between the accident and trial but for his injury is hypothetical.[3]

---

[1] 2021 ONCA 296.
[2] *Athey v Leonati* [1996] 3 S.C.R. 458 at para. 27.
[3] *West v Knowles*, *supra*, footnote 1, at paras. 75-76.

> What would have happened in the past but for the injury is no more "knowable" than what will happen in the future and therefore it is appropriate to assess the likelihood of hypothetical and future events rather than applying the balance of probabilities test that is applied with respect to past actual events.[4]
>
> [The issue is] not what *did* happen in the past but the chance that something *would* have happened, had the [wrongdoing] not happened in the past.[5]

Stated simply, a hypothetical event is one that *might* have happened in the past, or *might* happen in the future, in contrast to an event that has *actually* happened. Future events are, by definition, hypothetical events, because they have not yet *actually* happened.

Furthermore, the term "might" requires additional clarification. In the sense employed here, "might" refers to any degree of likelihood spanning from just above 0% to just below 100%.[6] Contrary to its usual meaning, "might" here does not necessarily mean a likelihood of less than 50%. An event which is hypothetical, in that it has not actually happened, can include a matter that probably, or even almost certainly, would have happened in the past, or will happen in the future. An Olympic-caliber runner is almost certain to win a race against lesser athletes, but until the race has actually been run and a winner declared, it is a hypothetical outcome.

The point being made is that not all hypothetical events require, both on a legal and a practical level, proof on a lesser standard than that of balance of probabilities. Just because a claim involves a hypothetical event does not necessarily mean that a relaxation of the normal standard of proof will be necessary. If a finding can be made on a balance of probabilities that a hypothetical event did or did not occur in the past, or will or will not occur in the future, the relaxed standard of proof is not necessary, nor will the assessment of damages be reduced, as occurs when the lower standard of proof is applied.[7] On the other hand, non-hypothetical events – those that actually have or have not happened – *do* require proof on the normal standard of balance of probabilities.[8]

Early case law focused on future loss claims

---

[4] *Smith v Knudsen* 2004 BCCA 613 at para. 29. This particular passage has been cited in numerous decisions. See, for example, *Century Services Corp. v LeRoy* 2021 BCSC 1285 at para 84: "This is a past hypothetical that is no more knowable than what will happen in the future." The critical distinction between a future, uncertain loss and a past, certain loss was emphasized in *Murphy v Mullen* 2022 ONCA 872 at para. 61.

[5] *MacLeod v Marshall* 2019 ONCA 842 at para. 17 (original emphasis).

[6] "You can prove that a past event happened, but you cannot prove that a future event will happen…All you can do is evaluate the chance. Sometimes it is virtually 100 per cent; sometimes virtually nil. But often it is somewhere in between": *Davies v Taylor* [1974] A.C. 207, cited in *Schrump v Koot* (1977) 18 O.R. (2d) 337, C.A. at para. 14.

[7] *Beldycki Estate v Jaipargas* 2012 ONCA 537 at para. 84, although see *Dhaliwal v Greyhound Canada Transportation Corp.* 2017 BCCA 260 at paras. 28-31 for an apparently contrary view.

[8] "When the question is whether…a certain event did or did not happen…the court must decide one way or the other. There is no question of chance or probability. Either it did or did not happen…[and] the standard of civil proof is a balance of probabilities": *Davies v Taylor*, *supra*, footnote 6.

The assessment of damages for claims for future loss has always been viewed as problematic and difficult, for the simple reason that the future is unknown[9] and, to some degree at least, unknowable, as reflected in the following oft-quoted statement:

> We must now gaze more deeply into the crystal ball. What sort of a career would the accident victim have had? What were his prospects and potential prior to the accident?[10]

Apart from decisions made in BC, most of the case law has been concerned with claims for future, not past, hypothetical losses. The leading decision on the matter of the standard of proof applicable to claims where the balance of probabilities standard is unworkable is *Athey v Leonati*.[11] *Kovats v Ogilvie*[12] was the first major pre-*Athey* decision:

> It is a fundamental rule that in civil cases questions of fact are to be decided on a balance of probabilities; this is a matter of proof. But it is not equally true that damages in respect of things which have not yet developed may only be awarded if it is probable that they will develop and may not be awarded if it is only possible that they will develop. One can decide on a balance of probabilities that something in the future is a possibility, and in appropriate circumstances that possibility can be taken into account in assessing damages; in such a case it is not essential, before damages can be assessed for the thing, to decide on a balance of probabilities that the thing in future is a probability. When the word "probability" is used in such a context there is an inclination to contrast it with the word "possibility". That can be avoided by using instead the word "risk", or perhaps "danger" or "likelihood". Then one can say, without the same danger of being misunderstood, that one can decide on a balance of probabilities that there is a risk of something happening in the future. In an appropriate case such a risk can be taken into account in assessing damages for the wrongful act or default that caused it. As put by Cartwright J…"the innocent person who has been gravely injured by the fault of another should not be called upon to bear all the risk of the uncertainties of the future".

---

[9] "No one knows the future": *Krangle (Guardian ad litem of) v Brisco* 2002 SCC 9 at para. 21.

[10] *Andrews v Grand & Toy Alberta Ltd.* [1978] 2 S.C.R. 229 at para. 58. A similar statement was made in *Graham v Rourke* (1990) 75 O.R. (2d) 622, C.A. at para. 40: "A trial judge who is called upon to assess future pecuniary loss is of necessity engaged in a somewhat speculative exercise…The ultimate questions to be determined – will the plaintiff suffer future loss and, if so, how much? – cannot be proved or disproved in the sense that facts relating to events which have occurred can be proved or disproved." See also *Beldycki Estate v Jaipargas*, *supra*, footnote 7, at para. 75.

[11] *Supra*, footnote 2.

[12] (1970) 17 D.L.R. (3d) 343, B.C.C.A.

