

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. It is a fundamental rule of assessment of damages that a defendant takes the plaintiff as he or she finds the plaintiff.
2. The essential purpose and most basic principle of tort law is that the plaintiff must be placed in the position he or she would have been in absent the defendant's negligence (the "original position"). However, the plaintiff is not to be placed in a position better than his or her original one. It is therefore necessary not only to determine the plaintiff's position after the tort but also to assess what the "original position" would have been. It is the difference between these positions, the "original position" and the "injured position", which is the plaintiff's loss.

Athey v. Leonati, [1996] 3 S.C.R. 458 at para. 32 [*Athey*]
Plaintiff's Book of Authorities, Tab 2

Blackwater v. Plint, [2005] 3 S.C.R. 3 at para. 81 [*Blackwater*]
Plaintiff's Book of Authorities, Tab 4

3. It must be remembered that there are two analyses possible when the issue of causation arises:

It is important to distinguish between causation as the source of the loss and the rules of damage assessment in tort. The rules of causation (source of the loss) consider generally whether "but for" the defendant's acts, the plaintiff's damages would have been incurred on a balance of probabilities. Even though there may be several tortious and non-tortious causes of injury, so long as the defendant's act is a cause of the plaintiff's damage, the defendant is fully liable for that damage. The rules of damages then consider what the original position of the plaintiff would have been (emphasis added)(parenthesis added)

Blackwater, supra at para. 78
Plaintiff's Book of Authorities, Tab 4

4. Two recent decisions of the Supreme Court of Canada focus on these two issues of causation: It is submitted that *Resurface v. Hanke* is a case focusing on causation as a source of the loss, while *Blackwater v. Plint* focuses on the damage analysis to evaluate what position the plaintiff would have been in without the tortious conduct of the defendant. Neither is a change in the law of causation clarified by Major J. in *Athey v. Leonati*.

Barker v. Montfort Hospital, [2007] O.J. No. 1417 (C.A.), leave to appeal to S.C.C. refused, [2007] S.C.C.A. No. 299 [*Barker*]
Plaintiff's Book of Authorities, Tab 3

5. Where it is established that the defendant's *tortious act* was one of the material causes or contributions to the plaintiff's loss (or a source of the loss), causation is established and there is no *apportionment* of the plaintiff's damages.

Apportionment is only available where there are contributing tortfeasors, which may include the plaintiff, largely dealt with in Canada by negligence statutes and in Ontario by the *Negligence Act*.

6. In the assessment of damages, *damages* will only be *reduced* (as opposed to apportioned) where the *defendant* can demonstrate that the plaintiff's condition would have inevitably deteriorated or the plaintiff would have been in the same position or condition without the tortious cause.
7. Where the defendant meets the onus in paragraph 6 he or she will nonetheless be responsible for worsening, in extent, degree or progression, of any pre-existing condition.

PART II - THE LAW

8. 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 of the latter out of the pocket of the former.

Snell v. Farrell, [1990] 2 S.C.R. 311 [*Snell*]
Plaintiff's Book of Authorities, Tab 27

Resurfice Corp. v. Hanke, [2007] S.C.J. No. 7 at para. 23 [*Resurfice*]
Plaintiff's Book of Authorities, Tab 25