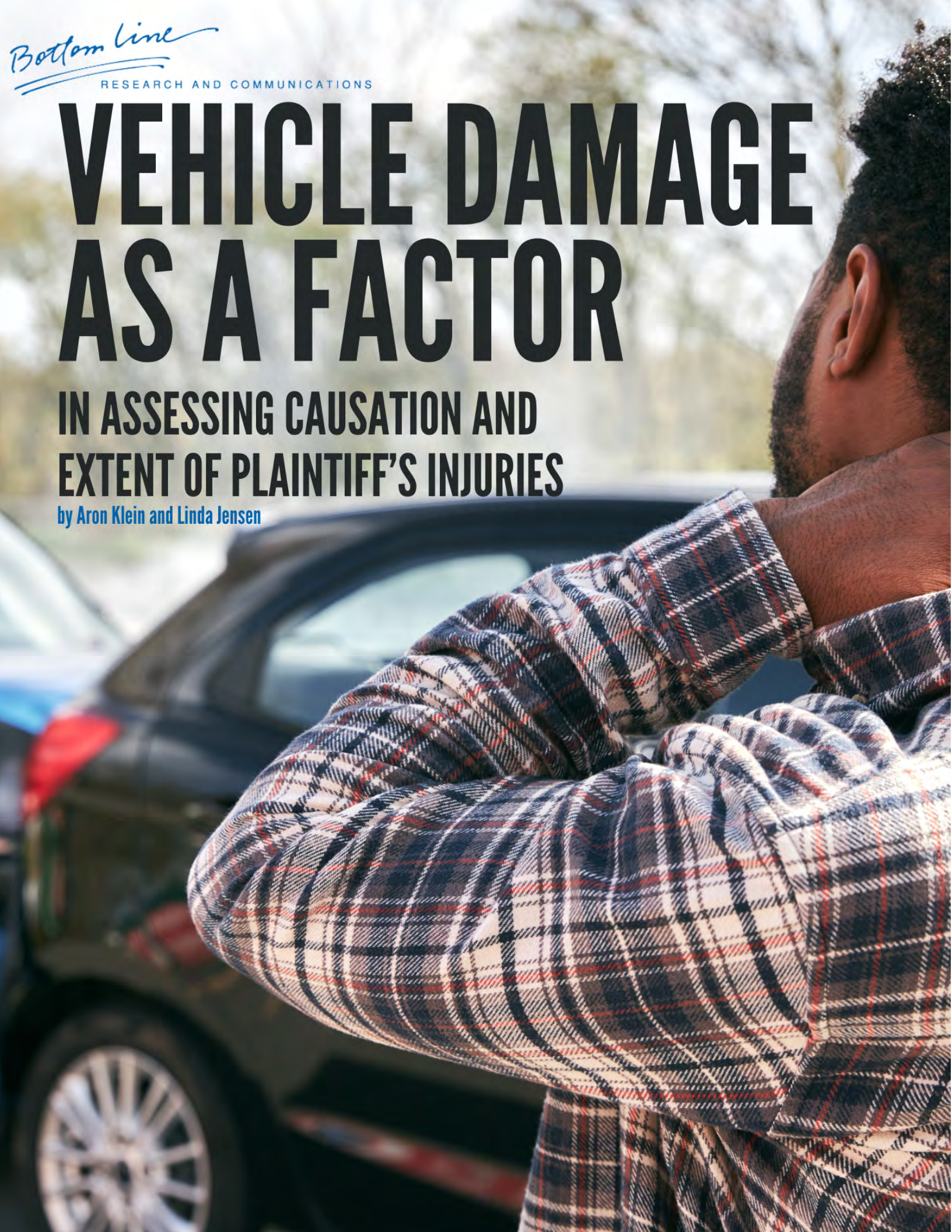
Bottom Line

RESEARCH AND COMMUNICATIONS

VEHICLE DAMAGE AS A FACTOR

IN ASSESSING CAUSATION AND EXTENT OF PLAINTIFF'S INJURIES

by Aron Klein and Linda Jensen



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A successful claim for damages arising from a motor vehicle collision often turns on proof of causation – specifically, whether and to what extent the defendant's conduct, on a balance of probabilities, was the cause of the plaintiff's injuries. In the seminal decision in *Athey v. Leonati,* [1996] 3 SCR 458, [1996] SCJ No 102, the Supreme Court established a number of principles that govern determinations of causation, including the "but for" and "material contribution" tests, and the absence of any requirement to show that the defendant's conduct is the sole cause of the plaintiff's injuries. As observed by Major J, "[a]s long as a defendant is part of the cause of the injury, the defendant is liable.

