

The Canadian Institute
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**How Canadian Courts Have Turned “Thin Skull” Damages
into “Crumbling Skull” Damages:
What are the Implications?**

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7. Introduction

The Supreme Court of Canada’s ruling in *Athey v. Leonati*¹ is a definitive commentary on the manner in which liability and damages should be apportioned in tort actions. The Court discusses a myriad of possible scenarios in which tortious and non-tortious factors, pre-existing conditions and subsequent incidents may contribute to a plaintiff’s ultimate condition following a tortious act. The Court also addresses the difficult and often misunderstood issue of damage awards in cases involving thin skull and crumbling skull plaintiffs.

This paper deals with the principles established in the *Athey* decision and their implications in the areas of causation and damages. The paper begins with a detailed analysis of the *Athey* case and then discusses the implications of the decision in determining liability in the case of tortious and non-tortious factors contributing to a plaintiff’s injury, and the judicial treatment of the *Athey* decision in this context, with a particular focus on thin skull and crumbling skull plaintiffs. The final sections of the paper are a commentary on the courts’ assessment of damages in two recent decisions, the

¹*Athey v. Leonati*, [1996] 3 S.C.R. 458 (QL) [hereinafter *Athey*].

Ontario Court of Appeal's decision in *Robinson v. Sydenham District Hospital Corp.*² and the Alberta Court of Queen's Bench Decision in *Moser v. Derksen*³, and the difference between the approach taken in those cases and the principles established in *Athey*.

8. The Supreme Court of Canada's Decision in *Athey v. Leonati*

A. *History of the Action*

The Supreme Court of Canada's 1996 decision in *Athey v. Leonati* provides a detailed analysis of the principles of causation and assessment of damages applicable to injuries involving thin skull and crumbling skull plaintiffs and pre-existing conditions.

The plaintiff suffered back and neck injuries in two motor vehicle accidents in February and April, 1991. The plaintiff had a history of back problems since 1972. Following the second accident, he

²*Robinson v. Sydenham District Hospital Corp.*, [2000] O.J. No. 703 (Ont. C.A.) (QL) [hereinafter *Robinson*].

³*Moser v. Derksen*, [2002] A.J. No. 917 (Alta. Q.B.) (QL) [hereinafter *Derksen*].

resumed his regular light exercise routine on the advice of his physician and suffered a herniated disc while stretching. The only issue at trial was whether the plaintiff's disc herniation was caused by the injuries sustained in the accidents, or whether it was attributable to his pre-existing back problems. The trial judge held that, although the accidents were not the sole cause of the herniation, the plaintiff proved on a balance of probabilities that they contributed in some degree. The trial judge found that the accidents were responsible for 25% of the plaintiff's injury and awarded the plaintiff 25% of the global damages assessed. The plaintiff's appeal to the Court of Appeal was dismissed. At issue on the appeal to the Supreme Court of Canada was the whether the trial judge erred in apportioning causation (and therefore damages) between tortious and non-tortious causes.

The Court held that, once the trial judge found that the plaintiff's injuries in the motor vehicle accidents materially contributed to the disc herniation (i.e., that they contributed to the injury to the extent that they fell outside the *de minimus* range⁴), the plaintiff had met the burden of proof and causation had been established. With respect to damages, the Court held that there could be no apportionment of damages between tortious and non-tortious contributing factors and therefore, the defendant would be fully liable for all damages flowing from the disc herniation. A detailed analysis of the Court's reasoning follows.

2. *Causation*

Major J., speaking on behalf of a unanimous Court, enunciated several general principles of

⁴The Supreme Court of Canada held that the trial judge's assessment that the accidents contributed to 25% of the plaintiff's disc herniation fell outside the *de minimus* range.

causation in tort law, as follows⁵:

1. Causation is established where the plaintiff proves, on a balance of probabilities, that the defendant caused or contributed to the injury;
2. The test for determining causation is the “but for” test, in which the plaintiff must establish that the injury would not have occurred but for the defendant’s negligence;
3. In cases where the “but for” test is unworkable, courts have recognized that causation is established where the defendant’s negligence “materially contributed” to the occurrence of the injury. As stated above, a materially contributing factor is one that falls outside the *de minimus* range; and
4. The plaintiff need not prove that the tortious act was the sole cause of the injury. As long as the tortious act is part of the cause, the defendant is liable, even if the tortious act alone was not sufficient to cause the injury.

