REPORT TO THE
ROYAL COMMISSION ON WORKERS COMPENSATION IN BRITISH COLUMBIA

Application of Legal Causation Principles
Assessment of Permanent Partial Disability Pensions
Deeming of Employment Opportunities

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A Comparison of the Workers Compensation and Tort Systems

Janet Currie,
Barrister & Solicitor

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A Comparison of the Workers Compensation and Tort Systems
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INTRODUCTION AND PRELIMINARY COMMENTS

This report deals with the following three topics:

- Application of Legal Causation Principles in the Tort and Workers Compensation Systems
- Loss of Earnings vs. Loss of Function/Physical Impairment Approaches to Assessment of Permanent Partial Disability Pensions
- Deeming of Employment Opportunities in Assessment of Loss of Earnings Permanent Partial Disability Pensions

As these three topics involve a number of overlapping issues, I concluded that they would be most efficiently dealt with in a single report. The remaining topics assigned to me, relating to fundamental entitlement issues, philosophical underpinnings of the workers compensation system, and the scope of reconsideration, re-opening and appeals will each be dealt with in separate reports.

The primary focus of my research and analysis in each subject area has been a comparison between the principles applied in the tort system and the workers compensation system. The fact that this comparison is made does not imply that one system is superior to another or that the workers compensation should aim to emulate all features present in the tort system. Rather, the object has been to identify similarities and differences between the principles applied under each system and, in the case of differences, to analyse and discuss the reasons why differences may or may not be appropriate or desirable.

That said, it should be noted that there have been some instances where courts have suggested that problems may arise if the workers compensation system departs too far from the tort regime.

One concern is that there may be some potential, albeit remote, for infringement of the Charter of Rights. For example in Reference re Workers’ Compensation Act, 1983 (Nfld.), ss. 32, 34 (1987) 44 D.L.R. (4th) 501 (Nfld. C.A.); appeal dismissed (1989) 56 D.L.R. (4th) 765 (S.C.C.), a worker’s dependent unsuccessfully challenged Newfoundland’s Workers’ Compensation Act under the equality provision of the Charter on the basis that it some parties injured by another’s tortious conduct of their right to sue the wrongdoer. While the Supreme Court of Canada gave scant reasons, the Newfoundland Court of Appeal commented in detail on the comparative advantages and disadvantages occasioned to workers and their dependants by the historic compromise, noting that “[a] global approach must be made in comparing the benefits of the Act with the remedies precluded.” (At 512)
The workers and their dependents to whom the Act applies are deprived of the benefits which might otherwise be available to them but have all the benefits available to them under the Act. The legislature has ordained that some will receive more, some will receive less, than they otherwise might. This is the manner that has been chosen to structure the social regime of workers’ compensation.

It is not required that the legislature choose the best method. The Charter does not, and the court cannot, require that legislative policy be perfect. If the scheme is reasonable and fair when viewed globally, it will not be condemned, notwithstanding that it may have imperfections. (At 524. Emphasis added.)

It is clear that feature-by-feature or benefit-by-benefit parity between the workers compensation and tort systems is not required by the Charter’s equality provisions. However, some commentators have suggested on the basis of judicial comment such as the passage cited above that a Charter infringement may conceivably arise if the overall system viewed globally is not reasonable and fair. In my view, the chance of this is extremely remote. However, the Commission may want to keep this in mind as a background issue in considering the cumulative effect of numerous departures from principles applied or benefits available under the tort system.

A further issue to keep in mind is the extent to which a failure to apply principles which are applied by the courts in the tort system might give rise to reviewable error on applications to the courts for judicial review. For example, recent decisions of the B.C. Court of Appeal suggest that a failure to apply certain causation principles (in this case, novus actus interveniens, which is discussed the causation section of this report) can be “patently unreasonable” and hence open to review by the courts notwithstanding the privative clause in s.96 of the Act. (Kovach v. Singh, (1996) 84 B.C.A.C. 176; reconsidered [1998] B.C.J. No. 1245 (C.A.))

It is not yet known whether this issue will be the subject of a second appeal to the Supreme Court of Canada, which had previously shown what I would regard as a higher degree of judicial deference to workers compensation board determinations. For the time being, it should be considered a risk that any failure to apply legal causation principles and perhaps other fundamental tort principles could constitute reviewable error. In my view, the stronger the policy justifications for the application of different principles in light of the historical compromise and no-fault underpinnings of the workers compensation system, the smaller that risk becomes.

Similarly, I believe that the risk diminishes where the different applications of principle result in a positive or at least a less drastic negative impact on the rights and liabilities of workers and others. In Kovach v. Singh, the result of the decision overturned by the Court of Appeal was a worker’s loss of the right to sue a physician for negligence in connection with the treatment of her work-related injury. The court seemed particularly concerned with this negative effect as well as the prospect of doctors “shielding themselves” behind the Act from the consequences of professional negligence. In many cases, departing from principles applied in the tort system will result in a benefit rather than a detriment to a worker and I would not expect the courts to so readily find such departures “patently unreasonable” and thus reviewable error.
References below to provisions of the “Act” are taken from the Workers Compensation Act, R.S.B.C. 1996 c.492, and references to excerpts from the “Manual” are taken from the Rehabilitation and Claims Services Manual. I have not appended materials referred to below which are already available in the Royal Commission’s library. Except as noted, copies of legal authorities are attached to the original of this report.

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SUMMARY

PART 1. LEGAL CAUSATION PRINCIPLES

Many of the same causation principles are applied in both systems. Where the two systems vary, there are often policy reasons, considerations relating to administrative feasibility, or statutory provisions imposing different burdens of proof which might explain the different approaches.

Factual Causation: To establish factual causation, tort law begins by asking whether the plaintiff’s damages would have occurred “but for” the tortious conduct. That inquiry often proves unhelpful, in which case the tort system then focuses on whether the tort made a “material contribution” to the harm suffered. I found no significant differences in the tests applied in the workers compensation system for the purpose of assessing the necessary basic cause-and-effect link between damages and employment.

Remoteness and Foreseeability: Compensation may still be denied in the tort system on the ground that the damages in issue are too remote. That issue tends to depend on whether a reasonable person in the position of the tortfeasor would foresee the damages in issue as likely to result from his or her wrongful act. There is no settled test in tort law for precisely how unlikely the damages must be to be classed unforeseeable. In general, the less likely it is that a reasonable person would have been able to foresee that the particular type harm in issue might result from the tort in issue, the less likely it becomes that a court will award compensation.

Foreseeability tests do not appear to be applied under the workers compensation system. However, I think that the general trend in tort law is also moving away from the application of foreseeability principles as other causation tests develop. In addition, the workers compensation system, unlike the tort system is not concerned with fault and therefore lends itself less readily to a test which requires an assessment from the wrongdoer’s perspective. It also may have less need for foreseeability rules since these arguably serve deterrence functions which are dealt with in other ways under the workers compensation regime.
Intervening Causes (*Novus Actus Interveniens*): In tort law, compensation may be denied where the chain of causation between the tort and the ultimate harm has been broken by an independent intervening cause in the form of a wrongful act by the plaintiff or a third party. The workers compensation system appears to have largely eliminated *novus actus* principles, except where a claimant’s own knowing and reckless selection of inappropriate medical treatment constitutes a “new cause” of disablement. Some recent authority from the B.C. Court of Appeal has suggested that failure to apply *novus actus* principles to the issue of third party misconduct may, at least in some circumstances, constitute jurisdictional error reviewable by the courts. However, the law is not currently clear on that point and there are also some compelling policy reasons why such principles might have little place in a no fault workers compensation system.

Where *novus actus* principles are applied in the workers compensation system with respect to conduct by a claimant, they appear to encompass a somewhat broader range of situations than contributory negligence principles. Contributory negligence principles generally relate to the pre-injury conduct of the worker, while *novus actus* principles relate to post-injury conduct. At present, only pre-injury conduct by a worker has no effect on compensation where the resulting injury leads to death or permanent disability. In contrast, it appears that compensation may still be affected where the worker’s subsequent choice of medical treatment causes results which are just as severe. The Commission may wish to consider whether the same rules should apply where either pre- or post-injury conduct by a claimant leads to death or permanent disability.

Pre-existing Conditions and Disabilities (“Thin Skull” and “Crumbling Skull” Rules): One of the most difficult areas of causation arises where a plaintiff’s injuries are triggered, accelerated or exacerbated by a pre-existing condition or weakness. Tort law makes a distinction between cases where victims’ injuries are unexpectedly severe as a result of pre-existing susceptibilities or predispositions which might never have troubled the plaintiff in the absence of the tort (known as “thin skull” situations), and cases where a pre-existing (though perhaps asymptomatic) condition is aggravated or accelerated by the tort (known as “crumbling skull” situations).

The thin skull situation is fairly straightforward. The general principle is that a tortfeasor “takes his victim as he finds him,” and as long as the tort is a material contributing cause, the full extent of the injury suffered by the victim is compensable. The same general principles appear to apply in the workers compensation system.

In the crumbling skull scenario, a tortfeasor is only responsible for the extent to which he or she has worsened the victim’s condition. The underlying principle is that if a plaintiff were compensated for disability which he or she would still have experienced in the absence of the tort, the result would be overcompensation. The general approach is to assess the worker’s pre- and post-tort condition and compensate on the basis of the difference between the two. This also appears to be the general approach in the workers compensation system.

A somewhat different approach has developed in tort law in a second branch of the crumbling skull rule in cases where pre-existing disabilities are asymptomatic at the time of injury. Since such a plaintiff had no active disability prior to the tort, measuring the difference as above would give misleading results and attribute the whole of the disability to the tort. Therefore, the court
instead measures the risk that the plaintiff’s condition would still have deteriorated had the tort not been committed and makes a corresponding deduction to take account of that risk.

The latter approach does not appear to be applied in the workers compensation system. In addition, none of the crumbling skull rules are applied with respect to temporary disability and health care benefits. As far as I can determine, these differences between the two systems are the result of deliberate policy choices, perhaps based on the idea that the costs saved by avoiding such complex factual inquiries outweigh the additional costs incurred in paying the higher benefits.

**Apportionment of Liability among Multiple Parties:** Where the acts of several parties contribute to a loss, there can be consequences both with respect to how much compensation the injured party can recover and who has to pay it. The rule in B.C. tort law is that the plaintiff can recover the full loss from any tortfeasor who legally caused part of it as long as the plaintiff was not also partially responsible (see **Contributory Negligence**, below). A tortfeasor who has paid more than the proportion of the harm he or she caused then has a right to contribution from other tortfeasors. For example, if a loss is caused 20% by defendant A and 80% by defendant B, the plaintiff is entitled to recover 100% from either defendant, who is then entitled to seek contribution from the remaining defendant in proportion to fault. Similarly, an injured party’s right to compensation under the workers compensation system is unaffected by the number of parties who caused the injury. The Act also provides for some apportionment of claim costs between different classes of employers depending upon who is responsible for an injury. However, those apportionment rules are much more limited than in the tort system. This may be explained in terms of administrative feasibility factors as well as the distinguishing emphasis on fault in the tort system.

**Contributory Negligence:** In tort law, a plaintiff’s compensation is reduced in proportion to the extent to which the plaintiff legally caused his or her own injuries. Also, where there are multiple tortfeasors and a plaintiff is contributorily negligent, the plaintiff loses the right to look to any one tortfeasor for recovery of the percentage of loss caused by all tortfeasors combined. Contributory negligence principles almost never apply in the workers compensation system, but are not completely eliminated. For example, under the Act, if a worker’s serious and wilful misconduct is the sole cause of his or her injury, no compensation is payable unless the injury results in death or permanent disability. There are conflicting policy reasons for why contributory negligence principles should or should not be incorporated into the workers compensation system and the Commission may want to consider whether the current approach strikes an appropriate balance between these.

**Presumptions of Causation:** There are no such presumptions in tort law, whereas several exist under the workers compensation regime, such as for example the presumption of causation in relation to recognized occupational diseases. For the most part, the presumptions employed are rebuttable and appear to be designed to enable adjudicators to address the real issues where they arise, while avoiding what are otherwise likely to be pro forma or repetitive inquiries.
PART 2. ASSESSMENT OF PERMANENT PARTIAL DISABILITY PENSIONS

In tort law, the assessment of lost earnings or earning capacity involves a detailed and highly individualized inquiry. The functional impairment approach to assessing permanent partial disability pensions has virtually nothing in common with the tort system. There is little to corroborate the premise that the degree of physical impairment correlates to income loss even in average terms. While such awards may be appropriate on the grounds of administrative feasibility and justifiable if they invariably lead to a more favourable result for the worker, they appear to have little to do with the estimation of “impairment of earning capacity” required by s.23(1).

The loss of earnings method of pension assessment is much more similar to the tort model in that each compares a pre- and post-injury level of earnings and bases compensation on the difference. However, there are some significant differences in how that assessment is made. In the tort system, the aim is to compare probable future earnings to what the plaintiff would have earned in the hypothetical future had he or she not been injured. In contrast, the workers compensation system almost always compares projected future earnings to the workers past earnings as measured up to the date of injury. As a result, future prospects and contingencies are generally ignored, with some limited exceptions such as cases involving workers who are younger or in the process of training for a new line of work at the time of injury.

In addition, except in limited circumstances, various benefits and other sources of income are not included in the assessment of a worker’s average earnings at the time of injury. For example, in tort law, fringe benefits which a plaintiff will not be able to fully replace through alternative employment are considered a loss and are generally compensable. In the workers compensation system, most such benefits are not considered either as part of the pre-injury average earnings or as the earnings available to the worker following injury. I have not been able to ascertain why the different approach is taken, although it may be based on administrative considerations relating to simplifying the inquiry.

With respect to other differences between the two systems, there appear to be a number of reasons why workers compensation assessments are less individualized and takes account of fewer factors. These include the fact that the resulting simpler inquiries save resources and costs and allow for a speedier process whereby disabled workers receive payments years earlier than their counterparts in the tort system. Also, in some cases, the difference will result in some workers being better off and some worse off, with the likelihood that collective justice is being achieved overall. For example, unlike the tort system, the workers compensation system does not take into account contingencies which might have affected the worker had there been no compensable injury. Since some contingencies are positive and some are negative, this will result in lower compensation for some and higher compensation for others.

