ESTABLISHING CAUSATION IN CASES OF CHRONIC PAIN

By Jim Tomlinson, Partner, and
Anthony Gatensby, Student-at-Law, McCague Borlack LLP

"Everything has a determinate cause, even if we do not know what it is … The fact that proof is rendered difficult or impossible because … medical science cannot provide the answer … makes no difference. There is no inherent uncertainty about what caused something to happen in the past or about whether something which happened in the past will cause something to happen in the future. Everything is determined by causality".[31]

- Lord Hoffmann of Chedworth, House of Lords

Introduction

It has now been over 10 years since Justice Gonthier made his well-known statements regarding chronic pain in the Supreme Court of Canada decision of *Nova Scotia (Workers' Compensation Board) v. Martin*.[32] While Justice Gonthier acknowledged that chronic pain lacks any objective signs or scientific explanation, he proclaimed that "there is no doubt that chronic pain patients are suffering and in distress, and that the disability they experience is real".[33] This statement has been cited in dozens of chronic pain cases across the country,[34] arguably becoming the foundation for the success of these types of claims well into the future.

Every plaintiff who alleges that they suffer from chronic pain as the result of negligence must prove that there is a causal link between their disability and the defendant's actions. This ensures that a defendant is not held liable for injuries where such injuries "may very well be due to factors unconnected to the defendant".[35]

This paper provides an overview of the law of causation as it pertains to a plaintiff that suffers from chronic pain as the result of an injury. It will begin with an analysis of recent Supreme Court of Canada jurisprudence regarding how a plaintiff can establish factual causation through the "but for" test. It will then provide an analysis of legal causation, which has also been referred to as "remoteness".[36] In the remoteness analysis, the paper will clarify when chronic pain can be considered a foreseeable injury, and discuss the principle of the "thin-skulled plaintiff". It will conclude by exploring how the courts apportion damages when faced with pre-existing injuries, and in particular, the principle known as the "crumbling skull".

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[31] *Gregg v Scott*, [2005] UKHL 2; [2005] 2 AC 176 at 196.
[32] *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 SCR 504.
[33] *Martin*, *supra* note 32 at para 1.
[34] A search on the CanLII database of all cases citing *Martin* and the words "chronic pain" total 122. The cases citing the words "chronic pain" in Ontario total 17,366.
[35] *Resurfice Corp v Hanke*, 2007 SCC 7, [2007] 1 SCR 333 at para 23 citing *Snell v Farrell*, [1990] 2 SCR 311 at 327.
[36] *Frazer v Haukioja*, 2010 ONCA 249, [2010] OJ No 1334 at para 51 *per* Justice LaForme.

Factual Causation and the "But For" Analysis

There are two branches to causation: factual causation and legal causation (also called remoteness).[37] Factual causation requires the plaintiff to prove that "but for" the defendant's negligence, the damages would not have occurred.[38] If the plaintiff proves factual causation, the plaintiff must still establish legal causation. Legal causation requires that the loss must be reasonably foreseeable to the defendant and not too remote.[39]

The Supreme Court of Canada recently revisited the legal concept of factual causation in the case of *Clements v Clements*.[40] In *Clements*, the Court affirmed that the primary test for proving factual causation is to ask whether the plaintiff's injuries would have resulted "but for" the defendant's act of negligence.[41] It is to be applied in a "robust and pragmatic" fashion,[42] meaning that it is enough to show a "common sense inference" without resorting to scientific evidence.[43]

The Supreme Court also acknowledged a narrow exception to the "but for" test: if a plaintiff can show that the defendant's actions "materially contributed to the risk of the plaintiff's injury", then factual causation will be deemed to have been established.[44] The "material contribution" test may only be used in very restricted circumstances, namely where:

1. "As a general rule, a plaintiff cannot succeed unless she shows as a matter of fact that she would not have suffered the loss "but for" the negligent act or acts of the defendant. A trial judge is to take a robust and pragmatic approach to determining if a plaintiff has established that the defendant's negligence caused her loss. Scientific proof of causation is not required.