This analysis sets the stage for the Court’s discussion of damages and the principles to be applied when dealing with thin skull and crumbling skull plaintiffs.

3. *Damages*

Once causation is established, the Court deals with the issue of damages where there is more than

⁵*Athey, supra* note 1 at 5-6.

one factor contributing to a plaintiff's injury. As a general principle, the Court states that

(t)he 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 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 loss⁶.

⁶*Ibid.* at 8.

With respect to the presence of other, non-tortious, factors contributing to the plaintiff's injuries, as in the case at bar, the Court applies the principle of full compensation and the need to return the plaintiff to his original position, stating that "a defendant is liable for any injuries caused or contributed to by his or her negligence. If the defendant's conduct is found to be a cause of the injury, the presence of other non-tortious contributing causes does not reduce the extent of the defendant's liability"⁷. The Court further states that "(t)here is no basis for a reduction of liability because of the existence of other preconditions: defendants remain liable for all injuries caused or contributed to by their negligence"⁸.

Major J. states that courts should not apportion liability for injuries caused by tortious and non-tortious causes, which would result in the plaintiff not being fully compensated, since he would not be placed in the position he would have been in absent the defendant's negligence.

4. *Independent Intervening Events*

In assessing damages where an unrelated event, such as a disease or non-tortious accident, occurs after the plaintiff is injured, the Court states that "(t)he plaintiff's loss is the difference between the original position the plaintiff would have been in absent the defendant's negligence and the plaintiff's position after the tort. Where an intervening event unrelated to the tort affects the plaintiff's 'original position', the net loss is not as great as it might have otherwise seemed, so

⁷*Ibid.* at 5.

⁸*Ibid.* at 6.

damages would be reduced to reflect this”.⁹ An independent intervening event will affect the plaintiff’s original position and therefore reduce the plaintiff’s net loss.

5. *Thin and Crumbling Skull Plaintiffs*

⁹*Ibid.* at 8.

The Supreme Court of Canada discussed the thin skull and crumbling skull rules at length. A thin skull plaintiff is one who has a latent, pre-existing condition or vulnerability to injury which is brought out by a tortious act but which would not otherwise have exhibited itself. The Court states that the thin skull rule “makes the tortfeasor liable for the plaintiff’s injuries even if the injuries are unexpectedly severe owing to a pre-existing condition. The tortfeasor must take his or her victim as the tortfeasor finds the victim, and is therefore liable even though the plaintiff’s losses are more dramatic than they would be for the average person.”¹⁰ The thin skull rule applies to make the defendant fully liable for all of the damages flowing from the tortious act, notwithstanding that the consequences of the tortious act are greater than they would have been had the plaintiff not suffered from a thin skull.

In contrast, Major J. states that the crumbling skull rule

simply recognizes that the pre-existing condition was inherent in the plaintiff’s ‘original position’. The defendant need not put the plaintiff in a position better than his or her 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. The defendant is liable for the additional damage but not the pre-existing damage¹¹.

The crumbling skull rule applies to a plaintiff whose “injured position” is a result of both the tortious

¹⁰*Ibid.* at 9.

¹¹*Ibid.*

act and the plaintiff's pre-existing condition.

Major J.'s analysis indicates that a plaintiff's injuries resulting from a tortious act must be separated from those injuries or disabilities *not* resulting from the tortious act, and the defendant is held liable only for damage resulting from the tortious act. In this regard, Major J. states that

if there is a measurable risk that the pre-existing condition would have detrimentally affected the plaintiff in the future, regardless of the defendant's negligence, then this can be taken into account in reducing the overall award....This is consistent with the general rule that the plaintiff must be returned to the position he would have been in, with all of its attendant risks and shortcomings, and not a better position¹².

The Supreme Court of Canada holds that the plaintiff in *Athey* was neither a thin skull nor a crumbling skull plaintiff and therefore, according to the principles enunciated by the Court and applicable to cases involving tortious and non-tortious contributing factors, and on the application of the "material contribution" test, the defendant was fully liable for the plaintiff's disc herniation.

