

Court File No.:

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

Plaintiff

- and -

Defendant

**PLAINTIFF'S STATEMENT OF LAW
CAUSATION AND PRE-EXISTING CONDITION**

PART I - OVERVIEW

1. Causation is the link between the defendant's breach and the harm suffered by the plaintiff. The causation analysis is undertaken only after the plaintiff has proven that the defendant has breached the standard of care owed to the plaintiff.
2. Causation is assessed in two respects: (1) the source of the loss giving rise to the damages claimed and (2) the extent to which the damages claimed can be attributed to the defendant's breach. To determine the source of the plaintiff's loss, the plaintiff must establish on a balance of probabilities that, but for the defendant's breach of the standard of care, the plaintiff would not have suffered

3. The legal or ultimate burden remains with the plaintiff, although positive or scientific proof of causation is not required. A common sense inference of causation may be drawn by applying a robust and pragmatic approach to the evidence.
4. The “but for” test of causation is applicable in all cases whether the source of the loss is caused by one or more defendants. However, where two or more defendants have breached the standard of care exposing the plaintiff to an unreasonable risk of harm, and each is potentially responsible for that harm, causation may be established by application of the test of material contribution to the risk of harm. The latter test establishes causation in law where factual causation is impossible. Impossibility arises where the plaintiff is unable to prove that any one of the defendants was the necessary cause of injury because each of the defendants can point to the other as the possible “but for” cause of the harm.
5. When applying either the “but for” or “material contribution to risk” tests of causation as the source of the injury, it is not necessary for the plaintiff to establish that the defendant’s breach of the standard of care was the sole cause of the plaintiff’s loss. Causation against any particular defendant will be established where the plaintiff proves that the defendant’s breach was a cause of the loss.

6. Once the plaintiff has proven that the defendant caused the plaintiff's loss, the court must then assess the extent to which the damages claimed can be attributed to the defendant's breach. In so doing, no discount from the full measure of the damages will be given to reflect the percentage of risk that the injury would have occurred in any event. Proof, on a balance of probabilities, that the defendant caused the loss is treated in law as a certainty despite a less than 50 percent chance that it would have occurred absent the negligence.

7. In the assessment, damages will only be reduced (as opposed to apportioned) where the defendant can demonstrate that the plaintiff's condition would have inevitably deteriorated or that the plaintiff would have been in the same position absent the defendant's breach. Where the defendant meets this onus, he or she will nonetheless be responsible for worsening in extent, degree or progression, any pre-existing condition.

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The remainder of this statement of law contains written submission on this issue and is written like the law portion of a factum.