> The degree of risk, danger or likelihood in each case will, of course, be taken into account in assessing damages…[13]

It may be noted that the court in *Kovats* swiftly distinguished[14] contrary comments made in *Corrie v Gilbert*,[15] where it was unequivocally stated that compensation was "to be assessed upon the basis of the injury suffered by [the plaintiff] as it manifested itself at the date of trial, making due allowance for the probable future developments but excluding such matters as remain in the sphere of possibility".[16]

An influential English decision that was released at about the same time as *Kovats* was *Mallett v McMonagle*,[17] which (as did *Kovats*) focused on claims for hypothetical future loss:

> The role of the court in making an assessment of damages which depends upon its view as to what will be and what would have been is to be contrasted with its ordinary function in civil actions of determining what was. In determining what did happen in the past a court decides on the balance of probabilities. Anything that is more probable than not it treats as certain. But in assessing damages which depend upon its view as to what will happen in the future or would have happened in the future if something had not happened in the past, the court must make an estimate as to what are the chances that a particular thing will or would have happened and reflect those chances, whether they are more or less than even, in the amount of damages which it awards.[18]

The next important pre-*Athey* Canadian decision was *Schrump v Koot*,[19] where it was held that future contingencies (a 25 to 50% possibility there that the plaintiff might in the future require surgery) which are less than probable are nonetheless to be taken into account in assessing damages, so long as they are not remote possibilities which amount to an invitation to speculate.[20] In regard to that proviso, recent decisions stated: "[T]he loss must be shown to be realistic, having regard to what the plaintiff's circumstances would have been absent the

---

[13] *Ibid*, at paras. 7-8.
[14] *Ibid*, at paras. 9-10.
[15] [1965] S.C.R. 457.
[16] *Ibid*, at para. 13.
[17] [1970] A.C. 166. This passage has frequently been referenced with approval, including in *Athey*, *supra*, footnote 2, at para. 29.
[18] *Ibid*, at p. 172.
[19] *Supra*, footnote 6.
[20] An example of such impermissible speculation is found in *Naylor Group Inc. v Ellis-Don Construction Ltd.* 2001 SCC 58, where a reduction in the assessment of damages on account of a negative contingency was overly based on speculation: "I think this line of reasoning carries the 'speculative' exercise too far" (at paras. 87-91; quote is from para. 88).

injury",[21] and "[t]he award cannot be based on a theoretical loss."[22] Tying in the "but for" causation test (and the balance of probabilities standard on which that test must be satisfied), the court in *Schrump* said:

> [O]ne must appreciate that though it may be necessary for a plaintiff to prove, on the balance of probabilities, that the tortious act or omission was the effective cause of the harm suffered, it is not necessary for him to prove, on the balance of probabilities, that the future loss or damage *will* occur, but only that there is a reasonable chance of such loss or damage occurring.[23]

Stated differently, the interplay between proof of causation on a balance of probabilities, and proof of harm on the lesser "real and substantial possibility" standard, amounted in *Schrump* to this: The plaintiff need not prove on a balance of probabilities that the alleged future loss or damage *will* occur; the plaintiff is obligated to prove only that there is a "real and substantial possibility" that the loss will occur. The plaintiff must, however, prove on a balance of probabilities that, but for the wrongdoing, the plaintiff would not be exposed to that less-than-50%, but nevertheless real and substantial, risk of future harm (more on this below).

It is noteworthy that here too the court quickly distinguished *Corrie v Gilbert*.[24] That decision has effectively been consigned to judicial limbo.

Next was the decision in *Graham v Rourke*,[25] which highlighted the need to take contingencies into account when applying the "real and substantial risk/possibility" test for future loss claims.[26] Two types were identified:

> [C]ontingencies can be placed into two categories: general contingencies which as a matter of human experience are likely to be the common future of all of us, *e.g.*, promotions or sickness; and "specific" contingencies, which are peculiar to a particular plaintiff, *e.g.*, a particularly marketable skill or a poor work record.[27] The former type of contingency is not readily susceptible to evidentiary proof and may be considered in the absence of such evidence. However, when a trial judge directs his or her mind to the existence of these general contingencies, the trial judge must

---

[21] *Conroy v Rodin* 2021 BCSC 861 at para. 217. Similar statements are: "The standard of proof for establishing such a possibility is a 'lower threshold than a balance of probabilities but a higher threshold than that of something that is only possible and speculative'": *Gao v Dietrich* 2018 BCCA 372 at para. 34; The possibilities must "go beyond conjecture": *Ralston v Rose* 2003 BCSC 647 at para. 35. See also *MacDougall v McLellan* 2021 BCSC 163 at para. 81; *Niescierowicz v Brookes* 2020 BCSC 1590 at para. 54.

[22] *Grant v Ditmarsia Holdings Ltd.* 2020 BCSC 1705 at para. 90; *Kim v Morier* 2014 BCCA 63 at paras. 7-8.

[23] *Supra*, footnote 6, at para. 12 (original emphasis).

[24] *Ibid*, at paras. 10-11.

[25] *Supra*, footnote 10.

[26] *Ibid*, at paras. 40-42.

[27] Another example of a specific contingency is the contingency of remarriage by the plaintiff. A 5% reduction in the assessment of damages for loss of care was made on account of that contingency in *Parsons Estate v Guymer (No. 2)* (1998) 40 O.R. (3d) 445, C.A.

> remember that everyone's life has "ups" as well as "downs". A trial judge may, not must, adjust an award for future pecuniary loss to give effect to general contingencies but where the adjustment is premised only on general contingencies, it should be modest.
>
> If a plaintiff or defendant relies on a specific contingency, positive or negative, that party must be able to point to evidence which supports an allowance for that contingency. The evidence will not prove that the potential contingency will happen or that it would have happened had the tortious event not occurred, but the evidence must be capable of supporting the conclusion that the occurrence of the contingency is a realistic as opposed to a speculative possibility.
>
> There are two specific contingencies relied on by the [defendant] in this case. First, the possibility of future improvement in [the plaintiff's] condition and, secondly, the possibility that [the plaintiff] would not have been able to work through to age 65, or care for her daily needs for the rest of her life, even if she had not been involved in the accident of July 1984. It was incumbent on the trial judge to determine whether the evidence merited the conclusion that either or both of these contingencies were realistic possibilities and, if so, to quantify those possibilities by determining the appropriate contingency deduction.[28]

Sometimes a contingency solidifies, in one direction or the other, into fact prior to trial, so that there is no need to resort to a relaxed standard of proof, because it is the actual fact that is now taken into account.[29] This can happen both with what originally was a negative[30] or a positive[31] contingency:

> [E]ntitlement to damages is to be determined as at the date of the accident, whereas assessment is to be determined as at the date of trial. Accordingly, evidence of events occurring between accident and trial may well be relevant.[32]
>
> There is an important principle here involved and it is that the court should never speculate where it knows…[33]

---

[28] *Graham v Rourke*, *supra*, footnote 10, at paras. 46-48. See also *Beldycki Estate v Jaipargas*, *supra*, footnote 7, at para. 79. In regard to negative contingencies generally, the following was said in *Thornton v Prince George School District No. 57* [1978] 2 S.C.R. 267 at para. 34: "The imposition of a contingency deduction [on a future economic loss claim] is not mandatory, although it is sometimes treated almost as if it were to be imposed in every case as a matter of law. The deduction, if any, will depend upon the facts of the case".