In addition some of the effects of the more limited inquiry are mitigated by the provision for exceptions and the potential for future review of decisions. The latter point is in sharp contrast to the tort system where the adjudicator has only one shot at predicting the future and the plaintiff may be drastically affected if those predictions turn out to be in accurate. In the latter context, it becomes more important to undertake exhaustive inquiries which will minimize inaccuracies.
With respect to mitigation principles, the obligation of the injured party in both systems is to take reasonable steps to promote recovery from injury. While both systems apply the same general principles, the workers compensation system appears to leave adjudicators a discretion to reduce or suspend benefits even where a claimant has acted reasonably in refusing a certain course of medical treatment. That may simply be an inadvertent lack of clarity in the drafting of relevant provisions and policy. If it is intentional, I have not been able to ascertain the rationale for it, and it seems inconsistent with other policies relating to workers’ rights to make reasonable choices about their own health care.

PART 3. DEEMING OF EMPLOYMENT OPPORTUNITIES

The deeming process is used as part of the loss of earnings permanent partial disability assessment where a worker’s post-injury earnings (or lack thereof) are not considered an accurate measure of maximum earning capacity. In those circumstances, adjudicators may deem a range of occupations suitable and reasonably available to the worker over the long term and base the pension calculation in part on what the worker could be earning in such occupations.

There are several difference between this approach and the approach to loss of earning capacity assessments in the tort system. The tort system again undertakes a more detailed and individualized assessment. It is not restricted to assessment of average earnings over the long term if there is evidence that such a measure is inaccurate, but can take much greater account of an individual plaintiff’s future prospects and contingencies. This can result in higher or lower compensation depending upon whether those are positive or negative, so that while the workers compensation methodology may result in a less accurate assessment in individual cases, it may nonetheless fulfill the system’s collective justice objectives.

The tort system also requires that the question of alternative occupations available to a plaintiff be determined on a balance of probabilities. The workers compensation system instead requires an assessment of occupations “reasonably available” to the worker. This is quite a vague standard and may lead to determinations which are difficult for a worker or employer to challenge on any principled basis, as they may effectively be put in the position of having to prove deemed occupations “unreasonable.”

The tort system also appears to impose moderately less onerous duties to mitigate by taking alternative employment and seeking retraining. In general, as with medical mitigation, plaintiffs are only required to act reasonably in choosing among a range of alternatives, and are entitled, within reason, to consider other factors besides maximization of earnings in making such choices. The consequences of failing to mitigate may be somewhat greater in the workers compensation system as well, since the latter does not appear to take account of contingencies that mitigation would not have been effective, which the tort system does.

There appear to be a number of reasons why different approaches may be appropriate in the two systems. In particular, the less complex inquiries in the workers compensation model result in lower costs and reduced demands on administrative and adjudicative resources, as well as earlier payment of benefits. The prospects for ongoing re-evaluation, in contrast to the tort system’s
one-time determination, substantially reduces the risk that workers will be treated unfairly over the long term as a result of inaccurate assessments of their prospects at the initial adjudication. With respect to mitigation principles, the fault-based nature of the tort system arguably makes it more appropriate to impose lighter obligations to mitigate where there is an issue as to who should bear the greater costs and undertake the greater sacrifices as between innocent victim and wrongdoer. That is not a comparison made in the workers compensation context.

PART 1. APPLICATION OF LEGAL CAUSATION PRINCIPLES

I have been asked to consider the extent to which the workers compensation system incorporates legal causation principles which are applied in the tort system, and to identify and discuss differences in principles applied under the two systems. I note that my review focuses on the principles applied in determining causation and does not include procedural issues relating to the onus, standards or methods of proving causation, as I understand that the latter issues are included in the research projects undertaken by Sharon Samuels.

I have identified the following categories of causation issues which arise in the tort system: factual causation tests, remoteness and foreseeability principles, the role of intervening causes (a.k.a. “novus actus interveniens”), the effects of pre-existing dispositions or conditions (a.k.a. “thin skull” and “crumbling skull” principles), apportionment of liability among joint and several tortfeasors, and contributory negligence. Although it is occasionally classified as such, I have not considered the injured party’s duty to mitigate to be a causation issue and have instead addressed mitigation issues in my discussion of permanent partial disability pensions and deeming of employment opportunities.

I note as a preliminary point that “causation” in the two systems relates to different fundamental issues. In the tort context, the question is whether the losses claimed by a plaintiff were caused by someone else’s tortious conduct. In the workers compensation context, fault is, of course, generally irrelevant. There, the threshold causation issue for determining entitlement to compensation for personal injury relates to whether a claimant’s losses “arose out of and in the course of employment” (Act, s.5(1)). In the case of occupational disease, the issue is whether the disease “is due to the nature of any employment in which the worker was employed” (Act, s.6(1)(b)).

I also note as a general point that most of the causation principles discussed below are common law principles which have been developed and articulated by way of legal precedent. Section 99 of the Act provides that the board is not bound to follow legal precedent, but must give its decisions in accordance with the “merits and justice” of each case and, where disputed possibilities are evenly balanced, must resolve an issue in accordance with the possibility favourable to the worker.
The board is thus not obliged to apply any causation principles which are not embodied in workers compensation law or policy. In addition, s. 99 may oblige the board to apply causation principles in a manner which differs from the tort law context if doing so results in an interpretation more favourable to a worker. In that regard, I note that the tort system requires that the injured party prove causation on a balance of probabilities (i.e. 51% or greater). Thus, a situation where disputed possibilities relating to causation are evenly balanced would be resolved against the injured party. In the workers compensation context, s. 99 would require the opposite.

However, despite s.99 as well as the privative clause in s.96, as noted in the introduction to this report, there is a risk that in some circumstances a failure to apply legal causation principles could open the door to judicial review. The B.C. Court of Appeal has recently suggested that the application of different causation tests than would be applied in the tort system can constitute a “patently unreasonable” jurisdictional error. (Kovach v. Singh, supra)

Lastly I note that dispute resolution under the tort system involves an adversarial process in which it is assumed that evenly matched opposing parties will put all relevant matters before the adjudicator, and the courts therefore generally limit themselves to considering the issues, evidence and argument which the parties have chosen to put forward. In light of this aspect of the tort system, it is often the case that results reached by courts have been influenced as much by the scope and quality of what has been put forward by the parties as by legal principle. This can make for a fair degree of inconsistency in the treatment of very similar facts and issues even where the applicable principles are quite uncontroversial.

As a result of this, it is difficult to compare approaches taken in the two systems by contrasting specific decisions made under each, and in my view, it is generally inadvisable to draw conclusions from the fact that decisions made on similar facts and issues under the two systems may vary in result. While the following discussion refers to a number of specific decisions in order to illustrate how the theoretical concepts are applied in practice, I have for the most part focused my analysis on first principles rather than specific results in specific cases.

A. Causation in Fact

In my view, the same basic factual causation tests are applied in both the workers compensation and tort systems.

The first question in the tort system is whether there is in fact a cause-and-effect relationship between the tortious conduct in issue and the losses claimed by the plaintiff. The most basic factual causation test in tort law is colloquially known as the “but for” test. This test is met if it is shown that the losses in issue would not have occurred “but for” the tortious event - i.e. the loss would not have occurred in the absence of the tort.

While the “but for” test tends to dominate tort litigation and suffices in the majority of cases to establish causation, it is not a comprehensive test used to cover all types of causes. For example, there may be multiple causes which call for further inquiry, or there may be situations where the “but for” test is met technically met, but the law recognizes reasons why a defendant should not
be liable for the resulting losses. These situations are addressed by principles such as those relating to pre-existing conditions or dispositions, unforeseeable consequences, intervening causes which “break the chain of causation,” and other concepts addressed under separate headings below.

Apart from such issues, there may be circumstances where the “but for” test is unhelpful. Applied too literally, it could lead to liability for injuries linked to a wrongdoer’s act by only the most tenuous of connections. Courts have thus recognized a “material contribution” test, under which causation is established where a tortious event materially contributed to the occurrence of injury. A contributing factor is considered material if it falls “outside the de minimus range.” (Athey v. Leonati [1997] 1 W.W.R. 97 (S.C.C.) at 102) That range has not been defined with any mathematical precision, but simply means that causes which are trifling or insignificant will not be considered legally causative.

As a rule, the onus is on the plaintiff to prove causation on a balance of probabilities (i.e. 51% or greater). However, courts do not require that the causation tests be applied too rigidly and the Supreme Court of Canada has affirmed in recent years that causation is “essentially a practical question of fact which can best be answered by ordinary common sense.” Where a plaintiff provides sufficient evidence to support a common sense inference of causation, that can suffice despite the absence of positive scientific proof. (Farrell v. Snell (1990) 72 D.L.R. (4th) 289 (S.C.C.) (Headnote only attached.)

In the workers compensation context, basic causation inquiries generally focus on the extent to which the injury had anything to do with the worker’s employment. While the terms “material contribution” and “de minimis” are not used in the Act or Manual, adjudicators appear to apply the same general concepts in considering whether connections are sufficiently significant to establish causation. As in the tort system, common sense is the general guide where causation issues do not involve scientific issues falling outside the adjudicator’s realm of knowledge of expertise. For example, section #22.00 of the Manual provides as follows:

#22.00 COMPENSABLE CONSEQUENCES OF WORK INJURIES

Once it is established that an injury arose out of and in the course of employment, the question arises as to what consequences of that injury are compensable. The minimum requirement before one event can be considered as the consequence of another is that it would not have happened but for the other.

Not all consequences of work injuries are compensable. A claim will not be reopened merely because a later injury would not have occurred but for the original injury. Looking at the matter broadly and from a “common sense” point of view, it should be considered whether the previous injury was a significant cause of the later injury.
This is a clear direction not to rely solely on the “but for” test and to apply common sense. Again, adjudicators do not tend to use the actual term “de minimis”, but it appears that causes are generally considered “significant” within the meaning of #22.00 if they fall outside that range.

**B. Remoteness and Foreseeability**

A general principle of tort law is that a tortfeasor is not responsible ad infinitum for all consequences which can technically be traced back to the wrongful act, and there will be no recovery for losses which are deemed to be too “remote.” While some legal scholars bring a host of issues such as mitigation and intervening causes under the rubric of “remoteness,” I am using the term in its more limited sense as it relates to foreseeability of harm as the means of assessing whether damages are too remote for recovery.

To illustrate the foreseeability rule, a defendant who bumps a pedestrian with his car would be liable for lost earnings and the cost of crutches if the pedestrian then missed a couple of days of work due to resulting injury and had to purchase crutches in order to get around. Those types of losses are reasonably foreseeable consequences of careless driving. However, suppose the plaintiff proved that because she was unable to go to work the day after the accident, she did not have an opportunity to get in on the office group lottery ticket purchase and as a result she missed sharing in her co-workers’ $10 million lottery win. While this meets the technical requirements of the “but for” test, the defendant would not be liable for the plaintiff’s loss of her share of the lottery win because a reasonable person would not foresee such consequences of the tortious conduct in issue.

While foreseeability rules can be illustrated by extreme examples, courts have grappled with how to formulate a workable test for determining when losses are too remote. It is not necessary that the extent or seriousness of the resulting damage be foreseeable, as long as the general class or character of the harm could be foreseen. Beyond that, there is no settled test of reasonable foreseeability. Tests applied by courts include whether a reasonable person would foresee the damages in issue as “a probable consequence,” “a possibility,” “a real risk,” “not impossible,” or “not far-fetched.” Risks of harm as rare as one in 50,000 have been deemed within the range of reasonable foreseeability, leading some commentators to conclude that the foreseeability rules are unpredictable and now only rarely result in restrictions on the scope of liability in tort. (E.g. K. Cooper-Stephenson, Personal Injury Damages in Canada, 2d ed. (1996) at 814-817; L. Klar, Tort Law, 2d ed. (1996) at 339-341.)

I have not been able to identify any circumstances where reasonable foreseeability tests per se are applied in the workers compensation context. This may be appropriate in light of differences in the two systems and the roots of the foreseeability principle. The foreseeability rule takes the perspective of the “wrongdoer” and no such party is identified or required under the no fault workers compensation scheme. Also, among the underpinnings of tort law in addition to the compensatory principle are considerations of “distributive justice” (i.e. distributing loss in accordance with degrees of moral fault) and creating disincentives for blameworthy conduct. The idea is not that the plaintiff is any less deserving of compensation because he or she was unlucky enough to suffer unforeseeable consequences. Rather, the principle acknowledges that it is unfair
to hold defendants responsible for infinite consequences of their acts and that blameworthy conduct may best be deterred by limiting the liability of tortfeasors to consequences which they ought to have been able to foresee and allowing them to weigh and determine their conduct accordingly. In contrast, in the workers compensation system, the focus is more squarely on compensation, as blameworthiness is generally irrelevant and there are many other initiatives and regulatory powers which serve to deter conduct which might cause injury.

C. Multiple Causes

More complex causation principles apply in the tort regime where more than one factor is a material contributing cause to the damage sustained. The general rule is that there is no apportionment between tortious and non-tortious external causes. However, where the wrongful intervening act of a third party or the plaintiff exacerbates the injury caused by the tort, or where the plaintiff’s pre-existing condition or own conduct is a contributing cause, there may be some reduction in the extent to which the damage is compensable. I will discuss each of these situations under separate headings below.

(i) Intervening Causes (Novus Actus Interveniens)

Even where the “but for” test is passed and the injury suffered was reasonable foreseeable, recovery may be denied to a plaintiff in tort law where the chain of causation is broken by the subsequent intervention of an independent new cause, known as a novus actus interveniens.

Novus actus cases involve a wide range of situations. It is key to the application of novus actus principles that the intervening cause arise after the commission of the tort. Causes which arise earlier or at the same time as the tort are addressed by the other causation rules discussed below. The subsequent intervening act may be the act of a third party or the plaintiff. For example, a third party medical practitioner treating a compensable injury may exacerbate that injury through an act of negligence, or a plaintiff may exacerbate the injury through his or her own carelessness.