III. Determination of Liability in the case of Tortious and Non-Tortious Factors

Contributing to a Plaintiff's Injury: The Implications of the *Athey* Decision

A. *Principles Enunciated in Athey*

The *Athey* decision established a set of three general rules to be applied to the determination of

¹²*Ibid.*

causation when determining whether a plaintiff has established that a tortious act materially

contributed to his injury, in a case where there may be tortious and non-tortious contributing factors¹³:

2. if the plaintiff's injury would likely have occurred at the same time without the injuries sustained as a result of the tortious act, causation is not proven;
3. if both the tortious and non-tortious acts were necessary to the injury, causation is proven, since the injury would not have occurred but for the tortious act. Even if the tortious act played a minor role, the defendant would be fully liable because the tortious act was still a necessary contributing cause; and
4. if the tortious act alone could have been a sufficient cause, and similarly, the non-tortious act could have been a sufficient cause of the injury, the trial judge must determine, on a balance of probabilities, whether the tortious act materially contributed to the injury.

Athey has been cited in a number of Ontario decisions since 1996. Ontario courts have generally not engaged in an in-depth analysis of the decision itself but have, with a few exceptions discussed below, consistently applied the principles enunciated by the Supreme Court of Canada regarding multiple contributing factors to accidents, both tortious and non-tortious.

¹³*Ibid.* at 10.

2. Judicial Treatment of Athey

(1) *Alderson v. Callaghan*¹⁴

In *Alderson v. Callaghan*, the Ontario Court of Appeal considered a trial judge's instruction to the jury with respect to causation and the assessment of damages. The plaintiff was a passenger in a vehicle operated by the defendant, who admitted liability for the accident. The plaintiff claimed damages for a serious brain injury and related memory problems, personality changes and mental impairment. The defendant claimed that these injuries were not related to the accident, but were the result of two factors: beatings inflicted on the plaintiff by the defendant and a non-party following the accident and the plaintiff's pre-accident psychological and emotional problems. With respect to the assessment of damages, the trial judge instructed the jury to consider the plaintiff's overall condition and then determine which portion of her "injured position" was attributable to the accident.

In a decision authored by Moldaver J., the Court of Appeal ordered a new trial on the basis that the trial judge had misdirected the jury on the issue of causation.

¹⁴*Anderson v. Callaghan* (1988), 40 O.R. (3d) 136 (Ont. C.A.) (QL) [hereinafter *Anderson*].

With respect to the subsequent tortious acts, Moldaver J. states that, based on *Athey*, the fact that the plaintiff's overall condition may have been exacerbated by the post-accident assaults does not relieve the defendant from full responsibility¹⁵. This is consistent with general legal principles allowing joint tortfeasors to seek contribution and indemnity from one another¹⁶. As such, there is no justification for reducing the damages awarded on the basis that there have been subsequent tortious events. This approach is also consistent with the Supreme Court of Canada's statement that the plaintiff must be placed in the position which she would have been in had the tortious incident not occurred.

Moldaver J. states that, in light of the *Athey* decision, the jury should have been advised that, if the plaintiff's overall condition resulted from the cumulative effect of the injuries sustained in the accident, the post-accident beatings and her pre-existing psychological problems, she would nonetheless be entitled to full compensation if the jury was satisfied, on a balance of probabilities, that the injuries sustained in the accident materially contributed to her overall condition (this would be an award of thin skull damages, combined with the principle that joint tortfeasors may claim

¹⁵*Ibid.* at 3.

¹⁶*Ibid.*

contribution and indemnity from one another).

Moldaver J. further states that, if the jury was not satisfied that the injuries sustained in the accident materially contributed to the plaintiff's overall condition, they should have been instructed to assess the plaintiff's damages based on the nature and extent of those injuries which could be directly attributed to the accident (this would be an award of crumbling skull damages, again combined with the principles applicable to joint tortfeasors)¹⁷. Although Moldaver J. does not make a determination as to whether the plaintiff suffered from a thin skull or a crumbling skull, his judgment indicates that, once the determination is made, the jury should be instructed in accordance with the principles regarding damages enunciated in *Athey*.