[29] *Beam v Pittman* (1997) 147 Nfld. & P.E.I.R. 166, Nfld. C.A. at para. 26.

[30] *Smith v Shade* (1996) 18 B.C.L.R. (3d) 141, C.A.

[31] *Parsons Estate v Guymer* (1993) 12 O.R. (3d) 743, C.A.

[32] *Ibid*, at para. 12.

[33] *Ibid*, at para. 21, quoting from *Curwen v James* [1963] 2 All E.R. 619.

The *Athey* decision

We come then to the decision in *Athey*, where consideration was given to both future and past losses, although perhaps not as clearly with regard to the latter as one might have wished:

> [There is a] fundamental distinction between the way in which courts deal with alleged past events and the way in which courts deal with potential future or hypothetical events.
>
> Hypothetical events (such as how the plaintiff's life would have proceeded without the tortious injury) or future events need not be proven on a balance of probabilities. Instead, they are simply given weight according to their relative likelihood…A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation…
>
> By contrast, past events must be proven, and once proven they are treated as certainties…The court must decide, on the available evidence, whether the thing alleged has been proven; if it has, it is accepted as a certainty…
>
> In this case, the disc herniation occurred prior to trial. It was a past event, which cannot be addressed in terms of probabilities. The plaintiff has the burden of proving that the injuries sustained in the accidents caused or contributed to the disc herniation. Once the burden of proof is met, causation must be accepted as a certainty.[34]

There is a certain lack of clarity in apparently making a distinction between future and hypothetical events (through use of the word "or").[35] As indicated above, future events are *always* hypothetical events, although that does not necessarily mean they are unlikely to occur or will be difficult to prove. In addition, it is said that "past events" must be proved on a balance of probabilities and, if so proved, they are treated as certainties. Was the term "past events" intended to refer only to events that had actually occurred in the past, or was it intended to include past hypothetical events as well?[36] We believe the former was intended; some later decisions, however, took the opposite view.

Divided case law regarding past loss claims

---

[34] *Athey v Leonati*, *supra*, footnote 2, at paras. 26-30.

[35] In addition to the passage quoted above: "Hypothetical events…*or* future events need not be proven on a balance of probabilities"; "A future *or* hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation" (emphasis added).

[36] There is a similar mild degree of ambiguity in remarks made in *Beldycki Estate v Jaipargas*, *supra*, footnote 7, at paras. 72-74.

There is a split in the case law since *Athey*. The majority view, and one which has increasingly settled into a universal position, has been that the relaxed standard of proof applies to claims for past, as well as future, hypothetical losses. There were, however, a number of decisions, including those of appellate courts, which adopted the opposite position. Curiously, there are few decisions on this issue other than from courts in BC.[37]

Perhaps the leading decision adopting the minority view was *Sales v Clarke*,[38] where the following was said:

> The plaintiff says the learned trial judge applied the wrong legal test in requiring proof of the [past] income loss on a balance of probability. He says that in the circumstances of this case the past loss should have been regarded as a lost opportunity, compensable if proven to be a real and substantial possibility.[39]
>
> [I]t is clear to me that the discussion of "hypothetical events" is limited to what will happen in the future or what would have happened in the future if something had not happened in the past.[40]

Sales was followed in BC in *Schellak v Barr*[41] and *Kerr v Macklin*,[42] and in Ontario in *Cobb v Long Estate*.[43] Both *Sales* and *Schellak* were considered in the subsequent (and often-followed) BCCA decision in *Smith v Knudsen*,[44] where they were distinguished on rather flimsy grounds, rather than held to have been incorrectly decided.[45]

There are now a great many decisions, most of which are out of BC courts, holding that the "real and substantial possibility" standard is applicable to a claim for a pre-trial loss, so long as the plaintiff has also satisfied, on the balance of probabilities standard, the "but for" test of

---

[37] One non-BC decision which adopted the minority view is *Davies v The Corporation of the Municipality of Clarington* 2018 ONSC 4370 at paras. 52-56. The issue there involved a pre-trial loss of income claim. As noted below, virtually all courts today say that that is a type of hypothetical claim to which the relaxed standard of proof applies.

[38] (1998) 165 D.L.R. (4th) 241, B.C.C.A.

[39] *Ibid*, at para. 2.

[40] *Ibid*, at para. 11.

[41] 2003 BCCA 5, where the following was said (at para. 47): "The appellants submit that the standard to be met is a balance of probabilities and that the real possibility test is applicable to future events, but does not apply to past loss of income. The appellants are correct in that submission." *Schellak* was followed in *Ma v Haniak* 2017 BCSC 549 at para. 346.

[42] 2004 BCSC 318 at para. 18.

[43] 2017 ONCA 717 at para. 40.

[44] *Supra*, footnote 4.

[45] *Ibid*, at paras. 19-38.

causation.[46] These include a number of BC appellate decisions:[47] *Gill v Probert*;[48] *Smith v Knudsen*;[49] *Grewal v Naumann*;[50] *Gao v Dietrich*;[51] *Rousta v MacKay*;[52] *Dhaliwal v Greyhound Canada Transportation Corp.*;[53] *Griffioen v Arnold*;[54] *Riley v Ritsco*;[55] *Thomas v Foskett*.[56]

On the other hand, there are, in addition to *Schellak*, two decisions of the BCCA which, without referencing *Sales*, have taken the opposite view.[57] The following was said in *Reynolds*:

> The burden of proof for past loss of earning capacity is proof on a balance of probabilities. It is a different burden of proof than that required to show future loss of earning capacity [which requires only a real and substantial possibility of loss]…The plaintiff must therefore prove his past loss of earning capacity on a balance of probabilities.[58]

And in *Ostrikoff*:

> The task for the plaintiff at trial in respect to past loss of earning capacity is to prove the loss on a balance of probabilities, as contrasted with the task in claiming for future loss of earning capacity, which requires the plaintiff to establish a real and

---

[46] Among those are the following trial level decisions: *Harris v Doe #1* 2021 BCSC 162 at para. 162: "The burden of proof relating to actual past events is a balance of probabilities. However, the test to be applied for both past and future hypothetical events is whether there is a real and substantial possibility that the events in question would occur"; *Gilbert v Bottle* 2011 BCSC 1389 at para. 224: "The burden of proof of actual past events is a balance of probabilities. Where the plaintiff's claim for past loss of earning capacity depends on proof of past hypothetical events, however, a different standard will apply. Once liability and causation have been established on a balance of probabilities, past hypothetical events that were a real and substantial possibility must be considered and taken into account. Such events are to be given weight according to the relative likelihood that they would have occurred"; *Bossio v Li* 2012 BCSC 1544 at para. 61; *Cantrill v Taylor* 2021 BCSC 764 at para. 8; *Carlos v Maier* 2021 BCSC 1056 at para. 49.