I note that it is only intervening conduct which is in some way wrongful that triggers novus actus principles. (There are quite a few cases where courts have purported to apply novus actus principles with respect to intervening acts which are not wrongful. However, in my view these decisions are at odds with the basic principle, recently affirmed in Athey v. Leonati, supra, that there should be no apportionment between tortious and non-tortious causes.) Thus, appropriate conduct by a plaintiff will not break the chain of causation and nor will a non-tortious act by a third party. Whether the consequences of such subsequent non-wrongful acts are compensable should be dealt with under ordinary causation principles such as the “but for” test, material contribution, remoteness and foreseeability, as outlined above.

It is much less common to see novus actus principles applied with respect to subsequent conduct by a plaintiff as opposed to a third party. Subsequent conduct which worsens a compensable injury is generally more likely to be addressed under principles involving a plaintiff’s duty to mitigate his or her own losses or, occasionally, under contributory negligence principles. (While mitigation principles do in some respects relate to causation, other issues are relevant as well and
I have addressed them in detail under the topics of permanent partial disability pensions and deeming of employment opportunities.) Thus, for example, a plaintiff who exacerbates a compensable injury by negligently failing to take medication or follow some other necessary aspect of treatment may have failed to mitigate and his or her damages might be reduced accordingly.

On occasion, however, *novus actus* principles do arise with respect to intervening acts by a plaintiff where these are so unrelated to the original injury that they are deemed to have broken the chain of causation. For example, it has been deemed a *novus actus interventiens* when a plaintiff who had been left with a shorter leg in a compensable car accident fell and broke the leg again while inebriated. Although there was an issue as to whether the condition of the plaintiff’s leg contributed in some matter to the subsequent injury, the plaintiff’s own carelessness was found to have broken the chain of causation. *(Priestly v. Gilbert (1972), 28 D.L.R. (3d) 553 (Ont. H.C.); affirmed (1973), 40 D.L.R. (3d) 365 (Ont. C.A.) (not attached)).* Suicide by a plaintiff is more frequently dealt with under “thin skull” principles (discussed below), but is occasionally addressed as a *novus actus*. In such cases, the focus of the inquiry is generally on whether the suicide is within the risks created by the tort. It is often unclear whether courts are really just applying material contribution or foreseeability tests in making such determinations.

*Novus actus* situations are not easy to identify and principles are at times applied by the courts in a seemingly inconsistent manner. This may be due to the fact that the rule is premised on two basic principles which may at times conflict. First, tort law recognizes that a tortfeasor ought generally to be held responsible for all reasonably foreseeable consequences of his or her acts. Second, tort law recognizes that an individual should not generally be held responsible for the wrongful acts of others. Where the wrongful acts of others are reasonably foreseeable, these principles come into conflict. Some courts have resolved them one way and some the other. I have not been able to identify any principled analysis or test which has been accepted to determine which principle should take precedence over the other.

Like the foreseeability test, the *novus actus* principle has diminished in importance over the past century as foreseeability has come to dominate remoteness assessments, as rules of apportionment have developed and provided other ways of addressing multiple causes and as the scope of the duty of care in negligence has widened to encompass greater responsibility for considering the potential future wrongful conduct of others in assessing one’s duties of care. *(Eg. K. Cooper-Stephenson, Personal Injury Damages in Canada at 824-5.)*

In my view, *novus actus* principles have been largely eliminated from the workers compensation system. The main area where such issues (i.e. events occurring subsequent to the original compensable event) might arise is covered by the portion of Chapter 3 of the Manual dealing with “Compensable Consequences of Work Injuries” (#22.00 to #22.34) The general approach to be taken by adjudicators is set out at #22.00:

Once it is established that an injury arose out of and in the course of employment, the question arises as to what consequences of that injury are compensable. The minimum requirement before one event can be considered as the consequence of another is that it would not have happened but for the other.
Not all consequences of work injuries are compensable. A claim will not be reopened merely because a later injury would not have occurred but for the original injury. Looking at the matter broadly and from a “common sense” point of view, it should be considered whether the previous injury was a significant cause of the later injury.

Thus, the general process focuses on “but for” and material contribution causation tests. No basic distinction is drawn between consequences arising from wrongful and non-wrongful subsequent acts in section #22.00 or in the subsequent sections dealing with specific contexts in which subsequent injuries arise. For example, at page 3-53, it is simply noted that if a worker who is being transported by emergency vehicle for treatment following a compensable injury is further injured in the course of that transportation, the further injury is also compensable. There is no direction to consider whether the injury in the course of transportation resulted from someone else’s negligence.

Thus, for the most part, the key question in the workers compensation context is simply whether there is a sufficient causal connection between the circumstances of the further injury and the original work-related injury. If the worker would not have been in the circumstances leading to the further injury had it not been for the original injury, that generally suffices to make the further injury compensable.

There is however some vestige of novus actus principles in section #22.11, which deals with further injury or increased disablement resulting from surgery which has been undertaken because of the original compensable injury. The section provides that such consequences are generally compensable, but notes the possibility for exceptions:

. . . No doubt an exception could be made if a claimant recklessly undertook surgery, knowing that it was likely to do more harm than good. In that case, a claimant might be viewed as having introduced a new cause of disablement. There may be other grounds for making an exception . . .

The section goes on to note that in the case of surgery not authorized by the board, a claimant should not be deprived of compensation unless he or she acted “foolishly” in being persuaded by surgeon that the particular surgery was the best course of action. In my view, the passage cited above invokes what amount to novus actus principles. It first requires some wrongful conduct on the part of a claimant, who must have acted “recklessly” or “foolishly,” and then considers whether that has broken the chain of causation and introduced a “new cause.”

I note that the above novus actus principles are only raised in connection with wrongful conduct by the claimant. There is no direction, for example, for the adjudicator to consider whether any negligence by a surgeon or health care worker involved with the surgery is a “new cause” which might render further injury non-compensable (although that possibility may be left open by the rather vague reference to “other grounds for making an exception).
I note that section #22.22, which deals with suicide by a claimant avoids novus actus considerations and simply focuses on whether the compensable injury was a material contributing factor to the suicide. If the suicide was unlikely to occur had it not been for the employment-related accident, then death benefits are payable. Similarly, in the case of a claimant’s alcoholism or drug dependency problems, section #22.34 directs the adjudicator to apply basic causation tests and, where applicable, the rules relating to pre-existing conditions.

The question arises whether the workers compensation system should limit the application of novus actus principles and, if so, whether it should eliminate them altogether or retain them for certain purposes. This question is somewhat more pressing in light of the Kovach v. Singh decision referred to above. In that case, the claimant had undergone surgery as a result of an original compensable injury, and she alleged that her surgeon’s negligence had greatly exacerbated her original injury. On a s.10 determination, the board held that there was a sufficient causal link between the compensable injury and surgery-related injuries. The board did not examine detailed medical evidence or attempt to determine whether there had been any professional negligence on Dr. Singh’s part, and essentially reached this result because the claimant would not have been having the surgery had it not been for the original injury.

In many cases, such a decision would be of benefit to a worker because it would result in compensation being available for the subsequent injury. However, in this case, the claimant wished to pursue the greater recovery which might be available through a legal action against her doctor. Since the doctor was registered with the board, the result of the board’s rulings under s.10 was to preclude such a lawsuit. On a judicial review application by the claimant, two of three members of the B.C. Court of Appeal found that the result was patently unreasonable as it avoided the whole issue of novus actus and was “inconsistent with any common sense view of causation.” (See (1996) 84 B.C.A.C. 176 at para. 37 and [1998] B.C.J. No. 1245, at para. 14.)

The judicial history of Kovach v. Singh is unusually complicated. The B.C. Supreme Court had upheld the board’s decision. A three member panel of the Court of Appeal overturned this result. Leave to appeal to the Supreme Court of Canada was sought. In the meantime, the latter court handed down a decision arising from a Saskatchewan case, concerning the scope and standard of review of workers compensation board decisions and emphasizing the degree to which courts should defer to the board’s decisions on judicial review applications. Rather than hearing an appeal, the Supreme Court of Canada remanded the matter to the B.C. Court of Appeal for reconsideration in light of this other decision. Two of the three Justices who heard the original appeal remained of the view that the board’s decision should be set aside and the matter has now been remitted to the board for reconsideration as a result. It seems likely that leave to appeal to the Supreme Court of Canada will again be sought, but the period for doing so has not yet expired and it is in any event uncertain whether leave would be granted.

Upon the subsequent reconsideration, Mr. Justice Donald of the Court of Appeal reversed his prior decision and declined to find the causation test applied by the board patently unreasonable. His reasons are worth citing at some length as they cover many of the issues the Commission may wish to consider in addressing whether the current scheme applies appropriate principles:
Was the result illogical? If the plaintiff had not been injured at work she would not have been treated by Dr. Singh. That fact forms a causal link connecting the employment related injury to the negligence alleged against the Dr. Singh. In my view, the causation finding would only be illogical if there were no connection. Whether the law should treat the connection as remote or proximate is a separate issue.

The Board was not bound to apply common law principles of causation, such as novus actus interveniens, in deciding the matter. No single theory of causation can be said to be infallible or universally applicable. What works for a tort based system my be unsuitable for a no fault scheme. It all depends on the policy goals of the system. The Board may decide that in order to encourage workers to undergo treatment for their industrial injuries, it must cover mistakes made during treatment. It may decide that it is unfair to deny coverage in such circumstances or inconsistent with a broadly inclusive policy of worker protection.

Different considerations arise when, instead of a collective fund, the purse of an individual defendant is put at risk. There it is important to determine whether an intervening act has broken the chain of causation. That is not an exercise in pure logic but a matter of justice in allocating responsibility between initial and subsequent tortfeasors.

The onus of proof in each system is different. Under the WCB scheme if the probabilities are evenly balanced the claimant succeeds in obtaining compensation. In tort law, the defendant wins.

Requiring the Board to apply the doctrine of novus actus interveniens creates the potential of confusion and delay for the injured worker. This is the consequence of mixing incompatible systems of compensation. For example, assume that the WCB ruled that the chain of causation was broken by medical negligence and a court later found that all or most of the worker’s problems were caused by the industrial injury. Neither the Board nor the court is bound by the findings of the other. The worker falls between the two systems.

What if the worker lacks the resources to pursue a medical malpractice claim or is unwilling to take the financial risk of losing? Even if he or she proceeds with an action, the time required in bringing the litigation to a conclusion and the uncertainties involved are potential deterrents. (At para’s 27-32)

However, notwithstanding these points, the remaining two Justices held that the board’s decision was patently unreasonable. As Mr. Justice Donald noted, the “truly vexing” aspect of the matter was the fact that a professional who participated in the workers compensation scheme as a “worker” or “employer” would be immune from action as a result of the board’s decision. That appears to have been a key factor for the majority of the court, which did not consider that workers’ professional malpractice claims need be barred “in order to protect the efficient functioning of the workers’ compensation scheme” and saw no evidence that the historic trade-off was intended to extend to cases of professional malpractice (per Madam Justice Newbury, at para. 12).
In my view, the points acknowledged by Mr. Justice Donald make a strong case for the current practice of applying broader causation principles rather than the novus actus doctrine in assessing the compensable consequences of original compensable injuries. As mentioned above, two fundamental principles underlying the novus actus rules are that parties who commit legal wrong should be held accountable for the foreseeable consequences of their acts and should not be held accountable for the wrongful acts of others. Both place a heavy emphasis on notions of fault and distributive justice, concepts which are fundamental to the tort system, but largely eliminated from the workers compensation regime.

With respect to the findings of the majority of the Court of Appeal in Kovach v. Singh, notwithstanding the comments about the inconsistence with “common sense” (which perhaps would more accurately be described as inconsistence with “common law”), it seems to me that one could see the real concerns of the majority as relating more to the interpretation of s.10 than the application of causation principles. The majority was particularly concerned that the breach of duty by the physician, viewed by the board as subject to the s.10 statutory bar against legal action, was not the same as the “breach” or event which gave rise to the worker’s right to compensation under s.5(1) (para.’s 17-20). Arguably, that is the nub of the majority’s decision and the decision does not mandate the application of novus actus or other specific legal causation principles in assessing the compensability of consequences of work-related accidents.

As was also noted in Kovach v. Singh, determining issues of professional negligence is not generally within the the scope of expertise of adjudicators in the workers compensation scheme. That is likely to prevent an adjudicator from being able to determine whether medical malpractice did occur if he or she was required to apply the novus actus doctrine. In relation to that concern, I note that the current section #74.11 of the Manual sets out a procedure whereby any board employee who concludes that there is prima facie evidence of medical negligence or malpractice is to report that information. Following review at various levels, the President makes a decision as to whether to proceed with an action. Presumably this procedure allows for more extensive consideration of novus actus principles than occurred prior to Kovach v. Singh while creating a body with more expertise to handle such issues in the professional negligence context.

If the Commission determines that the current general non-application of the novus actus doctrine is appropriate, the next question is whether the apparent exception referred to in #22.11, discussed above, should be retained or even expanded. As noted, a distinguishing feature is that this exception refers only to subsequent conduct by a claimant. It is also limited to circumstances where a claimant acts recklessly in proceeding knowing it is likely to do more harm than good (presumably a very rare occurrence).

Consideration should be given to whether this is consistent with other provisions relating to contributory negligence or failure to mitigate on the part of a claimant. I think that it is appropriate to make this comparison, as these are three aspects of a claimant’s role with respect to his or her own condition. Contributory negligence relates to the claimant’s role in causing the initial injury, novus actus is relevant to the claimant’s role in causing further consequences of the initial injury, and mitigation is relevant to the claimant’s role in failing to limit the effects of the initial injury.
I will discuss contributory negligence principles in detail below and mitigation issues are dealt with under the portions of the report dealing with permanent partial disability pensions (as to medical mitigation) and deemed employment opportunities (as to non-medical or “economic” mitigation). In general though, a claimant’s right to compensation is not affected by contributory negligence principles unless the claimant’s misconduct is serious and willful, is the sole cause of injury, and the injury does not result in death or permanent disability (s.5(3)). With respect to mitigation, a claimant has a general obligation to act reasonably in pursuing medical treatment and rehabilitation in order to minimize the effects of a compensable injury. Compensation is not generally reduced unless he or she has unreasonably refused medical treatment which is reasonably essential to promote recovery.