2. Exceptionally, a plaintiff may succeed by showing that the defendant's conduct materially contributed to risk of the plaintiff's injury, where (a) the plaintiff has established that her loss would not have occurred "but for" the negligence of two or more tortfeasors, each possibly in fact responsible for the loss; and (b) the plaintiff, through no fault of her own, is unable to show that any one of the possible tortfeasors in fact was the necessary or "but for" cause of her injury, because each can point to one another as the possible "but for" cause of the injury, defeating a finding of causation on a balance of probabilities against anyone".[45]

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[37] *Frazer*, *supra* note 36 at para 39 [*Frazer*].
[38] *King Lofts Toronto I Ltd v Emmons*, 2013 ONSC 6113, [2013] OJ No 4418 at paras 78-79 citing *Folland v Reardon* (2005), 74 OR (3d) 688 (CA).
[39] *Frazer*, *supra* note 37 at para 51 citing the foundational case of *Overseas Tankship (UK) Ltd v Mort's Dock and Engineering Co (The Wagon Mound (No 1))*, [1961] AC 388 (Privy Council) as adopted into Canada in *Ontario (Ministry of Highways) v Coté*, [1976] 1 SCR 595.
[40] *Clements v Clements*, 2012 SCC 32, [2012] 2 SCR 181.
[41] *Clements*, *supra* note 40 at para 8.
[42] *Snell*, *supra* note 35 at 569.
[43] *Clements*, *supra* note 40 at para 9.
[44] *Clements*, *supra* note 40 at para 46.
[45] *Clements*, *supra* note 40 at para 46.

In other words, material contribution only applies if the plaintiff cannot show which of several negligent defendants actually caused the event that led to the injury.

Establishing causation in chronic pain cases is no different from other tort cases. The 2013 Ontario Superior Court decision of *Leochko v Rostek* is one example.[46] Stacey Leochko was driving home from work in her 2000 Honda Civic in Kenora. Her vehicle was stopped on the road due to bumper-to-bumper traffic. When she looked into her rearview mirror, she saw Mr. Rostek's truck quickly approaching her "and it was not stopping".[47] The impact of the truck pushed her into the vehicle in front of her. As a result of the collisions, Ms. Leochko alleged that she developed chronic pain. Justice Shaw concluded that Ms. Leochko's "… chronic pain would not have developed but for her accident …",[48] and therefore factual causation was established.

In *Degennaro v Oakville Trafalgar Memorial Hospital*,[49] Ms. Degennaro cracked her sacrum when she fell to the floor after a makeshift hospital bed collapsed under her weight. The fall happened in 1999. In 2002, Ms. Degennaro was involved in a motor vehicle accident. The defendant Hospital took the position that Ms. Degennaro's chronic pain was a result of the injuries sustained in the motor vehicle accident, while the plaintiff took the position that it was a result of the cracked sacrum.

If Justice Gray had found that the motor vehicle accident and the fall in the Hospital had both played some indeterminate role in the development of the plaintiff's chronic pain, *Degennaro* may have been an appropriate case for the use of the material contribution test. However, Justice Gray accepted that the injuries from the motor vehicle accident had "effectively resolved within a few months".[50] Therefore, applying the "but for" test, Justice Gray concluded that "it is more likely than not that but for the incident in May, 1999, Ms. Degennaro would not suffer from the chronic pain from which she now suffers".[51]

Legal Causation and the "Reasonably Foreseeable" Test

Once a plaintiff has established factual causation, either through the "but for" test or the material contribution test, the plaintiff must then prove legal causation (or remoteness). Legal causation asks, despite the fact that the defendant's breach of the standard of care caused the plaintiff's damages, whether the harm suffered is "of a kind, type or class that was ***reasonably foreseeable*** as a result of the defendant's negligence".[52] In other words, are the damages "too unrelated to the wrongful conduct to hold the defendant fairly liable"?[53]

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[46] *Leochko v Rostek*, 2013 ONSC 7899, [2013] OJ No 6077. This case is not the trial of the action, but was a motion to bar the plaintiff's claim because the claim did not meet the statutory threshold, namely, that the plaintiff sustained a serious permanent impairment of an important physical, mental, or psychological function. See *Insurance Act*, RSO 1990, c I.8, s 267.5(3).
[47] *Leochko*, *supra* note 46 at para 7.
[48] *Leochko*, *supra* note 46 at para 96.
[49] *Degennaro v Oakville Trafalgar Memorial Hospital*, [2009] OJ No 2780, 67 CCLT (3d) 294 (Sup Ct).
[50] *Degennaro*, *supra* note 49 at para 77.
[51] *Degennaro*, *supra* note 49 at para 151.
[52] *Frazer*, *supra* note 37 at para 51 [emphasis added].
[53] Allen M. Linden & Bruce Feldthusen, *Canadian Tort Law*, 8th ed (Markham: Butterworths, 2006) at 360.