[47] It will similarly apply to the onus resting with a defendant who alleges a failure to mitigate which involves hypothetical events: *Forghani-Esfahani v Lester* 2019 BCSC 332 at para. 56 and following, and also to the onus resting with a defendant raising a crumbling skull defence: *Gill v Borutski* 2021 BCSC 554 at paras. 46-49; *Javorovic v Booth* 2021 BCSC 336 at para. 39; *Bidulka v Haugen* 2020 BCSC 1065 at para. 51. The latter is a form of "specific contingency" discussed in *Graham v Rourke*, *supra*, footnote 10, and referred to in *Athey v Leonati*, *supra*, footnote 2, at para. 35, as requiring a "measurable risk". However, "A risk that is a real and substantial possibility, and not mere speculation, is a risk that is measurable": *Dornan v Silva* 2021 BCCA 228 at para. 63.

[48] 2001 BCCA 331 at para. 9: "In assessing hypothetical events there is no reason to distinguish between those before trial and those after trial. In making an allowance for contingencies the trial judge was assessing the hypothetical events that could have affected the plaintiff's [pre-trial] employment earnings, according to the assessment of their relative likelihood."

[49] *Supra*, footnote 4, at paras. 5 and 23-38.

[50] 2017 BCCA 158, followed in *Party A v British Columbia (Securities Commission)* 2021 BCCA 358 at para. 174.

[51] *Supra*, footnote 21, at paras. 34-40.

[52] 2018 BCCA 29 at para. 14.

[53] *Supra*, footnote 7, at paras. 29-30.

[54] 2019 BCCA 83 at para. 67.

[55] 2018 BCCA 366 at para. 89.

[56] 2020 BCCA 322 at para. 36.

[57] *Reynolds v M. Sanghera & Sons Trucking Ltd.* 2015 BCCA 232 and *Ostrikoff v Oliveira* 2015 BCCA 351.

[58] *Reynolds*, *ibid*, at paras. 15 and 18.

> substantial possibility of the future event…[I]t remains true that it is for the plaintiff to prove a claim for past loss of earning capacity on a balance of probabilities…[59]

Reynolds and *Ostrikoff* were relied upon by the defendants in *Grewal*, where the court dealt with those decisions as follows:

> The appellants' submission conflates the way the courts deal with alleged past events and the way courts deal with hypothetical events, past or future…The governing authority in this court is *Smith v Knudsen*…[where] this court, after an extensive review of the authorities, rejected the proposition that a claim for past loss of opportunity had to be established on a balance of probabilities…[Unlike the issues of liability and causation, which require proof on a balance of probabilities, on the assessment of damages] the same test applies regardless of whether you are assessing past or future loss of earning capacity. In both situations, the judge is considering hypothetical events…[N]either *Reynolds* nor *Ostrikoff* referenced *Smith*. To the extent that those decisions could be read to hold that a past hypothetical event must be proven on a balance of probabilities, they must be regarded as *per incuriam*.[60]

Ostrikoff was effectively rejected in another BCCA decision as well:

> The test to be applied to *hypothetical events*, past and future, is whether there is a real and substantial possibility that the events in question would occur…[T]he standard for the proof of hypothetical past events, like hypothetical future events, is the lesser "real and substantial possibility" threshold. This standard can be contrasted with the standard of proof for past events, which is on the ordinary civil balance of probabilities standard, and alleged events which do not rise to the "real and substantial possibility" standard because they constitute mere speculation.[61]

Decisions such as *Reynolds* and *Ostrikoff*, and the earlier decision in *Sales*, were summarily dismissed in *Gao* with the following remark:

---

[59] *Ostrikoff v Oliveira*, *supra*, footnote 57, at paras. 15 and 21. *Ostrikoff* was followed in *Bricker v Danyk* 2015 BCSC 2404 at para. 142.
[60] *Grewal v Naumann*, *supra*, footnote 50, at paras. 44-47.
[61] *Rousta v MacKay*, *supra*, footnote 52, at paras. 14 and 17 (original emphasis).

> To the extent that other decisions could be read to hold that a past hypothetical event must be proven on a balance of probabilities they must be regarded as *per incuriam*.[62]

Ontario appellate decisions

In *West v Knowles*,[63] while not making any reference to the earlier Ontario appellate decisions in *Cobb v Long Estate*[64] and *Basandra v Sforza*,[65] both of which applied the minority view, the court relied on another Ontario appellate decision which embraced the majority, and now well-established, BC position:

> In the case of a claim for economic loss following childhood sexual abuse, *both* past and future loss of income claims involve a consideration of hypothetical events because the child had not earned income prior to the assault. The jury must therefore determine not what did happen in the past but the chance that something *would* have happened, had the sexual abuse not happened in the past.
>
> This requires a determination of loss of earning capacity, not the loss of actual earnings. Since the plaintiff is not required to prove hypothetical events on a balance of probabilities, the burden of proof for entitlement is that of real and substantial possibility…This is because we must now consider what kind of career the victim would have had, had he not been sexually abused.[66]

The court in *West* adopted the following comment made in one of the recent BCCA decisions:

> With respect to past facts, the standard of proof is the balance of probabilities. With respect to hypothetical events, both past and future, the standard of proof is a "real and substantial possibility".[67]

---

[62] *Gao v Dietrich*, *supra*, footnote 21, at para. 40. See also *Jacobs v Basil* 2017 BCSC 1339 at para. 47. In *Hans v Volvo Trucks North America Inc.* 2016 BCSC 1155, affirmed 2018 BCCA 410, it was said (at para. 650) that an "overly broad" statement had been made in *Reynolds v M. Sanghera & Sons*.
[63] *Supra*, footnote 1.
[64] *Supra*, footnote 43 at para. 40: "[A] plaintiff who claims for pre-trial pecuniary loss must prove the amount of that loss on a balance of probabilities…In contrast, a claim for future (*i.e.* post-trial) pecuniary loss needs only be proved on the basis of a 'real and substantial possibility' of impairment of future earnings".
[65] 2016 ONCA 251 at para. 24: "With respect to past losses, the burden of proof is on the balance of probabilities. For future losses, the burden is somewhat relaxed and can be proven on the basis of 'substantial possibilities'".
[66] *MacLeod v Marshall*, *supra*, footnote 5, at paras. 17-18 (original emphasis).
[67] *Gao v Dietrich*, *supra*, footnote 21, at para. 34, adopted in *West v Knowles*, *supra*, footnote 1, at para. 74.