(2) *Dusk v. Malone*¹⁸

In *Dusk v. Malone*, Brennan J. of the Ontario Superior Court of Justice also applied *Athey*. The plaintiffs, Dusk and Mackie, claimed damages for injuries sustained in a 1989 motor vehicle accident. The plaintiff, Dusk, sustained injuries to his neck and back. He had a history of lifelong spinal difficulties, including scoliosis and degenerative disc disease and had sustained a spinal injury in a 1972 motor vehicle accident. The plaintiff had received periodic chiropractic treatments from childhood to 1987.

Brennan J. accepted the evidence of the plaintiff's expert that, in the absence of the motor vehicle

¹⁷*Ibid.*

¹⁸*Dusk v. Malone*, [1999] O.J. No. 3917 (Ont. S.C.J.) (QL) [hereinafter *Dusk*].

accident, the plaintiff's symptoms would not have occurred. Brennan J. concluded that, given his pre-existing condition, the plaintiff was more vulnerable to back injuries than an ordinary victim.

Brennan J. therefore applied the *Athey* principles with respect to thin skull plaintiffs and held that, in light of the fact that the defendant had not proved on a balance of probabilities that the plaintiff would have reached the same condition based solely on his pre-existing problems, the defendant was liable for all losses flowing from the plaintiff's injuries¹⁹.

¹⁹*Ibid.* at 4-5.

(3) *Brown v. Canadian Tire Corp.*²⁰

In *Brown*, the Ontario Superior Court of Justice deals with an action for damages brought by a plaintiff for shoulder injuries resulting from injuries sustained while using a defective sledgehammer. The plaintiff had a long history of shoulder dislocations and had been advised to undergo surgery. However, in the two years preceding the incident, he experienced no shoulder problems. Following the incident, the plaintiff's shoulder problems worsened and he experienced further dislocations and functional limitations. The issue at trial was whether the accident caused the plaintiff's complaints, or whether his complaints were caused by his pre-existing shoulder condition, as a result of which he would have suffered the same disability, even if the accident had not occurred.

²⁰*Brown v. Canadian Tire Corp.*, [2000] O.J. No. 4722 (Ont. S.C.J.) (QL) [hereinafter *Brown*].

Spence J. concludes that it was inevitable that the plaintiff would have suffered the same problems had the accident not occurred, but the accident likely accelerated the onset of the symptoms so causation cannot be ruled out²¹. Spence J. states that, in light of his finding that either the tortious act or the non-tortious factors could have been the cause of the plaintiff's injury, the third principle of causation, as enunciated in *Athey*²², applies. Therefore, the Court must determine, on a balance of probabilities, whether the tortious act materially contributed to the injury. Spence J. concludes that the accident materially contributed to the plaintiff's injuries²³ and accordingly, held the defendants liable for the full extent of the plaintiff's losses.

(4) *Cottrelle v. Gerrard*²⁴

The *Cottrelle* case is another example of the straightforward application of the *Athey* principles regarding multiple contributing factors by Leitch J. of the Ontario Superior Court of Justice. The plaintiff in *Cottrelle* was a diabetic with a history of smoking and high blood sugar levels, both which put her at increased risk of developing vascular disease leading to the development of gangrenous tissue in her feet which could require amputation. In 1993, the plaintiff developed a sore on her foot which subsequently developed into a deeper infection and which contributed to the development of gangrene and the resulting amputation of the plaintiff's leg below the knee.

²¹*Ibid.* at 6.

²²See Part II(B), above, for a discussion of this principle.

²³*Brown, supra* note 20 at 7.

²⁴*Cottrelle v. Gerrard*, [2001] O.J. No. 5472 (Ont. S.C.J.) (QL) [hereinafter *Cottrelle*].

The medical evidence at trial indicated that the need to amputate the plaintiff's leg resulted from a combination of the (pre-existing, undiagnosed and latent) vascular disease arising from her diabetes and the infection of the sore on her foot. The medical evidence also suggested that, had the plaintiff's sore been properly treated in a timely fashion, she may not have developed gangrene and the amputation of her leg may not have been necessary. There was conflicting medical evidence that indicated that the plaintiff would have required an amputation as a result of her vascular disease at some point in any event and also that, even if the sore had been properly treated, given the advanced stage of her vascular disease, amputation was inevitable.