In attempting to establish a causal link between the defendant driver's negligence and the plaintiff's injuries, courts have sometimes been asked to consider the extent of damage to one or both of the vehicles as an indicator of the likely extent of injuries that may be causally related to the accident. Debate on this point may be particularly likely to arise in cases of low-impact collisions causing little vehicle damage, where a defendant may challenge the extent of injury claimed by the plaintiff on grounds that it is disproportionate to the physical damage and impact of the collision.

While recognizing that the extent of vehicle damage is not an irrelevant consideration, courts have repeatedly rejected arguments proposing any straight-line correlation between the scope of vehicle damage and the severity of injuries that may be attributed to the accident. On the contrary, case law affirms that no principle of law precludes a finding of serious injuries resulting from accidents with minimal vehicle damages. In all cases, the proper test remains whether the plaintiff can show on a balance of probabilities that their injuries resulted from the collision.

Relevant Case Law

While both BC and Alberta courts have issued judgments indicating that the dollar amount of damage to a vehicle should not be a predictor of the extent of the injuries suffered by the plaintiff, the BC courts have been more explicit in stating a clear principle to that effect.

A decision that is frequently cited for its clear language on this point is *Lubick v. Mei*, 2008 BCSC 555, [2008] BCJ No 777. The plaintiff in that case was stopped at an intersection waiting to turn left when the defendant's vehicle bumped him from behind. The plaintiff described the collision as a "jolt that I wasn't prepared for" and the defendant said the vehicles "barely touched" and that the impact was "very light, just a little boom". Damage to the vehicles was minimal. Although the plaintiff did not initially seek medical assistance for injuries related to the accident, he subsequently received physiotherapy treatment for low back issues. Macaulay J found that the plaintiff did sustain injuries despite the low impact of the collision, and rejected the defendant's argument that a nominal award of $1,000 was fair. Macaulay J observed that medical evidence established the injuries, and there is no legal principle barring recognition of injuries based on minimal vehicle damage:

> [5] **The Courts have long debunked as myth the suggestion that low impact can be directly correlated with lack of compensable injury.** In *Gordon v. Palmer,* [1993] B.C.J. No. 474 (S.C.), Thackray J., as he then was, made the following comments that are still apposite today:

> I **do not subscribe to the view that if there is no motor vehicle damage then there is no injury.** This is a philosophy that the Insurance Corporation of British Columbia may follow, but it has no application in court. **It is not a legal principle** of which I am aware and I have never heard it endorsed as a medical principle.
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> He goes on to point out that **the presence and extent of injuries are determined on the evidence, not with "extraneous philosophies that some would impose on the judicial process".** In particular, he noted that there was no evidence to substantiate the defence theory in the case before him. S**imilarly, there is no evidence to substantiate the defence contention that Lubick could not have sustained any injury here because the vehicle impact was slight.** [emphasis added]

Lubicki was followed in *Blackman v. Dha,* 2015 BCSC 698, 2015 CarswellBC 1156. The 37-year-old female plaintiff claimed damages for injuries sustained in a motor vehicle accident where the defendant rear-ended her. She said her car moved forward slightly, causing her to press firmly on the brake. She felt discomfort in her neck within a few minutes of her body being jolted. After the accident, she went to meet her family at a restaurant. The cost to repair her vehicle was $1,017.25. The accident caused the plaintiff to suffer chronic cervical spine sprain/strain; chronic mechanical neck pain and possible discogenic neck pain; chronic shoulder interscapular muscle strain with possible scapulothoracic bursitis; and chronic post-traumatic headaches that were suggestive of occipital neuralgia. The defendant argued that the plaintiff's complaints were out of proportion with the minor nature of the accident. Devlin J held that the medical evidence established on a balance of probabilities that the plaintiff's injuries were caused by the collision:

> [66] **It has been well recognized by the courts that the limited amount of motor vehicle damage is not "the yardstick by which to measure the extent of the injuries suffered by the plaintiff"**. As Mr. Justice Macaulay stated in *Lubick v. Mei,* 2008 BCSC 555 (B.C. S.C.) at para. 5:
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> > > **I do not subscribe to the view that if there is no motor vehicle damage then there is no injury. This is a philosophy that the Insurance Corporation of British Columbia may follow, but it has no application in court. It is not a legal principle of which I am aware and I have never heard it endorsed as a medical principle.**
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> > **He goes on to point out that the presence and extent of injuries are determined on the evidence, not with "extraneous philosophies that some would impose on the judicial process".** In particular, he noted that there was no evidence to substantiate the defence theory in the case before him. Similarly, there is no evidence to substantiate the defence contention that Lubick could not have sustained any injury here because the vehicle impact was slight [emphasis added].