Presumably, the Ontario courts will treat the *Cobb* and *Basandra* decisions, insofar as this issue is concerned, in the same manner as the out-of-step BC decisions are now treated by the courts of that province; as having been decided *per incuriam*.[68]

An important *caveat* to the now virtually-universal position is that the relaxed standard of proof applies only "to the extent that the analysis requires a consideration of hypothetical events".[69] "The burden of proof of actual past events [continues to be] a balance of probabilities",[70] and

> The standard of proof for either past or future loss of earning capacity depends on the "fact" relied on. Actual facts, such as the plaintiff's pre-accident earnings, must be proved on a balance of probabilities. Hypothetical facts, on the other hand, such as whether a plaintiff would have received a promotion if they continued in his or her pre-accident employment, may be considered so long as it is a real and substantial possibility and not mere speculation.[71]

B. THE INTERPLAY BETWEEN THE "BUT FOR" TEST AND THE RELAXED STANDARD OF PROOF FOR (MOST) HYPOTHETICAL CLAIMS

To which injury does the "but for" test apply?

First, some general comments: Rarely does wrongdoing cause only a single injury or loss. There is usually an immediate injury, such as the back injury suffered by the plaintiff in *Athey*, followed by secondary harm, such as loss of income, perhaps followed by another injury such as a disc herniation, and further loss of income. There can be spreading branches of resulting injuries and losses. Each injury/loss for which claim is made requires "but for" proof of causation. Just because a plaintiff proves that they suffered back injuries which would not have been sustained but for the wrongdoing does not mean that a later disc herniation would similarly not have occurred but for the wrongdoing. It would be contrary to basic principle to permit recovery for an injury or loss which has not been shown to be causally connected to the wrongdoing.

The central and mandatory nature of the "but for" test for the purpose of proving causation was highlighted in *Athey*:

> [The "but for" test] requires the plaintiff to show that *the injury* would not have occurred but for the negligence of the defendant.[72]

---

[68] To be fair, it should be noted that the issue with which we are dealing was no more than an incidental matter which was given virtually no consideration in the two decisions.
[69] *Juelfs v McCue* 2019 BCSC 1195 at para. 87(c); *Bergeron v Malloy* 2020 BCSC 963 at para. 106.
[70] *Bideshi v McCandless* 2020 BCSC 1853 at para. 124. See also *Anderson v Molon* 2020 BCSC 1247 at paras. 234-36.
[71] *Dunn v Heise* 2021 BCSC 754 at para. 158.
[72] *Athey v Leonati, supra*, footnote 2, at para. 14 (emphasis added).

But which "injury" was the court referencing - the initial back injuries sustained in the accidents, or the secondary injury (the disc herniation)? The court in *Athey* was considering the claim for the disc herniation. Did that mean that the plaintiff was required to show that, but for the wrongdoing, that particular injury would not have been sustained? The answer clearly is Yes:

> The only issue was whether the disc herniation was caused by the injuries sustained in the accidents or whether it was attributable to the [plaintiff's] pre-existing back problems…In the present case, there was a finding of fact that the accident caused or contributed to the disc herniation…[73]

As the disc herniation in *Athey* occurred prior to trial, it was an actual, not a hypothetical, event, one which was susceptible to proof on a balance of probabilities.[74] While the trial judge found that the role played by the accidents amounted to a less-than-50% (25%) contribution to the occurrence of the herniation, she also found, on a balance of probabilities, that the herniation would not have occurred but for the accidents. There was no need to resort to the "real and substantial possibility" standard of proof, because this was not a hypothetical injury. The plaintiff therefore was entitled to 100% of the damages attributable to the disc herniation (except to the extent that the defendant might have shown that it was a "crumbling skull" situation).

What, however, of the situation where the particular injury or loss for which claim is being made involves either a future or a past hypothetical event in regard to which proof on a balance of probabilities might be impossible? Will the requirement to satisfy the "but for" causation test on a balance of probabilities doom that type of claim to failure?

Generally speaking, there are two responses in that situation:

a. The "but for" test is applied to the *risk* of the occurrence of the hypothetical injury, not to the hypothetical injury itself – *i.e.* the question to be asked is:

   But for the wrongdoing,

   (i) would the plaintiff be exposed to the proved real and substantial risk of future injury or harm or, if the issue involves a claim for a past loss,
   (ii) would there be no real and substantial possibility of pre-trial harm having occurred? and

b. The injury or loss to which the "but for" test is applied is not necessarily the specific injury or loss for which claim is being made, but rather a more general and less hypothetical version, one which would be more amenable to proof on a balance of probabilities.

Response #1 to dealing with the "but for" test where the claim is hypothetical

---

[73] *Ibid*, at paras. 7 and 33.
[74] As noted above, the significance of this was highlighted in *Anderson v Molon*, *supra*, footnote 70, at paras. 234-36.

Let's take the factual background in *Athey* and twist it somewhat. Instead of the disc herniation having already occurred at the time of trial, let's instead make it a future risk, with the evidence being that there is a 25% chance of a disc herniation in the next 5 to 10 years. When there is only a 25% chance that something will occur, how does one prove on a balance of probabilities that it will occur at all? If the plaintiff were required to show that, because of the wrongdoing, they are more likely than not to sustain a disc herniation in the future, they would be out of luck. That, however, would be the wrong way of looking at the situation. The correct approach is to ask: But for the wrongdoing, would the plaintiff be exposed to a 25% risk of a future disc herniation? If the risk of future injury is a real and substantial possibility – and a 25% risk would certainly qualify as that – then the plaintiff need only show on a balance of probabilities that, but for the wrongdoing, they would not be so imperiled. The plaintiff would deserve compensation for having been made subject to that looming threat.

The classic and usual application of the "but for" test is summarized in the following statement, which largely mirrors the statement made in *Athey* that is reproduced above:[75]

> 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.[76]

However, the question that again must be asked is: Which "injury" would not have occurred? As previously noted, the passage in *Athey* was formulated in the context of a past actual event. It dealt with an injury that had already occurred, so that the statement "[The 'but for' test] requires the plaintiff to show that *the injury* would not have occurred but for the negligence of the defendant" was naturally directed toward that past actual event. What we are considering, however, is not an actual, but a hypothetical (whether future or past), injury. The basic principle outlined in the generic passage in *Clements* undoubtedly remains valid and binding, but subject to the context in which it is applied. The critical question is: What is "the injury" that would not have occurred but for the defendant's negligent act?