In dealing with the issue of causation, Leitch, J. finds that the plaintiff's sore was not properly treated by the defendant family physician and this breach of the standard of care resulted in the development of deeper infection, which in turn contributed to the development of gangrene and the resulting need for amputation. Leitch J. considers the *Athey* principles applicable to injuries caused by pre-existing conditions and tortious factors. Specifically, Leitch J. states that the plaintiff need not establish that the negligence was the sole cause of her injury and a defendant is not excused from liability merely because other causal factors for which he is not responsible helped produce the harm²⁵.

In assessing the plaintiff's damages, Leitch, J. considers whether there should be a reduction in the damages awarded based on the plaintiff's pre-existing vascular disease; specifically, whether, as stated in *Athey*, there was a measurable risk that this condition would have detrimentally affected her in the future, notwithstanding the defendant's negligence. Leitch J. applies the *Athey* doctrine

applicable to crumbling skull plaintiffs: the defendant need not return the plaintiff to a better “original position” than she would otherwise have been in. In considering the evidence of the medical experts regarding the “measurable risk” that the plaintiff would have required an amputation as a result of her vascular disease notwithstanding the defendant’s negligence, Leitch J. reduces the damages awarded by 15%²⁶.

²⁵*Ibid.* at 13.

²⁶*Ibid.* at 23.

4. *Summary of the Implications of Athey as Applied to Tortious and Non-Tortious Factors Contributing to a Plaintiff's Injury*

The *Athey* decision has encouraged courts to consider cases in which a plaintiff suffers injuries caused by a combination of tortious and non-tortious factors (or pre-existing conditions) by using a two-step process based on long-standing tort principles. The first step deals with the issue of causation and involves a determination as to whether the tortious factor at issue in the action materially contributed to the plaintiff's injury. Inherent in this analysis is the consideration of whether the plaintiff would have suffered the same problems at the same time had the tortious event not occurred, as in the *Brown*, *Dusk* and *Cottrelle* cases, and whether there is a measurable risk that the pre-existing condition would have caused the plaintiff's condition to deteriorate in the future, even without the tortious act.

The second step deals with the issue of damages. The fundamental principle established in *Athey* and followed by Ontario courts is that the plaintiff must be returned to her original position, but not a better position, than she would have been in had the tortious act not occurred. Once causation is proven, a defendant is held liable for the full extent of the plaintiff's damages arising from the tortious act. The only variation of this principle occurs when, as in the *Cottrelle* case, there is a "measurable risk" that the plaintiff's pre-existing condition would have detrimentally affected the plaintiff in the future, notwithstanding the tortious act (i.e. when the plaintiff has a crumbling skull). In this case, damages are reduced by the amount of the "measurable risk".

The same considerations apply when the plaintiff's injuries are caused by events following the tortious act at issue in the action, as in the *Callaghan* case. The principle of full liability does not change, as the plaintiff must be returned to her original position, notwithstanding subsequent tortious acts. The Court recognizes the right of joint tortfeasors to seek contribution and indemnity from one another once the plaintiff has been fully compensated. Applying this approach, subsequent tortious acts, like non-tortious acts, do not reduce the extent of a defendant's liability once material contribution is established.

In general, Ontario courts have consistently applied the *Athey* principles with respect to causation and the assessment of damages. However, these principles, at least with respect to damages, were substantially altered in the Ontario Court of Appeal's 2000 decision in *Robinson v. Sydenham District Hospital Corp.*, as will be seen below.

4. The Implications of the Ontario Court of Appeal's decision in *Robinson v. Sydenham Hospital*: How the Court turned Thin-Skull Damages into Crumbling Skull Awards

7. *Athey v. Leonati: Damages Awarded to Thin Skull and Crumbling Skull Plaintiffs*

The Supreme Court of Canada in *Athey* provided courts with a definitive framework within which to assess damages sustained by a thin skull or crumbling skull plaintiff. Simply stated, in the case of a thin skull plaintiff where the tortious act is found to have materially contributed to the plaintiff's injuries, the defendant is liable for all losses flowing from the tortious act, with no reduction in damages awarded based on the plaintiff's original thin skull position. The fact that a plaintiff has

a thin skull is not considered to affect her original position and therefore, does not affect the calculation of damages based on the difference between her original position and her post-injury position.