There appears to be essential parity between the treatment of novus actus and mitigation principles, both of which apply to a claimant’s conduct following injury. For the most part, a claimant whose actions following injury are not “clearly unreasonable” (#22.11) will be fully compensated for the ultimate extent of injuries suffered.

However, there are some similarities and some distinctions between the principles applied with respect to conduct causing the initial injury (i.e. contributory negligence) and subsequent conduct causing an exacerbation or further injury (i.e. novus actus). It appears that in both cases, the claimant’s conduct must be the sole cause or what amounts to the sole cause of the injury. In the case of contributory negligence, only “wilful” misconduct can result in the loss of compensation. While section #22.11 refers to “recklessness” or “foolishness,” an element of deliberateness seems called for there as well, since the worker must undertake surgery “knowing that it is likely to do more harm than good.”

The difference lies in the fact that pursuant to s.5(3) of the Act, contributory negligence principles do not operate to reduce compensation if the injury in issue results in death or permanent disablement. I have not found a similar limitation with respect to the novus actus exception referred to at section #22.11. Thus, it appears that where a worker’s reckless or foolish decision to pursue ill-advised surgical treatment leads to death or permanent disability, those consequences may not be compensable. That may be contrary to the broader compensatory intent evidenced by s.5(3) of the Act. On the other hand, situations covered by section #22.11 are removed from the original injury by “one link in the chain” and the Commission may wish to consider whether that alone is reason for treating the consequences of compensable injuries any differently than the original compensable injuries. If not, it would seem appropriate to clarify that the policy referred to in #22.11 does not apply in cases of death or permanent disability.

(ii) Predispositions and Pre-existing Conditions

A particular challenge under either regime is determining the “cause” of a loss where the injured party had a personal predisposition to injury or illness which resulted in the injury causing more severe harm than most people would experience.

In the tort system, the relevant principles for dealing with such situations are known as the “thin skull” and “crumbling skull” rules. Both arise where the plaintiff’s condition is made worse as a result of a pre-existing condition. At the risk of oversimplifying, the difference is that in the thin
skull situation, the plaintiff might never have suffered the ultimate harm in the absence of the tort and is therefore compensated for the full extent of his or her injuries. In the crumbling skull situation, the plaintiff would have experienced some ill effects from the pre-existing condition in the absence of the tort, and is therefore compensated only to the extent that the tort has made the condition worse.

The thin skull case was recognized by Mr. Justice Tysoe in his 1966 report:

The concept of taking a workman as he is is borrowed from a general principle in the law of tort. But the principle is not so wide as some persons seem to think it is. It does not mean that a tort-feasor must pay for a disability which existed in the victim prior to his being injured by the tort-feasor. All it means is that, to take an easy example, if your victim happens to have a thin skull or abnormally brittle bones and as a result the injury has more harmful effects to him than it would have to a person with a normally thick skull or with normally sound bones, you must nevertheless pay for all the harmful effects. This principle is followed and applied by the Board. In my opinion, it is a sound one and properly applicable in workmen’s compensation cases. (At p. 207)

A classic thin skull case is the recent Supreme Court of Canada decision in Athey v. Leonati [1997] 1 W.W.R. 97. The consensus appears to be that the decision does not state new causation principles, but clarifies the existing law. Prior to Athey, there was considerable inconsistency in the case law as well as confusion between thin skull and crumbling skull doctrines. It remains to be seen whether Athey will result in a more consistent approach.

In Athey, the plaintiff was a man in his mid-40’s who sustained neck and back injuries in two successive motor vehicle accidents. Prior to the accidents, he had had a history of back problems, although there had been no previous herniation. Several months after the accidents, he was doing some mild stretching exercises and collapsed with a herniated disc. The trial judge found on the medical evidence that the plaintiff had a predisposition to the disc herniation, and that while both that condition and the accidents contributed together to the injury, the accidents had played a causative role only to the extent of 25%. As a result, the trial judge awarded the plaintiff only 25% of his damages, and that decision was upheld by the Court of Appeal. The Supreme Court of Canada overturned this result, and held that since the accidents were a “necessary ingredient” and “material contributing cause”, the defendants should be fully liable for the injury. The Court set out the following propositions (at p. 109):

1. If the disc herniation would likely have occurred at the same time, without the injuries sustained in the accident, then causation is not proven.

2. If it was necessary to have both the accidents and the pre-existing back condition for the herniation to occur, then causation is proven, since the herniation would not have occurred but for the accidents. Even if the accidents played a minor role, the defendant would be fully liable because the accidents were still a necessary contributing cause.
3. If the accidents alone could have been a sufficient cause, and the pre-existing back condition alone could have been a sufficient cause, then it is unclear which was the cause-in-fact of the disc herniation. The trial judge must determine on a balance of probabilities, whether the defendant’s negligence materially contributed to the injury.

(As discussed under causation in fact, above, “material” contribution is defined in Athey and other cases as anything falling outside the de minimus range. Thus contributing factors which are trifling or slight will not be considered sufficient to give rise to compensation.)

Crumbling skull principles were also explained in Athey:

The respondents argued that the plaintiff was pre-disposed to disc herniation and that this is therefore a case where the “crumbling skull” rule applies. The “crumbling skull” doctrine is an awkward label for a fairly simple idea. It is named after the well-known “thin skull” rule, which 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 than they would be for the average person.

The so-called “crumbling skull” rule simply recognizes that the pre-existing condition was inherent in the plaintiff’s “original position” [i.e. prior to the tort]. 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 damage.

An example of a crumbling skull case is Pryor v. Bains (1986) 69 B.C.L.R. 395 (C.A.). In that case, the plaintiff had an extensive history of pre-accident health problems and was already off work as a result of some of these when she was injured by the defendant in a motor vehicle accident. The court distinguished her circumstances, where the pre-existing condition was “already manifest and presently disabling” from the thin skull situation where “the weakness or latent susceptibility of the victim is quiescent but is activated into being as a result of the tortious conduct” (pp. 399-400). As the pre-existing condition was found to be the cause of 75% of the plaintiff’s overall disability and the accident 25%, she was awarded only 25% of the assessed damages.
Athey refers to a different type of calculation of damages which may be necessary in crumbling skull cases:

. . . Likewise, 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 position.

This refers to the approach generally taken by the courts where a plaintiff’s pre-existing condition was active but asymptomatic at the time of injury. In a case like Pryor v. Bains where the condition is “presently disabling”, the plaintiff is generally compensated for the difference between his or her pre- and post-tort condition. This approach in not workable in the second type of case because if there were no symptoms prior to the tort, then measuring the difference between the pre- and post-tort condition would mean awarding the same compensation as in a thin skull case. A plaintiff whose condition would certainly have deteriorated irrespective of the tort would thereby be made better off, a result which tort law seeks to avoid. Therefore in such cases, the courts’ approach is to assess the full extent of the damages and then to adjust compensation in accordance with the measured risk that the plaintiff’s condition would have deteriorated in any event.

For example, a plaintiff might suffer an injury which left her suffering debilitating arthritis. Suppose that prior to the accident, she had not experienced any such symptoms. If the medical evidence showed that the accident triggered the injury, and that the plaintiff had a pre-existing disposition to arthritis but might never have developed it in the absence of the accident, thin skull rules would apply and the plaintiff would be fully compensated on the basis of her post-accident condition. If prior to the accident she had been suffering from arthritis but the accident made it twice as bad, she would be compensated under the first crumbling skull approach for half of her damages, i.e., the difference between her pre- and post-accident condition. If prior the accident she already had arthritis (which might be proven, for example, by way of evidence of x-rays showing the condition was present) but was not yet experiencing any symptoms of it, the second crumbling skull approach would apply. Thus, if the evidence showed that there was a 50% chance that her arthritis would have become symptomatic in the future regardless of the accident, her compensation would be reduced accordingly.

While the workers compensation system appears to accept many of the same principles underlying the thin skull and crumbling rules, there are some differences in specific approach. I note as a preliminary point that there has been some attempt, dating back at least as far as the Tysoe report and continuing in some of the submissions to the Commission to distinguish between “condition” and “disability,” where the former means the type of latent quiescent predisposition covered by the thin skull rules and the latter means the type of active pre-existing problem covered by the crumbling skull rules. I have not found this use of terminology to be consistent and have not used it myself or interpreted the following sections from the Act and Manual as using it.
#15.10 Worker Has Pre-existing Deteriorating Condition

There may be cases where an organ of the body is deteriorating, possible through disease, and it has reached a critical point at which it is likely to become a manifest disability. Some immediate activity might trigger the final breakdown. But if it had not been one thing it most likely would have been another, so this is only chance or coincidence whether it happened at work, at home, or elsewhere. The disability is one that the claimant would not have escaped regardless of the work activity, and hence the causative significance of the work activity is so slight that the disability is treated as having resulted from the deteriorating condition. The disability is the result of natural causes and is not compensable. A Board decision illustrates the point:

“An office worker goes to work at an office that is located above a store. He walks up one flight of stairs to his office and has a heart attack at the top. The evidence indicates a deteriorating condition of his heart. It indicates that a heart attack would not be unexpected and could be brought on by any activity at all. The disability is the result of natural causes and is not compensable.”

On the other hand, there may be other cases where the deteriorating condition was such that, in the absence of some exceptional strain or other exceptional circumstance, it was not likely to reach a critical point and become a disability about the time of the work injury. The worker could well have survived without disability for months or years if something exceptional in the course of his employment had not triggered the disability. Here the employment situation had substantial causative significance and the disability is compensable. An illustration of the point comes from the Board decision which stated in part:

“A transportation worker is moving a 300 lb. load up a flight of stairs when the load slips, causing fright and strain. The worker has a heart attack. Again the medical evidence indicates a deteriorating condition of the heart. But it supports a conclusion that the worker could well have survived for months or years without a heart attack had it not been for this unusually strenuous experience. Here the employment situation appears to have had causative significance and the heart attack is compensable.”

It is sometimes said that an event at work “triggered” the disability. This does not, however, determine whether the disability is compensable. The circumstances, including the condition of the worker, must be investigated in such cases to determine which of the above applies.
The approach to be taken with respect to the aggravation of diseases is addressed in section #26.55 of the Manual:

Where a worker has a pre-existing disease which is aggravated by work activities to the point where the worker is thereby disabled, and where such pre-existing disease would not have been disabling in the absence of that work activity, the Board will accept that it was the work activity that rendered the disease disabling and pay compensation. Evidence that the pre-existing disease has been significantly, activated, or advanced more quickly than would have occurred in the absence of the work activity is confirmation that a compensable aggravation has resulted from work.

This must be distinguished from the situation where work activities have the effect of drawing to the attention of the worker the existence of the pre-existing disease without significantly affecting the course of such disease. For example, a worker who experiences hand or arm pain due to an arthritis condition affecting that limb will not be entitled to compensation simply because they experience pain in that limb from performing employment activities. Similarly, a worker with a history of intermittent pain and numbness in a hand/wrist due to a pre-existing median nerve entrapment (carpal tunnel syndrome) will not be entitled to compensation just because their work activities also produce the same symptoms. To be compensable as a work-related aggravation of a disease, the evidence must establish that the employment activated or accelerated the pre-existing disease to the point of disability in circumstances where such disability would not have occurred but for the employment.

The above section appears to create some confusion between thin skull situations (where the disease would not have become disabling but was activated by the employment) and crumbling skull situations (where the disease might have become disabling in any event but has been accelerated or aggravated by the employment). However, any such confusion is probably cleared up once the apportionment principles mandated by s.5(5) of the Act, below come into play.

The above sections of the Manual relate to whether compensation is available at all in cases of pre-existing conditions. In my view, they are generally consistent with thin skull principles in that they provide that compensation is still payable if more serious consequences result from an injury or disease as a result of a claimant’s pre-existing condition. That compensation is based on the full extent of the worker’s disability unless s. 5(5) applies. Section 5(5) deals with whether there should be an apportionment between pre-existing and work-related injury or disease:
5. (5) Where the personal injury or disease is superimposed on an already existing disability, compensation must be allowed only for the proportion of the disability following the personal injury or disease that may reasonably be attributed to the personal injury or disease. The measure of the disability attributable to the personal injury or disease must, unless it is otherwise shown, be the amount of the difference between the worker’s disability before and disability after the occurrence of the personal injury or disease.

The relevant principle, known as “proportionate entitlement” is elaborated upon at section #44.10 of the Manual in connection with permanent disability awards. The preceding section has indicated that #44.10 deals with cases where compensability has already been accepted and does not concern itself with the initial adjudication “as to the causation of the particular disability.”

**#44.10 Meaning of Already Existing Disability**

The mere fact that a worker suffered from some weakness, condition disease, or vulnerability which partially caused the personal injury or disease is not sufficient to bring Proportionate Entitlement into operation. The pre-existing condition must have amounted to a disability prior to the occurrence of the injury or disease.

Three situations are distinguished:

1. In cases where it has been decided that the precipitating event or activity, and its immediate consequences, were so severe that the full disability presently suffered by the claimant would have resulted in any event, regardless of any pre-existing disability, Section 5(5) should not be applied.

2. In cases where the precipitating event or activity, and its immediate consequences, were of a moderate or minor significance, and where there is only x-ray evidence and nothing else showing a moderate or advanced pre-existing condition or disease, Proportionate Entitlement should not be applied. These cases should not be classified as a disability where there are no indications of a previously reduced capacity to work and/or where there are no indications that prior ongoing medical treatment had been requested or rendered for that apparent disability. In determining whether there has been ongoing treatment, regard will be had to the frequency of past treatments and how long before the injury they occurred.

3. Where the precipitating event or activity, and its immediate consequences, were of moderate or minor significance, but x-ray or other medical evidence shows a moderate to advanced pre-existing condition or disease, and there is also evidence of a previously reduced capacity to work and/or evidence of a request for and rendering of medical attention for that disability, Section 5(5) should be applied.
These rules apply to all permanent partial disability awards assessed on or after March 15, 1978.

Section 5(5) only applies where an injury is “superimposed” on an already existing disability. The injury and existing disability must be in the same part of the body. . .