The Supreme Court of Canada analyzed this principle most recently in the case of *Mustapha v Culligan of Canada Ltd*, which was relied upon in *Degennaro*.[54] In *Mustapha*,Mr. Mustapha and his wife both suffered significant psychological injuries after they spotted a dead fly (and part of another fly) inside their new Culligan water bottle. Mr. Mustapha alleged he developed a major depressive disorder and severe anxiety as a result.

Chief Justice McLachlin acknowledged the "evidence before the trial judge establishes that the defendant's breach of its duty of care ***in fact*** caused Mr. Mustapha's psychiatric injury".[55] However, she found that legal causation was not made out; it was not reasonably foreseeable that a person of ordinary fortitude would have suffered psychiatric injury from seeing two flies in an unopened bottle of water.[56]

When Justice Gray applied *Mustapha* in *Degennaro*, he was careful to highlight that there is a "subtle distinction" between an injury that was not reasonably foreseeable, and an injury that was reasonably foreseeable but causes damages that are "more serious than expected".[57] This is a legal concept known as the "thin-skulled plaintiff".[58] This concept, as described by Professor Osborne of the Faculty of Law at the University of Manitoba, holds that "as long as some physical injury to the plaintiff was foreseeable, the defendant is liable for all the consequences of the injury", no matter how unexpectedly severe.[59]

The position of the defendant Hospital in *Degennaro*was that it was not reasonably foreseeable that chronic pain would result from a physical injury. This was not a case where the thin-skulled plaintiff would apply. Justice Gray rejected this position and stated as follows:

> *In my view,* **it is foreseeable that chronic pain may result from a physical injury**. *While the actual cause of chronic pain is not known, it is known that some people will develop chronic pain after physical trauma. Thus, chronic pain is foreseeable as falling within a range of consequences that may flow from a physical injury. This is a foreseeable consequence in a person of ordinary fortitude. Thus, in my view, the defendants must take the plaintiff as they find her. As noted by McLachlin C.J.C. at para. 16 of Mustapha, supra, this is simply a case where the damage inflicted has proven to be more serious than expected.*[60]

Justice Rouleau, for the Court of Appeal of Ontario, dismissed the appeal of the Hospital and affirmed Justice Gray's application of *Mustapha* to cases of chronic pain:

> *In my view, the trial judge did not misapply* **Mustapha,** *which does not stand for the proposition that a defendant needs to foresee all of the damage suffered by the*

[54]*Mustapha v Culligan of Canada Ltd.*, 2008 SCC 27, [2008] 2 SCR 114.
[55]*Mustapha*, *supra* note 54 at para 11 [emphasis added].
[56]*Mustapha*, *supra* note 54 at para 14.
[57]*Degennaro*, *supra* note 49 at para 162.
[58] It is also referred to as the "eggshell skull", particularly in the UK: see *White v Chief Constable of South Yorkshire Police*, [1998] 3 WLR 1509 (HL)at 1512.
[59] Philip H. Osborne, *The Law of Torts*, 4th ed (Toronto: Irwin Law Inc, 2011) at 100.
[60]*Degennaro*, *supra* note 49 at para 161 [emphasis added].

> *plaintiff. Rather, the defendant needs to reasonably foresee damages suffered by a person of reasonable fortitude. Where, as here, the damages suffered are more extensive because the plaintiff was "thin-skulled", the defendant is nonetheless liable.*[61]

On its own, the harshness of the thin-skulled plaintiff is self-evident; the concept allows for recovery despite the fact that the damages are "grossly disproportionate" to the injury.[62] However, this harshness is lessened by a related principle known as the crumbling skull.

Pre-Existing Injuries and the Concept of the Crumbling Skull

The question underlying the liability analysis is whether, and to what degree (if there are multiple defendants), the defendant is responsible for the damages which have arisen as a result of its negligence. Once liability has been addressed, the next step is to assess the extent of those damages.[63]

The basic principle behind an award of damages in negligence is that the plaintiff should be restored to the position she would have been in but for the act of negligence.[64] The extension of this principle is that the plaintiff should not be placed in a *better position* than she would have been in; defendants should only responsible for the losses they cause. If the plaintiff has a pre-existing medical condition that "produced some debilitating effects prior to the accident or is, independently of the accident, likely to cause some disability in the future, the defendant is not liable for the full extent of the damage".[65] This is what is meant when a plaintiff is said to have a "crumbling-skull".