In the case of a crumbling skull plaintiff, the defendant is also liable for all losses flowing from the tortious act, with the caveat that the defendant need not place the plaintiff in a position better than his original position, taking into account any pre-existing problems inherent in the plaintiff's original position.

The analysis of damages in the case of a crumbling skull plaintiff recognizes that the plaintiff will suffer ongoing effects of her injuries—not only those resulting from the tortious act, but also those arising as a result of her pre-existing condition. The Supreme Court of Canada recognized that the plaintiff's original position would be that of a plaintiff with the pre-existing condition and a tortfeasor need not place the plaintiff in an original position which is better than that which she would otherwise have been in. The plaintiff's post-injury position would be combined the result of the tortious act and the pre-existing condition. Accordingly, the defendant is entitled to a deduction for the material risk of any future debilitating effects that would be the result of the plaintiff's pre-existing condition and not the tortious act.

8. An Analysis of the Ontario Court of Appeal Decision in *Robinson v. Sydenham District Hospital Corp.*

(i) History of the Action

In *Robinson*, the plaintiff sustained a fracture of his finger in an accidental (non-tortious) fall. The defendant physician, Dr. Halpenny, improperly immobilized the plaintiff's hand, following which the plaintiff developed a condition known as contractures. The plaintiff subsequently developed a complication known as reflex sympathetic dystrophy (RSD) and notwithstanding two unsuccessful attempts at corrective surgery, the plaintiff's hand was almost completely disabled. According to the evidence of the plaintiff's expert, the defendant's improper positioning of the plaintiff's hand resulted in a much higher risk of contractures and subsequent problems such as RSD. RSD may result from the injury itself, but it would have been more difficult to treat as a result of the improper positioning and therefore, the improper positioning also contributed to the subsequent development of RSD.

After finding that the defendant breached the standard of care, the trial judge accepted the evidence of the plaintiff's expert and concluded that there was a causal link between the improper immobilization, the contractures and the plaintiff's ultimate condition. Relying on the Supreme Court of Canada's ruling in *Snell v. Farrell*²⁷, the trial judge stated that "the plaintiff need only prove

²⁷*Snell v. Farrell*, [1990] 2 S.C.R. 311 [hereinafter *Snell*].

that the defendant created a risk of harm, and that the injury occurred within the area of the risk”²⁸.

The defendant appealed the trial judge’s ruling on several bases, one of which was that the trial judge misinterpreted the test applicable in determining causation and misapplied *Snell*. Specifically, the defendant submitted that the trial judge did not appreciate that, according to the medical evidence, the plaintiff’s RSD likely resulted from the initial fracture and not as a result of the defendant’s negligence. The defendant submitted that the trial judge erred in failing to determine the extent to which the plaintiff’s injury was caused by RSD (a non-tortious event) as opposed to the tortious act.

(2) The Ontario Court of Appeal Decision

²⁸*Robinson, supra* note 2 at 4.

In a decision authored by Charron J., the Ontario Court of Appeal held that the Supreme Court of Canada in *Snell* had rejected the proposition that a plaintiff need only prove that a defendant created a risk that the injury in question would occur to *prove* causation. However, the Court held that proof that the defendant created a risk that the injury would occur *is relevant* to the issue of causation and may result in an inference of causation being drawn adverse to the defendant²⁹. The Court holds that the trial judge's finding of causation was made consistently with the legal principles of causation and was a reasonable finding in light of the evidence.