Proportionate Entitlement is, as a matter of policy, not applied to temporary disability and health care benefits (section #44.20). It is applied where injuries arising as the consequences of treatment of compensable injuries are superimposed on an already existing disability (#22.12).

One pronounced difference between the tort system and the workers compensation system arises with respect to entitlement to temporary disability or health care benefits. In such cases, the effect of the above is that a worker receives such compensation on the basis of thin skull principles even in crumbling skull circumstances. However, given that such benefits tend to be less costly and thin skull/crumbling skull inquiries notoriously entail difficult and complex medical investigations, it may simply be more cost effective to pay the benefits than to delve into these issues at the initial adjudication stage and, no doubt, have numerous such matters end up before Medical Review Panels.

Another difference is that the apportionment called for by crumbling skull rules and s.5(5) is only applied where the injury and existing disability are in the same part of the body. I have not yet been able to determine the basis for this limitation, although it seems likely that in the vast majority of cases, both pre-existing disability and injury do so coincide. The policy may be the result of a choice to pay somewhat more in a few cases than the amount that might be required by the strict application of apportionment rules, in order to avoid costly and time-consuming inquiries into more far-fetched alleged connections between pre-existing conditions and post-injury disabilities in a larger number of cases.

The approach set out in the first situation referred to in #44.10 regarding proportionate entitlement is generally consistent with tort rules in that there is no apportionment where “the full disability presently suffered by the claimant would have resulted in any event,” i.e. without the pre-existing condition playing any material or significant role. However, the Manual suggests that a determination of whether this is the case be made on the basis of the precipitating event being “severe”. As discussed below, the severity of the precipitating event might or might not be relevant to the question of whether a disability would have developed in any event, as might many other factors. It is not clear why the Manual places such emphasis on this factor.

Likewise, the third situation outlined in #44.10 is broadly similar to the first branch of the crumbling skull rule in the tort context. In effect, that section along with s.5(5) provides that if there is medical evidence that the claimant had an active and symptomatic pre-existing condition, which was already causing the claimant reduced work capacity and/or for which the claimant was already seeking medical attention at the time of injury, then compensation would be based on the difference between the claimant’s disability before and after the compensable event. Again however, #44.10 suggests that whether the precipitating event was of “moderate or minor significance” is of relevance.
The second situation outlined in #44.10 not only departs from the application of the second branch of the crumbling skull rule, but seems to be specifically designed to oust it. This part of #44.10 appears to deal with a situation in which a claimant has an active but asymptomatic pre-existing condition which was not yet having an impact on the claimant. In such cases, the policy directs that s.5(5) will not apply, so the effect is presumably that compensation is paid for the full extent of disability and no account is taken of any risk that the claimant might have been just as badly off in the absence of the precipitating event.

I note that s.5(5) would be difficult to apply to the second part of the crumbling skull test anyway, since that section specifically refers to measuring the difference between the disability before and after the compensable occurrence, an approach which the tort system has recognized as resulting in overcompensation in the case of active but asymptomatic prior conditions. However, s.5(5) does appear to leave the door open to other methods of assessment by specifying that this is the measure “unless it is otherwise shown.”

I have not as yet been able to determine why the “severe,” “moderate” or “minor significance” of the precipitating events are given such emphasis in #44.10. I would have thought that the only relevant question would be whether the precipitating event was a material or significant contributing factor in order to determine whether it should be taken account of at all under ordinary causation principles. If those tests are met, then presumably the precipitating is established as a contributing cause. I am uncertain how the severity of the event is relevant to the question of whether the post-event disability would have developed in any case and it is the latter question which much of #44.10 makes relevant. It may simply be that in particularly severe or calamitous accidents, basic causation is quite obvious and a policy decision is made to ignore the effects of any pre-existing conditions.

I have also been unable to determine with any certainty why only the first branch of the crumbling skull rule is applied. The second branch has caused a good deal of confusion in the tort setting and may be that the different approach in the workers compensation is the result of similar confusion. However, as noted, the relevant portion of section #44.10 appears to have been specifically drafted to address such crumbling skull cases and this makes it seem unlikely that the approach is the result of confusion rather than deliberate choice.

I do note that it is apparent from a review of decisions under the tort system that the second branch tends to raise the most difficult, complex, and often speculative issues for adjudicators to resolve. There is no question that eliminating such inquiries from the workers compensation system must result in a significant saving of resources on the part of claimants, their employers and the system itself. However, it is very likely that the failure to apply such tests also results in the compensation of some workers for disabilities which they would have sustained irrespective of the compensable injury or disease. Given the many concerns expressed to the Commission about the rising costs of permanent disability pensions, this may be a factor which the Commission wishes to take into account, although I do not know if there is a precise or accurate means of measuring and comparing the relative costs saved in avoiding these inquiries as opposed to the funds spent on awards which might be reduced if such inquiries were undertaken.
(iii) Apportionment among Multiple Parties other than Plaintiff or Claimant Worker

In British Columbia, the Negligence Act, R.S.B.C. 1996, c. 333 provides for the apportionment of liability among various parties determined to be at fault.

Apportionment of liability for damages

1. (1) If by the fault of 2 or more persons damage or loss is caused to one or more of them, the liability to make good the damage or loss is in proportion to the degree to which each person was at fault.

(2) Despite subsection (1), if, having regard to all the circumstances of the case, it is not possible to establish different degrees of fault, the liability must be apportioned equally.

(3) Nothing in this section operates to make a person liable for damage or loss to which the person’s fault has not contributed.

Liability and right of contribution

4. (1) If damage or loss has been caused by the fault of 2 or more persons, the court must determine the degree to which each person was at fault.

(2) Except as provided in section 5 if 2 or more persons are found at fault
   (a) they are jointly and severally liable to the person suffering the damage or loss, and
   (b) as between themselves, in the absence of a contract express or implied, they are liable to contribute to and indemnify each other in the degree to which they are respectively found to have been at fault.

These provisions require a court to apportion fault among various parties, whether or not those parties have been sued by a plaintiff or are actually before the court. The result of s. 4 is that where multiple parties have contributed to the plaintiff’s loss, their liability is both joint and several, which means that the plaintiff can look to any one of them for full recovery. (This is not the case if the plaintiff is not also partially at fault, as I will discuss in the next section on contributory negligence.) The tortfeasors then have a right of contribution against one another. For example, if one tortfeasor caused 20% of the plaintiff’s loss and a second joint tortfeasor caused 80% of the loss, the plaintiff would be entitled to recover 100% of his or her loss from the first tortfeasor. The first tortfeasor would then be entitled to pursue the second tortfeasor to recover the latter’s 80% contribution. As a result, it is a co-tortfeasor rather than a plaintiff who bears the risk of remaining tortfeasors being impecunious. That risk has already been eliminated in the workers compensation system as a key part of the historic compromise, and is therefore irrelevant in that context.
From the perspective of the injured party, the workers compensation system yields the same result as above, in that the claimant’s right to compensation is wholly unaffected by any apportionment of responsibility among those who caused the injuries. For example, if a claimant worker suffers compensable injuries in a motor vehicle accident caused in part by defects in the vehicle supplied by the employer and in part by the negligence of another worker driving another employer’s vehicle, it has no effect on the compensation available to the claimant whether the accident is 20% attributable to the defects in the vehicle driven by the claimant and 80% to the negligence of the other driver or vice versa.

From the perspective of those funding the compensation, there are some significant differences. Unlike the tort system, of course, the workers compensation system requires no apportionment of blame, which is to be expected in a no fault system. However, when it comes to charging of the claim costs, section 10(8) of the Act does allow for the transfer of claim costs in certain circumstances from the class of the claimant’s employer to the class of another employer. In principle, this is broadly similar to the common law rights of tortfeasors to seek contribution from one another. The object in both cases is to make an apportionment so that parties only end up paying an amount proportional to the extent of the harm which they themselves have caused. Thus, in the above example if the second driver’s employer had sent that employee out driving knowing the vehicle was defective or the driver was incapacitated, the employer of the injured worker might seek to have some of the claim costs charged to the second employer’s class to reflect the latter’s greater culpability.

Section 10(8) does not go nearly as far as tort law contribution principles, but instead limits apportionment of claim costs to certain circumstances:

10. (8) . . . where the board considers that
   (a) a substantial amount of compensation has been awarded as a result of the injury or death of the worker; and
   (b) the injury or death was caused or substantially contributed to by a serious breach of duty of care of an employer or an independent operator to whom this Part applies by direction under section 2(2)(a) in another class or subclass,

the board may order that the compensation be charged, in whole or in part, to the other class or subclass. . .

As is apparent from the above wording and noted in Chapter 17 of the Manual (at section #114.10 ff.), such transfers of costs can only be made where the amount of compensation is “substantial” (currently fixed by the Board at about $34,000.00 - see section #114.11) and there has been a “serious breach of a duty of care” which has “caused or substantially contributed” to the injury or death. These limits on apportionment are not applied in the tort system, where liability may be apportioned even if the loss in issue is very small, if the breach of duty was less “serious” but nonetheless contrary to law and causative of harm and/or if the breach was a relatively minor contributing factor and not a sole or “substantial” cause. A further difference is that the transfer of costs under s.10(8) is discretionary, while it is mandatory for courts to apportion liability among multiple tortfeasors.
The above distinctions may be justifiable on the grounds of both administrative feasibility and underlying policy. With respect to administrative factors, I note that the thresholds defined in s.10(8) allow the board (and in fact require it) to bypass questions of apportionment where the amount which would be charged to another class or subclass is likely to be relatively small. This would include cases where relatively little compensation is being paid to the worker or where the percentage borne by the other class is apt to be smaller because the breach in issue was trivial or only contributed to the loss to a minor degree. I am not aware of any studies or statistics on this point, but it seems reasonable to suppose that the costs of assessing apportionment of blame in every case might well outweigh the amounts in issue in the cases which are eliminated by the strictures of s.10(8). If that is true, then given that employers fund the overall system it would be to the advantage of employers as a class that resources not be spent on such inquiries.

In terms of policy, as noted, the workers compensation system is largely designed to avoid the need for inquiries into fault. In light of that, it may be appropriate for inquiries involving apportionment of blame between different employer classes to be the exception rather than the rule. This is not to conclude that it is appropriate to eliminate fault-based inquiries altogether, given the relationship between employer classes and funding of the system. Giving the board the discretion to apportion blame and shift costs between classes or subclasses allows the board to take this course where it considers that fairness so dictates and competing claims on resources allows.

A discretionary rather than a mandatory provision for apportionment leaves the board free to consider the “bigger picture” beyond each individual claim. For example, the board is presumably able to consider whether things tend to automatically balance out between classes without the need for formal apportionment under s.10(8) or whether there are particular classes in which breaches of the sort described in s.10(8) might arise more frequently and, without the apportionment process, lead to an inequitable distribution of costs.

(iv) **Contributory Fault on the part of Plaintiff or Claimant Worker**

In the tort context, a plaintiff’s contributory negligence can affect both the plaintiff’s rights against multiple tortfeasors who also caused the injury, as well as the amount of compensation to which the plaintiff is entitled.

With respect to the multiple tortfeasor situation, the apportionment principles outlined above only apply in B.C.’s tort system where the plaintiff is not partially responsible for his or her own injuries. Our *Negligence Act* has been interpreted to mean that where a plaintiff is partially liable, the liability of the remaining tortfeasors is only “several” and not “joint.” (See, for example, *Leischner v. West Kootenay Power* (1986) 70 B.C.L.R. 145. Headnote attached.) This means that the tortfeasors are only liable to the plaintiff for the extent of their own contribution. Thus, a “several” tortfeasor found to be responsible for 20% of the plaintiff’s loss is only responsible for compensating the plaintiff for that 20%, and the plaintiff must pursue the remaining tortfeasors for the rest.

This approach is unique to B.C. and often criticized as unfair and apt to lead to unduly complicated inquiries in complex cases. As noted above, in the workers compensation context, a
claimant’s right to recovery is unaffected by apportionment among multiple tortfeasors, so the issue does not arise in the latter context. That seems appropriate in a system which has sought to free workers from the risk of impecunious employers.

With respect to the plaintiff’s entitlement to compensation, the extent to which a plaintiff is responsible for his or her own injuries is always relevant in the tort system, and compensation is reduced in proportion to the extent to which a plaintiff’s own conduct caused the damages for which compensation is sought. Thus, for example, a plaintiff in a motor vehicle accident case may be denied full compensation if his or her failure to wear a seat belt contributed to the severity of the injuries sustained or if the fact that he or she was driving while impaired contributed to the occurrence of the accident. In such cases, compensation is reduced in proportion to the extent to which the plaintiff’s conduct caused the loss. Thus, if the failure to wear a seat belt caused 25% of the ultimate extent of the injuries, the plaintiff would be compensated for only 75% of his or her damages.

Section 105 of the Act expressly preserves contributory negligence principles in the assessment of damages in cases relating to employers in industries not within the scope of Part 1. Otherwise, contributory negligence principles apply under the workers compensation scheme only in the most circumscribed form.

Section #16.00 ff. of the Manual deals with a variety of situations involving “unauthorized activities” in which workers were participating at the time of injury, such as horseplay, substance abuse and assaults. All of these sections place the focus on whether a worker’s conduct was sufficiently employment-related rather than whether it was blameworthy. Again, this is not surprising given that the workers compensation system is not fault-based. However, there are some exceptional situations where a worker’s fault is relevant to the right to compensation. One is the minor exception in s.21(8) of the Act which provides that the board may repair or replace glasses, dentures and hearing aids which are broken in the course of employment-related accidents in which no personal injury occurred, if the board is satisfied that the worker was not “at fault.”

A further exception arises in connection with claimants’ conduct following injury. Section 57(2)(a) of the Act gives the board authority to reduce or suspend compensation where a worker “persists in insanitary or injurious practices which tend to imperil or retard his recovery.” (I will discuss s.57 further under mitigation principles in the part of this report dealing with permanent partial disability pensions. There is considerable overlap between the position of claimants who actually cause additional injuries by their post-accident conduct and claimants who simply fail to take steps which would help them to recover from already existing injuries. I have considered the latter type of case under mitigation principles because it does not involve causation issues per se.)