Justice Major, in the Supreme Court of Canada case of *Athey v Leonati*, defined the crumbling-skull as a principle that:

> *… recognizes that the pre-existing condition was inherent in the plaintiff's 'original position' … The defendant is liable for the injuries caused, even if they are extreme, but need not compensate the plaintiff for any debilitating effects of the pre-existing condition which the plaintiff would have experienced anyway*".[66]

If a plaintiff is found to have a crumbling-skull, the defendant is entitled to a determination of which damages it caused and which damages were attributable to the plaintiff's previous condition. This apportionment of damages under the crumbling skull principle was described by the British Columbia Court of Appeal in *Pryor v Bains:*

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[61] *Degennarov Oakville Trafalgar Memorial Hospital*, 2011 ONCA 319, [2011] OJ No 1836 at para 27.
[62] Osborne, *supra* note 59 at 101.
[63] While the thin-skull principle is one of legal causation, the crumbling-skull is a principle of damages: *Rezaei v Piedade*, 2012 BCSC 1782, [2012] BCJ No 2499 citing *TWNA v Canada (Ministry of Indian Affairs)*, 2003 BCCA 670 at paras 21, 26.
[64] *Cunningham v Wheeler*; *Cooper v Miller*; *Shanks v McNee*, [1994] 1 SCR 359, [1994] SCJ No 19 at para 5.
[65] Osborne, *supra* note 59 at 101.
[66] *Athey v Leonati*, [1996] 3 SCR 458 at 473-74.

> *Where a plaintiff claiming damages for personal injuries suffers from a pre-existing condition which was manifest and disabling before the injury inflicted by the defendant, the appropriate course is to* **determine the damages which would have been awarded had the plaintiff's present condition resulted from a single cause for which a defendant was liable**. *The award should then consist of a portion of this amount equivalent to the portion of the plaintiff's disability which can fairly be attributed to the defendant's negligence.*[67]

In *Crawford v Canada (Attorney General)*,[68] an RCMP officer was travelling eastbound on Highway 111 just outside Saint John, when he spotted Mr. Crawford travelling westbound. Since Mr. Crawford was speeding, the officer signaled him to stop his vehicle in order to ticket him. The plaintiff stopped. The officer, who believed the plaintiff's vehicle was still in motion, turned his car into the westbound lane. In the process of making this manoeuvre, the officer "rammed into the side of Mr. Crawford's car, causing him injuries".[69]

Justice Grant of the New Brunswick Court of Queen's Bench found that Mr. Crawford suffered from chronic pain as a result of the accident involving the RCMP officer. Mr. Crawford was an experienced fisherman, and alleged a substantial loss of income claim due to his inability to fish. However, Justice Grant also took note of the fact that Mr. Crawford was not in perfect health prior to the accident; in fact, he had undergone three spinal surgeries in 1993, 1998, and 1999.[70] Justice Grant held that this was an appropriate case to "apportion damages as between Mr. Crawford's pre-accident and post-accident medical conditions", as per the crumbling skull principle.[71]

Justice Grant accepted medical evidence which concluded that Mr. Crawford would have been disabled from working in 10 years' time regardless of the accident. While Mr. Crawford may have worked until retirement if he were in better health, he was only entitled to compensation for 10 years of lost income.

In *Lee v Toronto District School Board*,[72] the minor plaintiff was a student at Cresthaven Public School, an elementary school near the intersection of Finch Avenue East and Don Mills Road in Toronto. Cliff Lee alleged that the defendant, another student named Tevin McNeil, punched in him in the head during recess. This punch aggravated an undiagnosed arteriovenous malformation ("AVM") in his brain, which led to a brain bleed and significant brain damage.

Justice Lauwers began with an analysis of factual causation. Applying the "but for" test with a "pragmatic, robust and common sense review of the evidence", he held that "but for" the

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[67] *Pryor v Bains*, 69 BCLR 395, [1986] BCJ No 29 (BC CA).
[68] *Crawford v Canada (Attorney General)*, 2005 NBQB 338, [2005] NBJ No 397.
[69] *Crawford*, *supra* note 68 at para 2.
[70] *Crawford*, *supra* note 68 at paras 5-6: The plaintiff underwent two surgeries on his L5-S1 disc, as well as "surgery on his C5-C6 spine".
[71] *Crawford*, *supra* note 68 at para 27.
[72] *Lee (Litigation guardian of) v Toronto District School Board and Tevin McNeil*, 2013 ONSC 3085, [2013] OJ No 1157.

defendant's punch the plaintiff would not have suffered any injury.[73] On that basis, factual causation was established.