A real and substantial risk of future harm, or possibility of past harm, introduced by the defendant's wrongdoing when otherwise that risk or possibility would not exist, is itself a form of compensable injury. The measure of damages consists of the value of the hypothetical injury or loss, discounted for the likelihood of its occurrence. It is that *risk* of future injury, or the *possibility* of past injury, which constitutes "the injury" to which the "but for" test applies. The test cannot apply to an actual injury, because there *is no* "actual injury"; there is only the potential or threat of one in the future, or the possibility of one having occurred in the past.

Therefore, the appropriate question to ask in the case of a hypothetical injury is whether the plaintiff has proved on a balance of probabilities that, but for the wrongdoing, the risk – *i.e.* the real and substantial possibility of future harm (which of course must be proved) - would not be present; or, in the case of a past hypothetical loss or injury, whether the plaintiff has proved on a

---

[75] *Supra*, footnote 72.
[76] *Clements (Litigation Guardian of) v Clements* 2012 SCC 32 at para. 8 (emphasis added).

balance of probabilities that, but for the wrongdoing, there would not [delete the dot which is after the word "not"] be a real and substantial possibility of past loss or injury having occurred.

The adoption of that approach can be seen in the following (although not incorporating any reference to the "but for" test):

> [U]ltimately the question is whether the plaintiff has proven on a balance of probabilities that there is a real and substantial possibility, and not mere speculation, that the loss will occur.[77]
>
> Is there a real and substantial possibility of a future event leading to an income loss?[78]

The very first significant Canadian decision on this issue provided a reconciliation of the two standards of proof:

> [O]ne can decide on a balance of probabilities that there is a *risk* of something happening in the future. In an appropriate case such a risk can be taken into account in assessing damages for the wrongful act or default that caused it. As put by Cartwright J…"the innocent person who has been gravely injured by the fault of another should not be called upon to bear all the risk of the uncertainties of the future".[79]

The emphasis on the introduction of risk of harm by the defendant's wrongdoing as "the injury" for which compensation is being sought was further confirmed in *Graham*:

> If the plaintiff establishes a real and substantial *risk* of future pecuniary loss, she is entitled to compensation.[80]

The 25% risk of a future disc herniation in the posited scenario would constitute a real and substantial possibility of a future serious injury, one which could be shown on a balance of probabilities to be causally connected on a "but for" basis to the wrongdoing. To deprive the plaintiff of a right to compensation for having to undergo that significant risk would be unjust. At the same time, the application of the relaxed standard of proof would result in fair compensation because of the reduction of damages to reflect the less-than-50% likelihood of the occurrence of the hypothetical injury.

Schrump was an example of this approach. The evidence was that there was a 25 to 50% chance or risk of a need for future surgery. [delete Here again,] To bar compensation for having been

---

[77] *Williams v Rosenstock* 2020 ABQB 303 at para. 410.
[78] *Perren v Lalari* 2010 BCCA 140 at para. 32; *Westbroek v Brizuela* 2014 BCCA 48 at para. 64; *Coffey v Sabbaghan* 2021 BCSC 63 at paras. 53-62.
[79] *Kovats v Ogilvie*, *supra*, footnote 12, at para. 7 (emphasis added). See too the comment made in *Schrump v Koot* reproduced *supra* at footnote 23.
[80] *Graham v Rourke*, *supra*, footnote 10, at para. 40 (emphasis added).

made subject to that risk would have been unjustifiable. The plaintiff therefore was required to show on a balance of probabilities only that, but for the wrongdoing, he would not have been exposed to that real and substantial risk of future harm.

The position advocated above is no more than a reflection of what was described in *Athey* as "the essential purpose and most basic principle in tort law", that being to restore the plaintiff to the position they would have been in absent the defendant's negligence (the "original position").[81] Viewed through that lens, the question would be: Has the plaintiff proved on a balance of probabilities that, but for the wrongdoing, their "original position" has been changed to their detriment? In a case involving a hypothetical future injury, the plaintiff's "original position" would be one in which there was no real and substantial risk of future injury or harm; in the case of a claim for a past loss, the "original position" would be one in which there was no real and substantial possibility of past harm having occurred.[82] Awarding damages for that hypothetical future or past loss is the manner in which the plaintiff is compensated for the adverse change to their "original position".

To summarize: In the case of a hypothetical injury, it is the *risk* of future injury, or the *possibility* of past injury, which constitutes "the injury" for which claim is being made and for which damages are awarded; the wrongdoer has subjected the plaintiff to a risk or possibility of harm that would not otherwise be present. The plaintiff is *not* obligated to prove, on a balance of probabilities, that the harm will in fact be, or has in fact been, sustained, but only that there is a real and substantial risk or possibility of that. The plaintiff *does* have an obligation to make proof on a balance of probabilities, but that obligation involves proof of a different matter: a causal connection, in the "but for" sense, between "the injury" and the defendant's wrongdoing.[83] There is no conflict between the two standards of proof.

Stated simply, the following questions should be asked:[84]

a. Has the plaintiff established a real and substantial risk of future injury or harm or, if the claim involves a past loss, a real and substantial possibility that a past injury or loss was sustained; and if so,
b. Has the plaintiff shown, on a balance of probabilities that, but for the wrongdoing, they would not be exposed to that risk of future harm, or to the possibility of a past loss having been sustained?

---

[81] *Athey v Leonati*, *supra*, footnote 2, at para. 32.
[82] This line of reasoning applies equally to a consideration of whether the "crumbling skull" doctrine applies: *Taylor v Peters* 2021 BCSC 2444 at para. 44. See also *Pickwell v Rotter* 2022 BCSC 18 at paras. 72-76 and *supra*, footnote 47
[83] While a bit jumbled, the following comment appears to incorporate this view: "I am satisfied on the whole of the evidence that, but for the [wrongdoing], there is a real and substantial possibility that the plaintiff would have…found full-time employment during the [pre-trial] period": *Basi v Xia* 2021 BCSC 1324 at para. 93. Somewhat simplistic and ambiguous is the following: "To succeed, [the plaintiff] needs to demonstrate that there is a real and substantial possibility that the hypothetical events that she advances would have taken place, but for the accident": *Higashi v Chiarot* 2021 ONSC 8201 at para. 139. A better formulation is found in *Constantinou v Stannard* 2021 ONSC 5585 at para. 37. See also *Deng v Malhotra* 2022 BCSC 101 at para. 102.
[84] These questions are effectively asked, in longer form, in *Singh v Storey* 2021 BCSC1825 at para. 66 and in *Smith v Knudsen*, *supra*, footnote 4, in the passages reproduced below at footnotes 87 and 88.