Section #78.12 of the Manual suggests two approaches with respect to claimants engaging in unsanitary practices. First, under s.57(2)(a), compensation should only be reduced or suspended while that conduct is persisting in the face of explicit warnings. “The section is intended as an inducement by [sic] workers to take more care in promoting their own recovery, and therefore is only applicable where the activity in question is continuing.” Second, #78.12 notes that compensation can be denied without invoking s.57(2)(a) at all if the worker’s unsanitary or injurious practices following injury caused the disability:
However, compensation may be denied without invoking [s.57(2)(a)] if the insanitary or injurious conduct engaged in by a claimant shows that the claimant was not disabled during the period in question, or if the evidence indicates that the disability was due to this conduct rather than to the original work injury.

Essentially, the final part of that paragraph seems to leave it open to an adjudicator to apply a combination of novus actus and contributory negligence principles and conclude that a claimant’s own conduct has broken the chain of causation.

The principal contributory fault-based exception is the one set out in s.5(3) of the Act:

5. (3) Where the injury is attributable solely to the serious and wilful misconduct of the worker, compensation is not payable unless the injury results in death or permanent disablement.

The question arises whether in a no-fault system, it ever makes sense to examine the worker’s degree of fault in bringing about his or her own injury and, if so, whether the current approach strikes an appropriate balance in the limited extent to which it takes account of a worker’s contribution to his or her own injury. In that regard, I note that on the wording of section 5(3), there are several limiting factors which do not apply in the tort system:

1. It is only “serious and wilful” misconduct which can affect a worker’s right to compensation. (Thus careless, but unintentional misconduct, even if it amounts to gross negligence will not affect a worker’s right to compensation. In the tort system, fault of any kind, including negligence can affect the extent to which compensation is payable.)

2. It is only where worker’s misconduct is the sole cause of the injury that compensation is affected. (The tort system requires apportionment between the worker’s conduct and other causes and corresponding reduction of compensation. Thus, for example, if an injured party’s damages were 90% attributable to his or her own wilful and serious misconduct and 10% to other factors, that party would receive only 10% compensation in the tort system but 100% compensation in the workers compensation system.)

3. Where an injury results in death or serious or permanent disablement, compensation is not affected by a worker’s misconduct, even if that misconduct was the sole cause of the death or disablement. (In tort law, allocation principles are not affected by the severity of the resulting injury.)

The workers compensation system has many aims apart from providing compensation for work-related injuries, not the least of which is the promotion of occupational health and safety. While the system aims at eliminating the need for workers to prove fault on the part of others, completely absolving workers of all consequences of the failure to take care for their own safety would not further the goal of workplace safety and might serve to undermine it. This may be the explanation for the inclusion of some consideration of worker fault, while the no fault nature of the system explains why that would be the exception rather than the rule.
Various explanations have been advanced for the inclusion of any fault-based inquiry and for the balance struck by s.5(3). According to some scholars, the aim of no fault schemes was never to eliminate victim fault from consideration but only to eliminate the need to prove fault on the part of another. (See, for example, K. Cooper-Stephenson, Personal Injury Damages in Canada, 2d ed. (1996) at p. 23.) On that reasoning, provisions such as s.5(3) go too far in eliminating victim fault as a consideration in most cases. It has also been suggested that provisions such as s.5(3) which minimize the effects of a victim’s responsibility came about as a result of historical error in the application of tort law principles in the area of employment law prior to the advent of workers compensation schemes (Cooper-Stephenson, p. 23). I have not as yet found any historical support for that conclusion.

Conversely, others suggest that the extent to which employment-related accidents result from the victim’s negligence was already taken into account globally in establishing categories of compensable harm and the types and levels of benefits. (See, for example, T. Ison, Workers’ Compensation in Canada, 2d ed. (1989), at p. 63) On that reasoning, provisions such as s.5(3) strike an appropriate balance or even go too far in considering worker responsibility in any cases. Again, I have not been able to locate any historical evidence of the alleged process of factoring in contributory negligence (at least in any formal or scientific sense) being undertaken in the determination of the scope of the Act or the compensation available under it. Instead, where compensation might be less than 100% of actual losses, that is more commonly justified as part of the trade-off of the need to prove fault and enforce judgments, and not related to the fact that some workers would have received reduced compensation under the tort regime as a result of contributory negligence factors.

While the specific details may differ, I note that provisions such as s.5(3) eliminating compensation for relatively “non-serious” consequences of serious worker misconduct are common in Canadian workers compensation legislation. Ison notes that even where such provisions are technically applicable, they rarely operate in practice to bar compensation. Since they only apply with respect to minor injuries, the cost of inquiry would often exceed the cost of paying compensation (Ison, p. 64). Issues for consideration by the Commission might include whether the current balance struck by s.5(3) provides a sufficient incentive for workplace safety and accident reduction by workers, particularly if it is rarely applied in practice.

Further, the Commission may wish to consider whether the elimination of contributory negligence principles serves both administrative and policy goals by resulting in fewer inquiries into apportionment of fault (which would be involved and costly in themselves and which one might expect to be highly contentious and lead to frequent appeals) and reducing the extent of adversarial proceedings between workers and employers.

On the whole, while different kinds of balances might be equally feasible, the current approach seems to strike a justifiable balance between competing policies.
Use of Presumptions in Determining Causation

Presumptions of causation do not arise in tort law, as they do in the workers compensation context, although such an approach has been proposed by commentators in various jurisdictions as a possible future development which might address unresolved causation issues in tort law. (See, for example, D. W. Robertson, “The Common Sense of Cause in Fact” (1997) 75 Texas L. Rev. 1765 and Madam Justice Beverly McLachlin, “Negligence Law: Proving the Connection” Torts - 1998 Update CLE, April, 1998 at p. 5.1.05.)

In the workers compensation system, several statutory presumptions relevant to causation are set out in the Act. First, s.5(4) provides that in cases where an injury is caused by accident, if the accident arose out of the employment then it must be presumed that the accident also occurred in the course of employment, unless the contrary is shown. Likewise, if the accident occurred in the course of employment, it must be presumed to have arisen out of the employment, unless the contrary is shown. (The presence of both features is, of course, a prerequisite to compensation under s.5(1).) This presumption is rebuttable and only arises where injuries are caused by “accident.” That term has been interpreted to mean a “traumatic event” so that the presumption does not apply where, for example, an injury is caused by a routine work action or series of actions. (Manual, section #14.10)

So far, I have found little directly addressing the rationale for this presumption, but I would expect that it is the norm for both features to coincide in the case of most accidents. (That may be something which can be verified statistically from the cohort study.) Assuming that that is the case, the rebuttable presumption may simply allow adjudicators to avoid undertaking the dual inquiry in the majority of cases where the result is essentially a foregone conclusion, while still allowing for both elements to be canvassed in those cases where there is any doubt as to whether all requirements of s.5(1) have been met.

In the case of occupational disease, s.6(3) provides that if a worker was employed in a process or industry mentioned in the second column of Schedule B at or immediately before the date of disablement and the disease contracted is the disease in the first column of the schedule opposite the description of the process, then the disease shall be deemed to have been due to the nature of that employment, unless the contrary is proven. Again the presumption is rebuttable.

Medical causation issues can be highly complex and contentious. Standard methods of proof involve expert opinion evidence. In the tort context, the result is that it may be beyond the means of an individual plaintiff to prove the necessary factual connection between the tort and the disease. Alternatively, large sums may be spent proving and re-proving such connections in different cases involving similar issues.

Schedule B only lists diseases in connection with described processes or industry where the board is satisfied on the basis of medical and scientific evidence that “there is a substantially greater incidence of the particular disease in a particular employment than there is in the general population.” (Manual, section #26.01.) Thus, in contrast to the tort system, individual claimants are spared the expense and effort of proving this elementary connection. This also saves adjudicators in each case the repeated effort of analysing evidence of work-relatedness (Manual,
Because the presumption created by s.5(4) is rebuttable, adjudicators can still consider whether there is evidence that the disease was caused by factors unrelated to the nature of employment. This would appear to strike a good balance among the goals of administrative efficiency, consistency of decisions and fairness to both the workers who sustain occupational illnesses and employers who fund compensation costs.

A further presumption is created by s.6(11), which provides that where a deceased worker was under age 70 at the date of his death and suffering from an occupational disease of a type that impairs the capacity or function of the lungs, and where the death was caused by some ailment of the lungs or heart of non-traumatic origin, then it will be conclusively presumed that the death resulted from the occupational disease. This is a conclusive, rather than a rebuttable presumption, so that even if there is strong evidence suggesting that the ailment which led to the death arose from other causes (as would presumably be the case, for example, with any worker who had been a heavy smoker), the necessary employment connection will nonetheless be deemed to be established.

This presumption is unusual in that it is not rebuttable, and there is no question that the result will be payment of compensation in some cases where a deceased worker’s employment did not in fact contribute to death. However, the circumstances covered by s.6(11) are ones which are not generally susceptible of proof in either direction in individual cases, and it is equally clear that without the presumption, there would be instances where compensation would not be paid despite the existence of the necessary employment connection. Section 6(11) appears to be the result of a policy choice to prefer the risk of over-compensation to the risk of under-compensation.

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PART 2. LOSS OF FUNCTION VS. LOSS OF EARNINGS APPROACHES TO ASSESSMENT OF PERMANENT PARTIAL DISABILITY PENSIONS

I have been asked to compare the assessment of lost earnings or earning capacity in the tort system with the two methods used pursuant to s. 23 of the Act for calculating permanent partial disability pensions. I have been asked to consider the extent to which the various approaches seek to compensate an injured party for the same or different types of loss, and whether the same types of losses should be compensable under both systems. I note that my review has not included an investigation into issues relating to adequacy, equity and consistency in the provision of benefits, as I understand that such investigation is included in the work undertaken by Victoria Macfarlane and Diana Tindall.
A. General Principles Applicable to Assessment of Income Loss in the Tort System

As noted, the compensation principle is fundamental to the tort system, where the aim of an award is to restore the victim of a wrongful act to the same position (as far as possible) that he or she would have been in had no tort been committed. As part of this, tort law aims to measure and replace remuneration which an injured party has lost as a result of the tort.

The measurement of that loss is, of course only part of the evaluation, as courts also apply the causation tests discussed in the previous section of this report in order to ascertain the extent to which income loss may be related to other tortious and non-tortious causes. In addition the tort system recognizes certain circumstances where for policy reasons a tortfeasor is not required to pay compensation for the full extent of the plaintiff’s losses, even though legal causation tests may be met. The most common area relates to the injured party’s duty to mitigate his or her losses. In more limited circumstances, a plaintiff who acted illegally may be denied recovery on *ex turpi causa* or illegality principles. I will discuss mitigation and *ex turpi* at the end of this part of the report.

In terms of earning-related losses, several inquiries may be necessary. As a rule, the court will evaluate what a plaintiff’s projected earning level would have been if no tort had been committed and compare that to the plaintiff’s projected earnings after the tort. The difference is, in most cases, the primary or exclusive measure of the plaintiff’s loss of earnings or earning capacity. As trials in the civil system generally take place some years after the tort, courts are in a position to measure with considerable precision losses occurring up to the date of trial, i.e. “past income loss,” and plaintiffs are awarded the full value of the difference. Future income loss is more speculative, and courts attempt to assess on the basis of all available evidence what the plaintiff will earn and would have been likely to earn in the absence of the tort. Having arrived at this figure, courts may award the full value of the difference or, if the evidence warrants, may make some adjustment to this figure to reflect contingencies.

Contingency adjustments may relate to the projected earnings of the plaintiff in the real future or in the hypothetical future which measures earnings on the premise that no tort occurred. They can be negative or positive, and can be general contingencies faced by everyone or specific to the particular plaintiff. For example, negative contingencies which might adversely affect a plaintiff’s earnings include unemployment, strikes, illness, premature death, early retirement, etc. Positive contingencies include such possibilities as future career change and advancement, raises, etc.
While the ordinary rule in tort law requires proof on a balance of probabilities, contingencies by their nature do not lend themselves to such calculation and it need only be shown that the contingency in issue is a real and substantial possibility:

A plaintiff who establishes a real and substantial risk of future pecuniary loss is not necessarily entitled to full measure of that potential loss. Compensation for future loss is not an all-or-nothing proposition. Entitlement to compensation will depend in part on the degree of risk established. . .

. . . The evidence will not prove that the potential contingency will happen or that it would have happened had the tortious event not occurred, but the evidence must be capable of supporting the conclusion that the occurrence of the contingency is a realistic as opposed to a speculative possibility. (Graham v. Rourke (1990) 74 D.L.R. (4th) 1 (Ont. C.A.), at 13-15)

The degree of risk or probability that a given contingency or set of contingencies would have occurred is then reflected in a percentage assessment. Thus, for example, where a court has assessed a plaintiff’s future earnings on a balance of probabilities, a future negative contingency assessed at a 10% risk might result in a 10% deduction from that figure.

In some cases, there may be evidence relevant to contingencies which might specifically affect the particular plaintiff. Contingencies which are simply part of general human experience and might happen to anyone are more difficult to assess and courts rely on statistical evidence. (See, for example, Andrews v. Grand & Toy (1978) 83 D.L.R. (3d) 452 (S.C.C.), at 470. In that case, the lower courts had applied a 20% reduction to the wage loss award to take account of contingencies. The Supreme Court of Canada reluctantly accepted the figure while criticizing it as arbitrary and noting the need for actuarial evidence to support such adjustments.) Thus, parties commonly put forward statistical evidence on disability, fatality and unemployment rates, generally tailored to the plaintiff’s specific circumstances, such as age, education occupation, geographical location, etc. It is always open to parties to lead specific evidence as to why a statistical average may not apply to a particular plaintiff.

As inquiries into the above sorts of issues can become quite complex and costly to resolve, extensive evidence on contingencies is generally reserved for those cases involving more severe injuries and larger income loss claims.