In *Boudreau v Zhang*, 2019 BCSC 1347, [2019] BCJ No 1523, the plaintiff's vehicle was struck from the side

by the defendant's vehicle. The accident did not involve a violent collision - the air bags did not deploy in either vehicle and both parties drove away from the scene of the accident. MacNaughton J nonetheless found that the plaintiff had suffered a mild traumatic brain injury which was causally connected to the accident:

> [20] The defendant relies, in part, on an argument that, based on the vehicle damage, and Ms. DeMarco's biomechanical engineering evidence, it is extremely unlikely that the Accident was of sufficient force to cause Ms. Boudreau to suffer a concussion. The essence of this argument is that the likelihood of Ms. Boudreau suffering a concussion may be assessed from vehicle damage. As discussed below, Dr. Wong also considered the vehicle damage in support of the conclusions in his report.
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> > [21] In *Gordon v. Palmer*, 1993 CanLII 1318 (BC SC), [1993] B.C.J. No. 474 (S.C.), Mr. Justice Thackray, when a member of this Court, **rejected the proposition that vehicle damage can be used as a measure of the likelihood of injury:**
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> > > [5] **Significant injuries can be caused by the most casual of slips and falls. Conversely, accidents causing extensive property damage may leave those involved unscathed. The presence and extent of injuries are to be determined on the basis of evidence given in court.**
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> > [23] **Even a low-impact collision can cause injury, and it is the whole of the evidence, both lay and medical, that must be considered to determine whether there has been an injury.** [emphasis added]

In *Duda v. Sekhon,* 2015 BCSC 2393, 2015 CarswellBC 3746, the 25-year-old female plaintiff was in two motor vehicle accidents. Immediately following the first accident, in which she was rear-ended, the plaintiff began to experience pain and stiffness in her left shoulder girdle. In the second accident, the injuries from the first accident were aggravated, and the plaintiff began to experience mid and low back pain extending into the buttocks. A collision investigation report found that the speed of the first collision was less than 11 km/hr and caused only minor damage to the plaintiff's vehicle. An injury biomechanics report found that the plaintiff was wearing a properly functioning seatbelt and did not anticipate the collision. The report concluded that the plaintiff suffered a whiplash injury consistent with collision exposure. The defendant argued that neither of the two accidents caused significant motor vehicle damage. Ball J found that the plaintiff's evidence concerning her injuries was credible and held that the limited vehicle damage did not provide a reason to doubt her testimony:

> [62] Counsel for the defendants spent considerable time and effort making the submission that the two accidents did not cause significant motor vehicle damage. However, it has been clearly established in Canadian law that minimal motor vehicle damage is not "the yardstick by which to measure the extent of the injuries suffered by the plaintiff". […]
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> [67] I find Ms. Duda to be entirely credible. She did not seek to exaggerate and her evidence was present-

> ed in a direct manner. She was responsive to questions, including questions posed in cross-examination. I accept her evidence with regard to her symptoms, both past and present. There was no evidence at all of any pre-existing injury or condition. I am satisfied beyond any doubt that her injuries and ongoing symptoms were caused by the two accidents in 2012. While the accidents were not significant and the damage to the vehicles was slight, the evidence points to no other cause of the injuries and symptoms experienced by Ms. Duda [emphasis added].

In *Dabu v. Schwab*, 2016 BCSC 613, 2016 CarswellBC 927, the 54-year-old female plaintiff suffered from neck, back, and shoulder pain, as well as psychological problems including a major depressive episode and panic attacks after a low velocity rear-end collision. The defendant testified that the accident was a "love tap" and that the plaintiff's vehicle had pre-existing damage (which the plaintiff later admitted to). Steeves J nonetheless found that the medical evidence established the plaintiff's physical and psychological injuries, which affected her personal life and work, were causally connected to the accident:

> [29] Finally, it is well-established that minimal vehicle damage is not the "yardstick" to measure the extent of a plaintiff's injuries. That may be the philosophy of insurance carriers but it has no application in court and no medical basis. **The presence and extent of injuries are determined on the basis of evidence rather than extraneous theories** (*Duda v. Sekhon,* 2015 BCSC 2393 (B.C. S.C.), at para. 62, citing *Lubick v. Mei,* 2008 BCSC 555 (B.C. S.C.), at para. 5, citing *Gordon v. Palmer (1993),* 78 B.C.L.R. (2d) 236 (B.C. S.C.)) [emphasis added].