Response #2 to dealing with the "but for" test where the claim is hypothetical

The second method of coping with the potential clash of different standards of proof is illustrated in *Smith v Knudsen*,[85] which involved a pre-trial hypothetical loss. The plaintiff was the sole shareholder, director, and officer of a company (described as his "alter ego") which allegedly lost $1.39 million because, due to his injuries, he had been unable to prepare a quality tender offer for a major contract:[86]

> [The plaintiff] was required to establish both liability and causation on the balance of probabilities; specifically, the [plaintiff] was required to establish on the balance of probabilities that the [defendant's] negligence, in whole or in part, caused the accident, and that the injuries the [plaintiff] sustained in the accident caused or contributed to the loss for which damages were sought.
>
> …[T]he issue that is squarely in contention in the case at bar is whether the [plaintiff's] claimed pecuniary loss, even though the loss was by its nature hypothetical, had to be proven on the balance of probabilities.[87]
>
> …..
>
> [A] causal connection must be established between the accident and pecuniary loss claimed, and the causal connection must be established on the balance of probabilities. In other words, to succeed in the claim, the [plaintiff] would have to establish, on the balance of probabilities, that the injuries he sustained in the accident impaired his ability to prepare or marshal the documents required for the contract bid.
>
> The jury ought to have been instructed that if they were satisfied on a balance of probabilities that the injuries sustained as a result of the accident caused such an impairment, they had to go on to assess the chances of the [plaintiff] having been the successful bidder on the ambulance contract and to make an award using that assessment.[88]

As outlined above, the application of the "but for" test on a balance of probabilities standard of proof to the precise injury or loss for which claim is being made may be unworkable where that precise injury or loss involves hypothetical matters.

The question posed by the court in *Smith v Knudsen* therefore was not whether the plaintiff had proved on a balance of probabilities that, but for the wrongdoing, he would have successfully

---

[85] *Supra*, footnote 4. This decision has been widely followed in BC.
[86] *Ibid*, at para. 19.
[87] *Ibid*, at paras. 26-27.
[88] *Ibid*, at paras. 36-37.

obtained the contract and the profit to be derived from it (a hypothetical issue), but rather whether, but for the wrongdoing, the plaintiff would have been better able to prepare or marshal the documents required for the contract bid.[89] By identifying a general, rather than precise, loss, the "but for" test was made workable for the plaintiff. The loss was no longer hypothetical and causation was therefore amenable to proof on a balance of probabilities.

As noted below, that is the approach which has most often been taken with regard to hypothetical loss of income claims. It is the general, not the specific, loss to which the "but for" test, and the balance of probabilities standard of proof associated with it, has been applied.

Claims for loss of income – loss of earning capacity v loss of specific income

The commonest example of hypothetical claims are claims for loss of income, whether past or future:[90]

> Projecting what a plaintiff would have earned in the past had she not been injured is a hypothetical exercise.[91]
>
> An assessment of a loss of income involves a consideration of hypothetical events.[92]
>
> An assessment of loss of both past and future earning capacity involves consideration of hypothetical events.[93]

Claims for future loss of income are determined either on the basis of loss or impairment of earning capacity[94] (usually described as the "capital asset" approach), or loss of specific income (usually described as the "earnings" approach).

> Both approaches are correct. The "earnings" approach will generally be more useful when the loss is easily measurable…Where the loss "is not measurable in a pecuniary way", the "capital asset" approach is more appropriate.[95]

---

[89] *Ibid*, at para. 36.
[90] See generally *Primeau v Dhaliwal* 2022 BCSC 19 at paras. 171-77 and *Ratelle v Barton* 2022 BCSC 22 at paras. 220-26.
[91] *Libera v Burgoyne* 2021 BCSC 1028 at para. 104.
[92] *Hale v Keyes* 2020 BCSC 559 at para. 99.
[93] *Murphy v Tait* 2021 BCSC 292 at para. 104. See too *C.D. v Mostowy* 2021 BCSC 1920 at para. 77; *Sulinska v Payne* 2021 BCSC 202 at para. 42.
[94] "It is not loss of earnings but, rather, loss of earning capacity for which compensation must be made": *Andrews v Grand & Toy*, *supra*, footnote 10, at para. 58; *B.(M.) v British Columbia* 2003 SCC 53 at para. 47; *Palmer v Goodall* (1991) 53 B.C.L.R. (2d) 44, C.A. at paras. 51-52; *Boucher v Wal-Mart Canada Corp.* 2014 ONCA 419 at para. 102; *Villing v Husseni* 2016 BCCA 422 at para. 17; *Bahniwal v Johal* 2021 BCSC 269 at para. 109.
[95] *Perren v Lalari*, *supra*, footnote 78 at para. 32; *Westbroek v Brizuela*, *supra*, footnote 78, at para. 64; *Hoy v Williams* 2014 BCSC 234 at para. 156; *Villing v Husseni*, *ibid*, at para. 17.

While "[i]t is up to the trial judge to determine what approach to use to quantify the loss (*i.e.* an earnings approach or a capital asset approach)",[96] the case law has generally taken the impairment of earning capacity, or "capital asset", approach when dealing with claims not only for future but also for past loss of income claims,[97] or at least (as indicated in the passage reproduced above) in those situations "where the loss is not easily quantified".[98] Where, however, the plaintiff was working at the time of the wrongdoing, "there is a clear benchmark from which to determine whether there was a loss of income and from which to quantify past loss of income…As such, it should be determined on a balance of probabilities",[99] although actual lost income is not necessarily the most reliable measure of the value of the loss of capacity to earn income.[100]

A plaintiff would otherwise be hard-pressed to prove on a balance of probabilities that, but for the wrongdoing, they would have earned specific income, during a relatively short period of time, from some hypothetical and unknown employment. Proof, on the basis of the "real and substantial possibility" standard, of loss or impairment of pre-trial earning capacity,[101] together with proof, on a balance of probabilities standard, of a "but for" causal connection with the wrongdoing, is the correct approach.