With respect to the trial judge's failure to apportion liability between the alleged tortious cause of the plaintiff's injuries (the defendant's negligence, which according to the defendant, may have resulted in contractures, but not RSD) and the alleged non-tortious cause (the initial fracture which

²⁹*Ibid.* at 5.

was, in the defendant's submission, the sole cause of the RSD) Charron J. writes:

The Supreme Court of Canada makes it clear in *Athey v. Leonati*, supra, that any apportionment between tortious and non-tortious causes is contrary to principles of tort law because the defendant would escape full liability even though he or she caused or contributed to the plaintiff's entire injuries. Once the trial judge found, as he was entitled to do on the evidence, that Dr. Halpenny's initial treatment³⁰ of the fracture was causally connected not only to the contractures suffered upon removal of the cast but also to the aggravated subsequent condition, it was unnecessary for him to proceed any further. As a result of his finding on causality, Dr. Halpenny was liable with respect to Mr. Robinson's entire injury.³¹

If one reads this case applying an analysis of the thin skull and crumbling skull rules enunciated in *Athey*, it is a case involving a plaintiff who, following the initial hand fracture and prior to the negligent treatment, became a crumbling skull plaintiff, whose pre-existing condition (the hand fracture, and presumably the risk of developing RSD) was inherent in his original position. Therefore, according to the *Athey* principles with respect to damages to be awarded to crumbling skull plaintiffs³², the defendant would not be liable for any debilitating effects of the plaintiff's pre-existing condition, which the plaintiff would have experienced even in the absence of the tortious

³⁰Presumably referring to Dr. Halpenny's *negligent* treatment.

³¹*Robinson*, supra note 2 at 9.

³²See Part II(E), above, for a discussion of the *Athey* decision with respect to damages to be awarded to crumbling skull plaintiffs.

act. Applying the “measurable risk” principle³³, the defendant is entitled to a reduction in the amount of damages awarded if the pre-existing condition would have detrimentally affected the plaintiff in the future.

Applying the crumbling skull and “measurable risk” principles to the facts in *Robinson*, it becomes clear that the plaintiff was a crumbling skull plaintiff at the time of his treatment by the defendant. The plaintiff had fractured his hand, which created a measurable risk of contractures and RSD. Inherent in the plaintiff’s original position was this pre-existing condition. Once negligence and causation were established, the defendant’s obligation was to place the plaintiff in his original, crumbling skull, position.

The Court in *Robinson* failed to recognize that the plaintiff was a crumbling skull plaintiff and, in applying the *Athey* principles, awarded damages as though the plaintiff was a thin skull plaintiff whose injured position, while extreme, was not the result of any pre-existing condition. The Court awarded full damages to the plaintiff, effectively placing him in the “original position” of an individual without a pre-existing hand fracture and an increased vulnerability to contractures and RSD. In fact, the *Athey* approach requires the Court to assess the “measurable risk” of the plaintiff developing contractures and RSD in the absence of the tortious act and to reduce the damage award

³³*Athey*, supra note 1 at 9.

accordingly. This would not result in an apportionment of damages between the tortious and non-tortious causes (rejected by the Supreme Court in *Athey*) but would prevent the crumbling skull plaintiff from being placed in a position which is better than his original position.

6. The Effect of the Alberta Court of Queen's Bench Decision in *Moser v. Derksen* in Determining Damages

The *Derksen* case concerns a plaintiff's claim for damages for soft tissue injuries to her neck, back and arm and aggravation of a pre-existing psychiatric condition known as somatization disorder³⁴ arising as a result of injuries sustained in three successive motor vehicle accidents in 1995. In addition to questions of liability and mitigation, the Court also dealt with causation and damages; specifically, whether the plaintiff's post-accident condition was causally connected to the accidents and the application of the thin skull and crumbling skull rules enunciated in *Athey*.

The defendants acknowledged the causal connection between the plaintiff's physical injuries and the accidents. However, the defendants alleged that the duration of the plaintiff's physical problems and the aggravation of her psychiatric problems were the result of a non-tortious factor; specifically, the death of her husband in the year prior to the accidents. The plaintiff had a long history of visits to medical practitioners for a variety of complaints including depression, fatigue, joint pain, headaches and digestive problems, for which her treatment providers were unable to find a specific cause. Although the plaintiff was not diagnosed as suffering from somatization disorder prior to the

³⁴“in psychiatry, the conversion of mental experiences or states into bodily symptoms”, *Dorland's Illustrated Medical Dictionary*, 27th ed. (Philadelphia: W.B. Saunders Company, 1988) at 1546.

accidents, it was generally agreed at trial that this was a pre-existing condition.