While not stating the principle as definitively as the British Columbia courts, the Alberta courts have awarded damages for injuries sustained in low-impact collisions with minimal property damage based on the same reasoning. In *Pfob v. Bakalik*, 2003 ABQB 819, [2003] AJ No 1204, appeal dismissed 2004 ABCA 278, 354 AR 359, the plaintiff initially continued to work after the accident despite experiencing concussion-like symptoms, but several months later, he took ten month off work to heal, based on the advice of his doctors. The defendant argued that the damages claimed were out of proportion to the low impact of the collision and the plaintiff's injuries could only have been explained by a pre-existing condition. Erb J found that medical evidence to the contrary was compelling:

> [33] On causation, the Defendant argued that the damages claimed as a result of the impact for which it has accepted responsibility, are out of proportion to the low impact of the collision and must be explained by a pre-existing condition. This pre-existing condition as submitted by the defendant was a psycho-social disorder which has manifest itself in physical pain.
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> [34] **It is not the amount of damage which is the determining factor in whether an individual is injured in a lower impact collision.** Members of the medical profession, among others, have established that an injury can occur where the head and neck are rotated or extended at the moment of impact. The impact on an acceleration-deceleration movement becomes exaggerated and the injury is more severe than it would have been had the plaintiff sat upright with his head against his head rest anticipating the accident and therefore protecting himself against it. [emphasis added]

The reasoning in *Pfob* is the closest the Alberta courts have come to an explicit statement affirming the principle set out in the BC jurisprudence. However, the manner in which other decisions have applied the principles of causation appear to reflect similar considerations.

In *Goertzen v. Sandstra*, 2005 ABQB 623, [2005] AJ No 1134, the plaintiff was stopped at a red light when a vehicle that was hit by another vehicle ran into him in a chain reaction collision. It was estimated by an accident reconstructionist and biomechanist that the speed change sustained by the plaintiff's vehicle was between 3.5 and 12 km/hr. Notwithstanding the minor impact, the plaintiff had not worked since the accident. According to the plaintiff, immediately after the accident he felt a shooting pain in his neck that extended through his shoulder and down to his arm. It was later determined that he had injured his C2 and C3 facet joints in the accident, and this eventually developed into chronic pain, depression, and generalized anxiety disorder. The plaintiff was involved in a second motor vehicle accident approximately two years later that was a more significant impact and exacerbated his injuries. Concerning the first accident, however, Hawco J found that the extent of the plaintiff's injuries were believable, notwithstanding the low impact of the collision, and applied basic principles of causation:

> [70] From early June 2003, Mr. Goertzen's condition appeared to deteriorate significantly. His depression deepened, his anxiety increased, and his pain increased. **By the time of the second accident, Ms. Kim MacIsaac had already determined that he was unemployable.**
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> [71] The first accident **would not, in the normal course of events, have done anything more than cause, at the most, a mild whiplash.** According to Dr. Russell, that accident could not physically have caused Mr. Goertzen to suffer the injuries which presently plague him. Rather, what has caused Mr. Goertzen's injuries is not the trauma which he suffered but his reaction to the initial trauma. […] A person such as Mr. Goertzen may have been suffering from [internal] stressors but **was functioning and coping prior to the initial accident.** Then an incident such as the initial accident occurs which can bring about certain symptoms which then serve to become an acceptable cause of a disability to a susceptible person. Dr. Russell believed that Mr. Goertzen was such a person. In his view, chronic pain reflects various forms of internal stressors. Some people focus on it and worry about it. They restrict their activities because of it. This leads to further symptoms and often to chronic pain.
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> [75] As earlier stated by Justice Major in Athey, it is not necessary that a plaintiff establish that the defendant's negligence was the sole cause of the injury. **All the plaintiff need do is establish that the defendant's negligence caused or contributed to the injury.** Even Dr. Russell concedes that the initial accident may have been the trigger which brought many internal stressors into play. I am satisfied that it was. The defendants are, therefore, liable to the plaintiff for his injuries, subject to the impact of the second accident and the plaintiff's duty to mitigate [emphasis added].