With respect to the nature of the loss for which tort damages seek to compensate, courts do not use entirely consistent language which at times obscures or confuses the actual process. In a frequently cited passage, Dickson C.J. of the Supreme Court of Canada described the relevant loss as relating to the reduction in value of a “capital asset”:

We must now gaze more deeply into the crystal ball. What sort of career would the accident victim have had? What were his prospects and potential prior to the accident? It is not loss of earnings but, rather, loss of earning capacity of which compensation must be made. . . A capital asset has been lost: what was its value? (Andrews v. Grand & Toy, supra, at 474.)
Notwithstanding this description of the relevant inquiry, the primary basis for assessment in the vast majority of cases is an estimation of the plaintiff’s actual lost earnings. For example, the determination of the value of the “lost capital asset” in Andrews v. Grand & Toy was actually based on a comparison of the plaintiff’s projected earnings and what he would have earned had he not been injured.

A further basis for compensation, which has much in common with and is approached in much the same fashion as the contingency assessment is the loss of opportunity for enhanced earnings in a particular position or career. This type of assessment tends to arise in cases of plaintiffs who are injured at a relatively young age and who had entertained some hope and prospect of a special career or position. For example, the plaintiff might have aspired to a profession which relatively few people attain, such as a doctor or airline pilot, or might have planned to pursue a line of endeavour such as acting or sports in which a few individuals find enormous rewards. Despite the absence of proof of actual loss in such cases, where there is evidence that there was some real possibility that the plaintiff might have succeeded, courts will award a sum for the “loss of chance” to attain the goal. Generally courts assess both the value of the lost opportunity and the percentage chance that the plaintiff would have attained it, and bases the award upon the percentage of the value, although some awards are considerably more rough and impressionistic. (See, for example, Hearndon v. Rondeau (1984) 54 B.C.L.R. 145 (C.A.))

B. “Dual System” for Assessing Loss of Earnings under Workers Compensation Regime

Section 23 of the Act deals with the calculation of pensions for permanent partial disableity.

**Permanent partial disability or disfigurement**

23. (1) Where permanent partial disability results from the injury, the impairment of earning capacity must be estimated from the nature and degree of the injury, and the compensation must be a periodic payment to the injured worker of a sum equal to 75% of the estimated loss of average earnings resulting from the impairment, and must be payable during the lifetime of the worker or in another manner the board determines.

(2) The board may compile a rating schedule of percentages of impairment of earning capacity for specified injuries or mutilations which may be used as a guide in determining the compensation payable in permanent disability cases.

(3) Where the board considers it more equitable, it may award compensation for permanent disability having regard to the difference between the average weekly earnings of the worker before the injury and the average amount which the worker is earning or is able to earn in some suitable
occupation after the injury, and the compensation must be a periodic payment of 75% of the difference, and regard must be had to the worker’s fitness to continue in the occupation in which the worker was injured or to adapt to some other suitable employment or business.

(4) Where permanent partial disability results from the injury, the minimum compensation awarded must be calculated in the same manner as provided by section 29(2) for temporary total disability but to the extent only of the partial disability.

(5) Where the worker has suffered a serious and permanent disfigurement which the board considers is capable of impairing the worker’s earning capacity, a lump sum in compensation may be paid although the amount the worker was earning before the injury has not been diminished.

This section provides for two basic methods of calculating pensions. Section 23(1) allows the Board to estimate impairment of earning capacity from the nature and degree of the injury itself. This is generally done by reference to the Permanent Disability Evaluation Schedule at Appendix 4 of the Manual, (the “Schedule”) which lists disabilities and assigns a percentage to each. The Schedule is intended to reflect the degree of impairment of bodily function (eg. T. Ison, Workers’ Compensation in Canada, 2d ed., 1989, at 94-5). The percentage impairment is then applied to 75% of the worker’s average earnings (up to the s. 33 statutory maximum) in calculating the pension. Analagous methods are used to estimate a percentage disability in the case of non-scheduled disabilities.

Under the alternative set out in s.23(3), a worker may be awarded a pension based on the difference between his or her average pre-injury earnings and the amount he or she is or could be earning after the injury. In such cases, the worker’s pension would be based on 75% of the difference between the two figures. This is generally referred to as the projected loss of earnings method.

Section 23(3) allows for application of the loss of earnings method where the board considers it “more equitable.” As a matter of policy, pensions are calculated using both methods in every case and the pension is based on the method which results in the highest amount. (See, for example, the Manual, at #38.00.)

By way of background statistical information, relatively recent figures indicate that of roughly 70,000 claims made annually, between 5,000 and 6,000 generally result in awards of permanent partial disability pensions. Approximately 90% of those pensions are calculated on the basis of the functional disability method and 10% on the basis of the loss of earnings method. The latter was first introduced on a widespread basis in the late 1970's and there has been a steady and significant increase in the number and proportion of loss of earnings pensions awarded since then. However, while loss of earnings pensions account for only about 10% of the pensions awarded, such awards tend to be close to ten times higher on average than functional disability pensions, and the annual cost of paying the loss of earnings pensions accounts for close to half of the total cost of all permanent partial disability pensions. (H. Hunt, P. Barth, M. Leahy The Workers’ Compensation System of British Columbia: Still in Transition, W.E. Upjohn Institute, 1996 (the
(i) **Issues Relevant to Loss of Function Pensions**

As was reiterated in many submissions made to the Commission, the connection between the actual earning losses of injured workers and the figures yielded by application of the Schedule is at best questionable and at worst non-existent.

All are in agreement that a particular disability can affect different people in drastically different ways. For example, partial blindness would have a different impact on a copy editor than a court reporter. Everyone also agrees that the Schedule is not intended to reflect the actual future earning loss of specific individuals, but that it is intended to reflect the average earning impairment of all those suffering each of the functional disabilities outlined. However, I have not been able to locate any studies establishing correlation between functional impairment as set out in the Schedule and actual average earning losses. According to the Board’s Briefing Paper on Permanent Disability Pensions, the Schedule applied in B.C., like other similar schedules used by workers compensation adjudicators in other jurisdictions:

> . . . is not based on objective scientific data on the impact of different disabilities. Rather, it is based on the opinions of experts, primarily doctors. It has been questioned whether assessing percentages of average earning loss is a matter of purely medical expertise and whether a different scientific approach could be followed. (At page 8)

Given the lack of proven connection between the degree of functional impairment and the impact on earning loss in even an average sense, evidence such as that reflected in the Schedule would simply never be relied upon in the tort system and this is therefore an area in which the two systems diverge most sharply. I have been able to identify few reasons why that divergence is appropriate if the principle underlying the permanent partial disability pension is compensation for earning loss.

There appears to be no evidence that the functional impairment method is an accurate predictor of either the actual loss of individual workers or the average loss of average workers. While there have been some suggestions that functional disability awards may compensate in part for non-monetary effects of disability, this is not the acknowledged aim of permanent partial disability pensions. That aim, as stated in the Tysoe report (at 307), and many other sources is to compensate for loss of earnings. It is difficult to see how the method can be justified if it fails to serve the acknowledged aim. In that regard, one alternative might simply be to re-evaluate the purpose of the functional impairment award. Perhaps an award based on functional disability alone is appropriate as part of the historic trade-off, given that it is widely used in jurisdictions which have workers compensation schemes, it has served in B.C. for several decades and is used only when it yields a higher pension than the loss of earnings method.

I note however that s.23(1) refers to the estimating of “impairment of earning capacity.” If that impairment is not what is estimated by this method, then whether it is justified or not, the method

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“1996 Administrative Inventory”) at pp. 111-113 and 123-124; and Policy Bureau Briefing Paper on Permanent Disability Pensions, at pp. 1 and 11-12. I note that both sources refer to figures up to 1995.)
is inconsistent with the directive in the statute. An amendment to s.23(1) which says something like “the compensation may be calculated on the basis of the nature and degree and the injury” rather than “the impairment of earning capacity must be estimated” from same would result in more consistency between the method and the Act. A further alternative might be to revise the Schedule using figures which bear some proven connection to average earning loss. The fact that other jurisdictions do not appear to have come up with a more accurate proven predictor of average loss suggests that this may not be practicable.

I also considered administrative feasibility rationales. While the functional impairment method is much simpler, it does not actually allow adjudicators to avoid the more complex inquiry involved in loss of earnings assessments since the dual system requires that calculations under both methods be made in every case. However, while the goal of administrative expediency is not served in respect of initial adjudication, it may be served in other respects. In particular, the current scheme calls for an automatic review within two years of all decisions resulting in the awarding of a loss of earnings pensions, and further reviews may be scheduled where considered appropriate. (See section #40.30 of the Manual.) If that review process were retained, it would place an enormous burden on the system if the functional impairment method now used in about 90% of permanent partial disability pension cases were eliminated and all such cases became subject to this review process. In addition, the more individualized loss of earnings assessment method is likely to result in far more controversial decisions which are apt to be the subject of reviews and appeals.

Since the functional impairment method is selected only when it results in higher compensation than the loss of earnings method, one might conclude that its use results in higher overall costs. It is difficult to say how far these might be offset or exceeded by the saving in adjudication costs and I have not located figures relevant to this question. Certainly the current process results in many workers receiving a permanent partial disability pension in cases where the evidence suggests that there has been no actual income loss. It has been suggested that this type of award can be justified on the basis that even if there has been no actual income loss, there may have been other types of losses such as pain and suffering or loss of amenities. However, no compelling reason has been offered for paying such compensation only in cases of this nature and not in connection with loss of earnings pensions.

(ii) Issues Relevant to Loss of Earnings Pensions

The loss of earning assessment method is another frequent subject of appeals as well as criticism in submissions made to the Commission.

The loss of earnings method is based on the difference between an injured worker’s assessed earnings before and after the injury. The award is calculated as 75% of the difference between the two. Difficulties arise with both aspects of the equation. One contentious area involves the focus on past earnings in the assessment of what a worker would have earned had he or she not been disabled (“average earnings”) and the omission of various kinds of income and benefits from that calculation. I will discuss those issues below under the heading of average earnings, as they are not all exclusive to loss of earnings pensions.
An equally if not more contentious area involves the projection of what a claimant will be able to earn in a suitable occupation after the injury. Those issues generally relate to the “deeming” of available and suitable occupations, which I will discuss in the final section of this report. Issues include the fact that the deeming process only takes account of jobs considered to be reasonably available over the long term, and claimants may essentially be called upon to meet more stringent mitigation obligations in respect of the types of occupations which adjudicators may deem “suitable.”

Apart from these issues, which may result in a less accurate or comprehensive assessment of actual loss than would be arrived at in the tort system, the fundamental calculation employed with respect to the loss of earning pension is essentially the same as the one employed under the tort system for calculating future income loss. The inquiry and calculation in the workers compensation system is considerably less detailed and individualized than in the tort system. Presumably, this saves administrative costs. As is often the case in the workers compensation setting, the result is that some claimants receive greater compensation than they would under the tort system and some receive less. This is not inconsistent with the “collective justice” objectives of the system.

(iii) Average Earnings

Both of the approaches considered under the dual system require a determination of the worker’s “average earnings.” This is the figure to which the percentage reflected in the Schedule is applied in the case of functional impairment pensions, and is the figure which is compared to projected future earnings in calculating loss of earning pensions. Average earnings determinations are frequently contested by workers and the methodology employed has been the subject of considerable criticism in submissions made to the Commission.

One set of issues arises in connection with the types of benefits which are excluded from average earnings. In tort law, the full value of lost fringe benefits is generally taken into account, which is in keeping with the compensation principle. In the workers compensation system, many types of benefits are excluded from the calculation of average earnings. I understand that an exception is made with respect to collateral benefits which are part of a collective agreement, on the reasoning that workers have given up something in exchange for collective agreement rights and have therefore “paid” for those benefits.

The latter reasoning appears to echo principles which arise in tort law in connection with a very different type of situation involving the deduction from tort awards of collateral benefits being received after injury. This issue arises where the plaintiff is receiving some form of income replacement after the tort has been committed, and the defendant argues that any such amounts should be deducted from the damages award to avoid the possibility of double recovery. The current approach is that courts do not make any such deduction if the plaintiff had made some contribution toward obtaining those benefits. Thus, for example, in Cunningham v. Wheeler [1994] 4 W.W.R. 153 (S.C.C.), the plaintiffs were receiving disability benefits under collective agreements after injury. The court ruled that such benefits should not be deducted from a tort award where there is evidence that the plaintiff has paid for them in some manner. While this
does result in some double recovery, the underlying principle is that the tortfeasor should not benefit from the plaintiff’s forethought and sacrifice by having to pay reduced damages.

I have not been able to ascertain why the majority of benefits are excluded from the assessment of average earnings. It may be that the system is seeking to avoid the need for inquiry in individual cases into whether a claimant has paid something for the benefits in question, a conclusion which can be presumed from the existence of a collective agreement. However, be that as it may, it is not clear why a gratuitous benefit is any less real a loss to a worker than a benefit for which he or she has paid something. It may be that the workers compensation system is simply seeking parity in eliminating the consideration of fringe benefits from both the pre- and post-injury projected earnings. This has the advantage of eliminating one more highly speculative consideration from an exercise already fraught with speculation. However, it is not necessarily more difficult to predict benefits available in connection with long term employment prospects than to predict earnings.

The present approach does not appear to be one which would result in a trade-off where some workers receive less and some receive more. Where the opportunities available to the disabled worker involve significantly lower fringe benefits, compensation will be lower. That seems far more likely to be the scenario than that of a disabled worker who finds that alternative employment opportunities offer higher benefits.

An even more widespread issue relating to average earnings arises from the emphasis which is placed on a claimant’s past earnings. Section 33(1) of the Act contains the main general provisions regarding determination of average earnings:

**Average earnings**

33. (1) The average earnings and earning capacity of a worker must be determined with reference to the average earnings and earning capacity at the time of the injury, and may be calculated on the daily, weekly or monthly wages or other regular remuneration which the worker was receiving at the time of the injury, or on the average yearly earnings of the worker for one or more years prior to the injury or on the probable yearly earning capacity of the worker at the time of the injury, as may appear to the board best to represent the actual loss of earnings suffered by the worker by reason of the injury, but not so as in any case to exceed the maximum wage rate, except that where, owing to the shortness of time during which the worker was in the employment of his or her employer, or in any employment, or the casual nature of his or her employment, or the terms of it, it is inequitable to compute average earnings in the manner described in this subsection, regard may be had to the average daily, weekly or monthly amount which, as shown by the records of the board, was being earned during the one or more years or other period previous to the injury by a person in the same or similar grade or class of employment.
This provision requires reference to the worker’s actual earnings or earning capacity at the time of injury, which can be determined by looking at varying periods of time prior to that. In a similar vein, s.23(3) requires the board to have regard to the worker’s average weekly earnings “before the injury” and use that figure as the basis for comparison with post-injury earnings.