At trial, the medical experts opined that the majority of the plaintiff's physical problems prior to the accidents were the result of her then-undiagnosed somatization disorder. However, notwithstanding her physical complaints and particularly in the year prior to the accidents (the year following her husband's death), the plaintiff was functioning exceptionally well, working 30 hours per week and caring for her daughter while maintaining an active social life. The defence experts stated that the aggravation of the plaintiff's disorder was the result of a delayed reaction to her husband's death, while the plaintiff's experts concluded that the somatization disorder was aggravated by the accidents. Applying the *Athey* principles of causation, Rowbotham J. accepted the plaintiff's evidence, concluding that the accidents materially contributed to the aggravation of her somatization disorder³⁵.

Rowbotham J. then addressed the issue of damages, considering the thin skull and crumbling skull principles. Rowbotham J. correctly states that, according to these principles, the plaintiff "can only be compensated to the extent that she is placed in the position she was in prior to the accident"³⁶.

In determining which of the principles applies to the plaintiff, Rowbotham J. concludes that the plaintiff's somatization disorder was an active condition at the time of the accidents and as such, she is a crumbling skull plaintiff and is therefore entitled to damages only for the aggravation of her pre-

³⁵*Derksen, supra* note 3 at 11.

³⁶*Ibid.* at 12.

existing psychiatric condition³⁷. Rowbotham J. distinguishes *Athey*, “where the accident triggered a latent condition and which was found to be the entire cause of the damage”³⁸.

³⁷*Ibid.* at 12-13.

³⁸*Ibid.* at 14.

Rowbotham J. distinguishes between the plaintiff's physical condition, which he finds is fully attributable to the accident and which, in the absence of the somatization disorder, would have resolved by 1997, and her psychiatric condition, which he holds is only compensable to the extent that it was aggravated by the accidents. Rowbotham J. awards damages to the plaintiff "taking into account (her) pre-existing somatization disorder"³⁹ but does not allocate the global damage award between the physical injuries (which would have been fully compensated) and the aggravation of the pre-existing psychiatric disorder (which would have been compensated only to the extent that it was aggravated by the accidents).

In *Athey*, the Court states that a crumbling skull plaintiff's pre-existing condition is one that would necessarily cause debilitating effects in the future. This justifies the reduction in damages awarded to a crumbling skull plaintiff in contrast to a thin skull plaintiff, who may have had a pre-existing condition or vulnerability but, absent the tortious act, would not have suffered any detrimental effects as a result and is therefore entitled to compensation to the full extent of her damages.

In the absence of a finding that there is a material risk that the pre-existing condition would have caused debilitating effects in the future, there is no basis for the characterization of a plaintiff as a crumbling skull plaintiff and no basis for a reduction in damages awarded to the plaintiff.

³⁹*Ibid.* at 15.

Rowbotham J. misinterprets the plaintiff's "original position" as that of an individual likely to suffer debilitating effects of the somatization disorder in the future, notwithstanding the absence of any evidence in this regard and notwithstanding his finding that the aggravation of the plaintiff's somatization disorder was solely as a result of the accidents. Rowbotham J. does not reduce the plaintiff's damages according to the risk of future debilitating effects attributable to her pre-existing condition (which would have been appropriate if any such future effects were proven), but instead limits damages to the extent to which the plaintiff's injuries were aggravated by the accidents.

7. Conclusion

The Supreme Court of Canada's decision in *Athey* has served as a framework for the assessment of liability and damage awards in Canadian courts and in particular, has had a profound effect on the assessment of damages awarded to thin skull and crumbling skull plaintiffs. The principles in *Athey* provide a comprehensive and cogent analysis of the extent to which a defendant should be held responsible for a plaintiff's injuries in the presence of other contributing factors and pre-existing conditions.

In general, Canadian courts have been successful in applying the *Athey* principles consistently to create predictable results with respect to causation and damages. However, in certain circumstances, courts have misapplied the *Athey* principles with respect to in awarding damages. This move towards thin skull awards for crumbling skull plaintiffs results in over-compensation of plaintiffs and a high level of liability on defendants and is contrary to the principles established by the Supreme Court of Canada.