In *Meehan v. Holt*, 2010 ABQB 287, (2010) 485 AR 1, the 42-year-old female plaintiff was a passenger in a vehicle being driven by her friend. The driver hit the brakes and the collision occurred in the middle of the intersection. The plaintiff remembers that her seatbelt locked, and her head went forward and then back. No part of

her body struck any part of the vehicle, and the cost estimate for repairs to the vehicle was under $1,500. Immediately after the accident, the plaintiff felt shock, headache, and neck pain. She felt flushed and hot, neck pain, shoulder pain, a severe headache, and sore jaw. Her mobility was greatly restricted, she had ringing in her ears, and a sharp pain in her mid-thoracic spine. Her back pain worsened over the next few days, and she had trouble sleeping. An expert for the defendant prepared a report that stated that the impact of the collision was minor, with an instantaneous forward speed loss of 4-7 km/hr while in contact with the other vehicle. The plaintiff argued that although the nature of her injuries seemed quite severe and unexpected given the minimal change in velocity identified in the expert report, she was not a crumbling skull plaintiff. The defendant conceded that the plaintiff had suffered injuries but argued that these had already resolved, and the ongoing injuries were not causally linked to the accident. Sullivan J observed that *Athey* makes it clear that if a 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 liability (at para 224). Applying the "but for" test, the plaintiff would not be suffering from her injuries but for the accident, as the forces involved in the collision either caused or materially contributed to her injuries:

> [221] The parties agree that the test for causation in law has been set out by the Supreme Court of Canada in *Athey v. Leonati*, [1996] 3 S.C.R. 458 (S.C.C.) and *Hanke v. Resurfice Corp.*, 2007 SCC 7, [2007] 1 S.C.R. 333 (S.C.C.). **In *Athey*, the court reiterates that causation is established where the plaintiff proves to the civil standard on a balance of probabilities that the defendant caused or contributed to the injury. The court goes on to state that the general test for establishing causation is the "but for" test, which requires the plaintiff to show that her loss would not have occurred but for the defendant's negligence.** The court recognized that in certain circumstances the "but for" test may not be workable and that in such cases causation may be established where a defendant's negligence "materially contributes" to the occurrence of the loss: *Athey*, paras. 13-15.
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> [222] In *Resurface Corp.,* the court took the opportunity to clarify the test for causation, confirming that the basic test for determining causation remains the "but for" test, which recognizes that compensation for negligence should only be made "where a substantial connection between the injury and defendant's conduct" is present. The court went on to state that in special circumstances, the "law has recognized exceptions to the basic 'but for' test, and applied a 'material contribution' test" [emphasis added].

By contrast, the decision in *Pettipas v. Klingbeil*, 2000 ABQB 378, 260 AR 1 illustrates circumstances where the court found that evidence of the reconstruction experts supported a finding that the plaintiffs' injuries were not as severe as they claimed. The plaintiffs were a husband and wife who suffered injuries in a motor vehicle accident when they were hit from behind by the defendant. An accident reconstructionist estimated the impact velocity of the defendant's vehicle was between 8-10 km/hr. The defendant driver was not injured in the accident. Hutchinson J found that the low impact of the collision and the medical evidence together cast doubt on extent of the plaintiffs' injuries, which they claimed were ongoing seven years post-accident:

> [55] A critical review of the totality of all of the claims of both Mr. and Mrs. Pettipas as disclosed in the amendments to their Statement of Claim which have been described above and which remained unaltered at the end of the trial **compared to my finding of a comparatively low impact collision resulting from the motor vehicle accident and using the actual available medical evidence leads me to conclude that the**

> **plaintiffs' claims have been magnified out of all proportion to their actual damages.** This includes the quantification of their non-pecuniary losses taking into consideration the extent of their physical and emotional injuries and the period of time over which they actually suffered. In the case of Mrs. Pettipas, I find that she should have recovered on her before the second anniversary date of the accident, that is, December 10th, 1994. [emphasis added].

The above decisions therefore confirm that there is no legal rule supporting a direct correlation between vehicle damage and the extent of a plaintiff's injuries. In all cases, the basic rules of causation apply. Evidence that a collision was low impact or caused little vehicle damage, while not irrelevant, must be weighed against other available evidence, such as medical records, expert reports, and the plaintiff's own testimony. Where the plaintiff can provide credible evidence showing that the defendant's negligence is the cause of his/her injuries, the defendant is liable.