On the issue of legal causation, the defendant submitted that the damages suffered by the plaintiff were too remote and therefore did not warrant recovery. Justice Lauwers sympathized with the defendant to the extent that the brain bleed was indeed a "surprising outcome" of the assault.[74] However, citing the thin-skull principle, Justice Lauwers recognized that the undiagnosed AVM was an inherent weakness in the plaintiff and that the defendant was responsible for the brain bleed and all associated sequelae.[75]

Next, the defendant argued that it was entitled to a significant discount on the basis of the crumbling-skull principle. The argument was based on medical evidence which suggested that catastrophic brain bleed was inevitable; in other words, the assault merely *aggravated* the underlying condition. Justice Lauwers accepted that the plaintiff had a crumbling skull on the basis that "had he not bled as the result of Tevin McNeil's punch, the strong probability is that ***he would eventually have bled*** with possibly catastrophic consequences".[76] Interestingly, the fact that the plaintiff was asymptomatic prior to the assault was irrelevant.

The issue of what damages the defendant would be liable for was a difficult question. The medical evidence proffered to the Court stated that "statistically, the incidence of a bleed on the part of a diagnosed AVM patient is one to four per cent per year, and that the probability of a bleed is cumulative".[77] An actuary also provided evidence to chart the mathematical probability of an AVM occurring. Justice Lauwers opined that the utility of the table only went so far; it predicted "only the mathematical probability of an AVM event over the time periods", not its severity.[78]

Using the actuary's table, the defence argued for a discount of 33% on damages, while the plaintiff argued for a lesser discount of 17.5%. Justice Lauwers accepted the plaintiff's position, providing the limited rationale that the 17.5% better accounted "for the uncertainty of the timing" of an AVM.[79]

Summary & Important Notes for Adjusters

There are several key points that an adjuster should keep in mind when faced with a new claim. The basic tenet to begin with is that factual causation must be proven by the plaintiff on a balance of probabilities.[80] This will entail the use of the "but for" test in almost every case, as the material contribution test can only be used in restricted circumstances.

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[73] *Lee*, *supra* note 72 at para 50.
[74] *Lee*, *supra* note 72 at para 181.
[75] *Lee*, *supra* note 72 at para 51.
[76] *Lee*, *supra* note 72 at para 235 [emphasis added].
[77] *Lee*, *supra* note 72 at para 236.
[78] *Lee*, *supra* note 72 at para 239.
[79] *Lee*, *supra* note 72 at para 241.
[80] *Mandeville v Manufacturers Life Insurance Co*, 2012 ONSC 4316, [2012] OJ No 6083 at para 260.

Once factual causation is proven, the analysis will then move to legal causation. Legal causation requires that the plaintiff show that that the initial damage suffered was "of a kind, type or class that was reasonably foreseeable as a result of the defendant's negligence".[81] When there is evidence that a plaintiff has some kind of pre-existing medical condition or injury, the plaintiff will attempt to characterize themselves as thin-skulled. In other words, the plaintiff will want to maximize damages by attempting to prove that the injuries suffered are a severe reaction but stemmed from an injury that was reasonably foreseeable.

On the other hand, the defendant should attempt to characterize the plaintiff as having a crumbling-skull, thereby entitling the defendant to a significant reduction in damages. While the onus of establishing factual and legal causation rests on the plaintiff (and this includes that the plaintiff is thin-skulled), the burden is not on the plaintiff to prove that they *do not* have a crumbling skull. Rather, it is incumbent upon the defendant to establish "a 'real and substantial possibility', 'measurable risk' or 'realistic chance' that the crumbling skull would manifest itself".[82]If a plaintiff is found to have a crumbling-skull, the defendant will then be entitled to a determination of which damages it caused and which damages were attributable to the plaintiff's previous condition.

Admittedly, causation is a highly technical area of law. At the same time, the outcome of a causation analysis is also dependent on the specific facts involved. The above notes are the basic building blocks to understanding how to establish causation in chronic pain cases.

[81]*Frazer*, *supra* note 37 at para 51.
[82]*Rezaei*, *supra* note 63 at para 46, citing *Athey*, *supra* note 66 at paras 26-28; and *Zaruk v Simpson*, 2003 BCSC 1748, 22 BCLR (4th) 43.