The court will consider "what the plaintiff likely would have earned, not what they could have earned, if the injury had not been sustained",[102] and the determination will involve an assessment, not a mathematical calculation, of the damages:[103] "The assessment of damages is a matter of judgment, not calculation,"[104] although "the court 'should ground itself as much as possible in factual and mathematical anchors'".[105] "An award for loss of income earning

---

[96] *Hale v Keyes, supra*, footnote 92, at para. 99. See also *Anderson v Molon, supra*, footnote 70, at para. 220 and following; *Hadley v Pabla* 2021 BCSC 238 at paras. 81-83; *Palani v Lin* 2021 BCSC 59 at paras. 92-95. "[The earnings approach] is generally preferred where there is an earning pattern history or some other circumstances allowing the court to chart an earnings path. The capital asset approach, on the other hand, is more appropriate where a plaintiff's circumstances are more indeterminate": *Coulombe v Morris* 2021 BCSC 2034 at para. 47.

[97] "In *Rowe v Bobell Express Ltd.*, 2005 BCCA 141 at paras. 30-31, the Court of Appeal explained that a claim for what is often described as 'past loss of income' is actually a claim for past loss of earning capacity": *Valand v Campbell* 2021 BCSC 439 at para. 66. "Both past and future income loss is properly premised on the basis of a loss of income earning capacity": *Murphy v Tait, supra,* footnote 93, at para. 101. See also *Lee v Tunuguntla* 2021 BCSC 223 at para. 42; *Orregaard v Clapci* 2020 BCSC 1726 at para. 144; *Ibbitson v Cooper* 2012 BCCA 249 at para. 19.

[98] *Gao v Dietrich, supra*, footnote 21, at paras. 31 and 62. The capital asset approach "is not a panacea for situations where what could have been proven, or at least given some evidentiary foundation, was not proven or given an evidentiary foundation" (at para. 62).

[99] *MacLeod v Marshall, supra*, footnote 5, at para. 15.

[100] *Ibbitson v Cooper, supra*, footnote 97, at para. 19.

[101] *MacLeod v Marshall, supra*, footnote 5, at paras. 18-22. The same conclusion was reached in *Grewal v Naumann, supra*, footnote 50, at paras. 42-58 by Goepel, J.A., dissenting on other grounds. *Grewal* has been widely followed in the BC courts.

[102] *Faizi v Thandi* 2019 BCSC 434 at para. 165; *Golkar-Karimabadi v Bush* 2021 BCSC 990 at para. 82.

[103] *Mulholland (Guardian ad litem of) v Riley Estate* (1995) 12 B.C.L.R. (3d) 248, C.A. at para. 43; *Aarts-Chinyanta v Binkley* 2020 BCSC 392 at para. 175; *Quigley v Cymbalisty* 2021 BCCA 33 at para. 34.

[104] *Rosvold v Dunlop* 2001 BCCA 1 at para. 18. "[D]amages are to be assessed, and not mechanically calculated": *Coulombe v Morris, supra*, footnote 96, at para. 47.

[105] *Tolea v Huang* 2021 BCSC 260 at para. 163; *Schenker v Scott* 2014 BCCA 203 at paras. 50-53.

capacity, whether past or future, requires an assessment that considers the overall fairness and reasonableness of the award, taking into account all positive and negative contingencies."[106]

The lower standard of proof is not, however, a blank cheque; it demands that "any employment loss must be shown to be realistic, having regard to what the plaintiff's circumstances would have been absent the injury…[and there] must be an evidentiary foundation to the plaintiff's claim."[107] "Adopting the capital asset approach does not mean that the assessment is entirely at large without the necessity to explain the factual basis of the award".[108] However, the fact that the plaintiff may have sustained no drop in income after the wrongdoing, or even had higher income, does not necessarily mean that there was no impairment of earning capacity.[109]

Concluding remarks

There is no longer any serious doubt that the "real and substantial possibility" standard relating to future claims applies equally to past hypothetical claims.[110] The "but for" test, to be shown on a balance of probabilities, similarly applies in both instances. "Causation is an expression of the relationship that must be found to exist between the tortious act of the wrongdoer and the injury to the victim in order to justify compensation to the latter out of the pocket of the former."[111] The principle is seemingly simple, but when applied to hypothetical scenarios, it has caused difficulty. The two standards of proof are not, however, inconsistent, provided the right questions are asked, as we have hopefully demonstrated. It should be noted that the comments made in this paper relate to tort claims; a claim made for breach of contract may be subject to different principles.[112]

Hillel David and Theresa Hartley
Both of McCague Borlack LLP, Toronto

---

[106] *Murphy v Tait*, *supra*, footnote 93, at para. 106; *Hussack v Chilliwack School District No. 33* 2011 BCCA 258 at para. 92; *Boyle v Luc* 2021 BCSC 200 at para. 66(g). "Ultimately, the award must be fair and reasonable in all the circumstances": *Coulombe v Morris*, *supra*, footnote 96, at para. 46.

[107] *Gao v Dietrich*, *supra*, footnote 21, at para. 36. It was held there that the plaintiff had not satisfied the "real and substantial possibility" test for his claim for past loss of income (at para. 66). See also *Quigley v Cymbalisty*, *supra*, footnote 103, at para. 33; *Sahota v Slupskyy* 2019 BCSC 2215 at para. 121; *Barker v Barker* 2021 ONSC 158 at para. 109.

[108] *Morgan v Galbraith* 2013 BCCA 305 at para. 56; *Villing v Husseni*, *supra*, footnote 94, at para. 18. Some relevant issues for consideration when applying the capital asset approach were listed in *Villing* at para. 19, and the legal principles applicable to the assessment of loss of future earning capacity were summarized in *Sulinska v Payne*, *supra*, footnote 93, at para. 43 and *Morgan v Ziggiotti* 2021 BCSC 106 at para. 178 and following. See too *Doberstein v Zhao* 2020 BCSC 1788 at paras. 140-44; *Bidulka v Haugen*, *supra*, footnote 47, at paras. 77-82; *Safdari v Buckland* 2020 BCSC 769 at para. 186 and following, additional reasons etc.

[109] *Marshall v Dyson* 2020 BCSC 2052 at para. 193; *Willett v Rose* 2017 BCSC 627 at para. 69; *Tolea v Huang*, *supra*, footnote 105, at para. 164. See generally *Rab v Prescott* 2021 BCCA 345.

[110] "Assessing past hypothetical events is no different than future hypothetical events": *Sweeney v Yu* 2021 BCSC 2133 at para. 254.

[111] *Snell v Farrell* [1990] 2 S.C.R. 311 at para. 27.

[112] See *Inzola Group Ltd. v City of Brampton* 2019 ONSC 7632 at paras. 268-69 affirmed 2021 ONCA 143.