As noted above, in the tort system, loss is assessed by comparing actual future income (as nearly as this can be estimated) to hypothetical future income which the injured party would have earned had no tort been committed. In the latter case, evidence of earnings at or prior to the time of injury tends to be very strong evidence of prospective earnings, but it is only one form of evidence and courts are not limited to considering only this form to the extent that adjudicators in the workers compensation system are so restricted. Similarly, the workers compensation process generally omits the whole range of contingencies which are considered by courts in estimating what a plaintiff’s income would have been had there been no tort.

For example, there might be compelling evidence that a plaintiff was about to assume a more remunerative position or was planning to make a career change which would have led to higher earnings. A court might find past earnings an inaccurate predictor of future income in such circumstances and base the income loss calculation on the likely future scenario (perhaps making some deduction, if appropriate, for contingencies relating to the plaintiff’s plans not working out as hoped). In contrast, the adjudicator in the workers compensation would be obliged to ignore such evidence.

Section 33 makes very few exceptions to the above approach. Section 33(3) allows adjudicators to consider a claimant’s probable future increase in average earnings only in very limited circumstances. This is where past earnings are not considered a fair indicator of average earnings “by reason of the worker’s age or the worker being in the course of learning a trade, occupation, profession or calling.” (I note that this section leaves open the possibility of “loss of chance” claims in the case of young workers or those who are in the process of training or retraining.) Thus, adjudicators have no authority to take an alternative approach in other circumstances where past earnings are not a reasonable indicator of earning capacity.

Policy, as outlined in Chapter 9 of the Manual as well as parts of Chapter 6 (#40.10-11) also echoes the statutory emphasis on workers’ past earnings in the assessment of average earnings. Section #40.11 (which deals with the s.23(3) calculation of average earnings prior to injury) discourages taking account of likely post-injury promotions, even where there is fairly compelling evidence of same:

In making [the average earnings] calculation, regard will not normally be had to promotions which might have been received if the worker had not been injured. This is so even though the worker returns to the pre-injury job following the injury, is promoted, but is unable to remain in the job because of the disability.

This is in contrast to the tort system where if the injured party can prove on a balance of probabilities that he or she would have been promoted had it not been for the accident, then the extra income associated with the lost promotion is taken into account in assessing income loss.
note that #40.11 says that the adjudicator will not “normally” consider such evidence. This appears to leave open the possibility that such evidence may be considered in some abnormal situations. However, the Manual provides no guidance on when such situations might arise and there appears to be no statutory authority under s.23 or 33 for an adjudicator to do this in any case apart from the age and training exceptions in s.33(3).

The Policy Bureau’s Briefing Paper on Permanent Disability Pensions acknowledges that awards are normally based on pre-injury earnings rather than what the worker would actually have earned. Reasons identified for this departure from the “ideal” of full compensation for actual monetary loss include the historic compromise, the need for incentives to return to work and the administrative practicalities of adjudicating individual cases (at pp. 5 - 6). Presumably other reasons which might explain a departure from the approach taken under the tort system include the earlier provision of benefits under the workers compensation system and the fact that the latter allows for some revisiting of the assessment while the tort systems allows only a one-time assessment with no possibility of future adjustment.

If the aim is not to replace what each individual worker would have received under the tort system but, as the Briefing Paper puts it, to “cover the average loss of the average worker,” the “collective justice” function of the system is met. While there is no question that the focus on past earnings will result in lower compensation for some workers, it will also result in higher compensation for others. This is because the focus on past earnings omits consideration of both positive and negative future contingencies. Thus, while one worker’s prospects for being promoted in the near future might be ignored, another’s prospects for being laid off in the near future will also be left out of the calculation.

Moreover, s.33(3) creates an exception allowing adjudicators to take account of future prospects in certain circumstances. Since the section refers only to considering a worker’s “probable increases” in earnings, this exception would only apply where the result is greater compensation for the claimant.

Another consideration is the need for an administratively workable approach in the workers compensation system. There is no question that an inquiry into actual past earnings rather than hypothetical future earnings is simpler, less time-consuming and less speculative. The same is true of the elimination of consideration of adjustments for contingencies (often a complex and costly inquiry in the tort system) as well as the focus on average long-term earnings. Some may argue that the fact that the result is a less accurate measurement of the individual claimant’s actual loss is contrary to the aim set out in s. 33 of selecting the wage rate which best represents “the actual loss of earnings suffered by the worker by reason of the injury.” However, I note that that provision only requires the best choice among the various alternatives which are set out in the subsection and not among all possible methods of assessment. There are numerous instances where the system departs from assessments based on actual loss. For example, the Act provides for maximum and minimum levels, and provides that volunteer ambulance drivers and firefighters are deemed to have had a certain level of earnings even though their positions were actually unpaid.
As noted, cases often take years to get to trial in the tort system. This can have quite drastic consequences for a plaintiff who receives no compensation in the interim, and many plaintiffs end up settling in advance of trial for less than the compensation to which they are entitled because financial constraints do not allow them to wait for the legal process to be completed or, in some cases, to finance the costs of expert evidence and other means necessary to prove their claims. This is one of the disadvantages to workers which the historic compromise eliminated. The aim under the workers compensation system is for payment of benefits to commence as quickly as possible. At present, injured workers receive compensation far earlier than those who proceed under the tort system and there are initiatives underway to speed the process even further. The comparatively less complex inquiries undertaken in the workers compensation setting are among the factors which permit faster decisions and earlier payment of compensation.

On a related point, the tort system contemplates a “one shot” opportunity for the plaintiff’s loss to be assessed. As outlined above, the assessment can be highly speculative in many respects and should the court happen to gauge any element of loss incorrectly, the plaintiff has no recourse and is simply stuck with a result which may be gross undercompensation. (Conversely, some plaintiffs do much better than projected by the court and end up receiving a windfall.)

Thus, for example, a court might conclude on the evidence that the plaintiff’s injuries will fully resolve and he or she will be able to return to work and resume earning the same wages five years after trial. Future income loss would be awarded on the basis that the plaintiff has only lost those five years of earnings. If the court’s conclusion turned out to be incorrect and the plaintiff was never able to return to work, the plaintiff would never be compensated for the remainder of his or her lifelong income loss. It is therefore very important that the inquiry in the tort setting be more detailed and wide-ranging as there is only the one opportunity to get it right.

In contrast, as I discuss in more detail in my report on reconsideration, re-opening and appeals, there are a number of opportunities for decisions to be revisited in the workers compensation system, some of which relate to permanent partial disability pension assessments. While these tend to relate to issues other than average earning assessments, the main point is that there is considerably less scope for a claimant being undercompensated over the long term as a result of inaccurate projections or assumptions made at the initial adjudication.

C. Duty to Mitigate on Part of Injured Party

As noted, a further limitation on compensation payable by a tortfeasor, even where factual causation is proven, arises in connection with a plaintiff’s duty to mitigate or reduce his or her losses. Common aspects of the duty to mitigate are the obligation to seek medical care in order to reduce the physical effects of an injury and the duty to take reasonable steps to seek alternative employment where necessary in order to reduce resulting economic loss. I will discuss the latter aspect in the final section of this report relating to deeming of employment opportunities in the assessment of loss of earnings pensions. With respect to medical treatment and health care, tort law generally requires a plaintiff to take reasonable steps to promote recovery from or otherwise reduce the effects of injury. Such steps may include taking medication, undergoing surgical or other treatment, following a course of physiotherapy or other rehabilitative measures, or avoiding activities which tend to exacerbate the
injury or condition. What is “reasonable” depends upon factors such as the risks involved in
treatment, the likelihood that it will be successful and the relative benefits of accepting or refusing
treatment. Evidence generally consists of medical advice and opinion on such questions. If it is
found that the plaintiff has acted unreasonably and fallen short of his or her duty to mitigate, the
damage award is reduced proportionately to the extent to which the failure to mitigate is
responsible for the plaintiff’s ultimate damages. For example, if it were determined that
physiotherapy would improve a plaintiff’s condition by 25% and the plaintiff unreasonably refused
to undertake physiotherapy, the damage award would be reduced by 25%.

Both tort law and the workers compensation system appear to aim for a balance between
promoting recovery while at the same time respecting an injured party’s right to make reasonable
choices about his or her own course of treatment. Both systems provide for reduced
compensation if the injured party makes unreasonable choices regarding treatment and the injuries
are made worse as a result.

The relevant portions of the Act give the board considerable authority over workers’ health care.
Section 21(6) provides that health care is “subject to the direction, supervision and control of the
board.” Section 57(2) permits the board to reduce or suspend compensation where a worker
persists in insanitary or injurious practices which tend to impede recovery or where a worker. . .

57 (2). . . (b) refuses to submit to medical or surgical treatment which the board
considers, based on expert medical or surgical advice, is reasonably
essential to promote his or her recovery.

While these provisions could in theory be read as wholly depriving the worker of choice or
control over his or her medical treatment (at least if the worker wants to continue to receive
compensation), policy makes it clear that such a sweeping interpretation is not to be applied.
Section #78.00 of the Manual notes that s. 21(6) provides that health care is “subject to” not
“under” the board’s direction and control, and this is interpreted to mean that the board has a
choice with respect to the circumstances under which it will give direction on health care matters.
It is stated at #78.10 that:

. . .the control of treatment by the Board is not intended to exclude patient choices. If
there are reasonable choices of treatment, or reasonable differences of opinion among the
medical profession with regard to the preferable treatment, or choices to be made that
depend on personal preferences, the matter should be regarded as one of patient choice.

Where a treatment or appliance is deemed reasonably necessary and more than one type is
suitable, the choice is left to the treating practitioner and the worker.

With respect to s.57(2)(b), #78.13 states that as a prerequisite to reduction or termination of
benefits, there must be a “clear medical opinion on file that the relevant treatment ‘is reasonably
essential to promote his recovery’” and the worker must know that the board considers the
treatment reasonably necessary and be given a chance to explain his or her refusal to submit to it.
Subsection 2(b) is not intended to exclude all patient choices, and even when the terms of the subsection are satisfied, the Adjudicator is not bound to reduce or suspend compensation benefits in every case. There is a discretion. For example, if the proposed treatment involves a significant risk of an adverse side-effect, or a questionable prospect of success, or is hazardous, the Adjudicator might well conclude that the refusal to undertake that treatment was reasonable.

The principles reflected in the passages cited above are generally consistent with mitigation principles applied in the tort context. While there is no specific direction to reduce compensation in proportion to the degree to which the claimant’s conduct has affected his or her condition, that appears to be the approach which is taken in practice. Thus, for example, a claimant’s benefits would not be terminated altogether if he or she refused to pursue a reasonably essential course of treatment which would have only a partial effect on his or her earning ability (such as, for example, when the treatment relates to only one of several injuries which the claimant has sustained or, if successful, would somewhat improve but not eliminate the claimant’s symptoms).

However, I note that in the tort context, a plaintiff who has acted reasonably in refusing treatment for reasons such as its hazardous nature, risk of side effects or questionable prospect of success has met the duty to mitigate. Full compensation in those circumstances is mandatory and not a matter of discretion. As #78.10 seems to support the same result in principle, it is not clear why this is referred to as “a discretion.” It is also not entirely clear how this fits in with the reference to “reasonably essential” treatment in s.57(2)(b). It would be more consistent with tort law principles and would also seem more in keeping with the general intent of the Act if it were made clear that claimants who make reasonable choices with respect to health care remain entitled to full compensation. Perhaps that aim might better be expressed by rewording s.57(2)(b) to provide that compensation may be reduced or suspended where a worker “unreasonably refuses” (as opposed to simply “refuses”) treatment which the board considers “essential” (as opposed to “reasonably essential”).

D. **Ex Turpi Causa**

As noted, tort law recognizes a defence known as *ex turpi causa* which essentially prevents a plaintiff who has acted illegally from using the process of the courts to benefit from it. For example, a plaintiff who is injured while riding in a car fleeing police pursuit might at one time have been precluded from recovery if he or she were found to be complicit in the unlawful flight. However, the doctrine has been strictly limited in recent years to situations where a plaintiff is seeking to profit from wrongdoing rather than simply obtain compensation for loss. (E.g. Hall v. Hebert [1993] 2 S.C.R. 259. (Headnote attached.))

I do not believe that the workers compensation system applies *ex turpi* principles. (Although there are some policies and sections of the Act which are slightly ambiguous in this regard, I will discuss these below and have concluded that none call for the application of the *ex turpi* doctrine.).
I have discussed above s.5(3) of the Act which precludes recovery by a worker in certain circumstances where an injury has been caused solely by the workers own serious and wilful misconduct. While this might encompass some cases which would also come within *ex turpi* principles, that appears to be purely coincidental. Section 5(3) does not require illegality as the *ex turpi* defence does.

Apart from that, section #16.30 of the Manual makes a rather ambiguous reference to assaults, noting that the the “first question” for an adjudicator considering an assault is “whether the claimant was the aggressor and therefore the agent which caused the injuries.” While the Manual does not actually say so, this seems to imply that injuries arising from such circumstances may not be compensable. If so, it is not clear why that would be the case, since it is not inconceivable that some assaults in which the worker was the aggressor might arise out of and in the course of employment (for example if the worker is employed as a bouncer in a night club) and it is not clear why there should be any limit on compensation in such a case. Again, the assault provision is not tied specifically to illegality, but would appear to coincidentally encompass some situations of illegal conduct.

Lastly, I note that s.98(3) of the Act allows the board to cancel, suspend or without compensation from a worker who has been confined to jail or prison (although I also note that the Appeal Division has called the legality of this provision into question). The Manual still states that in practice the board cancels permanent partial disability payments among other benefits while a worker is incarcerated. As far as I can determine, this provision is more likely to relate to the worker’s loss rather than *ex turpi* principles, although it is not clear why disability pensions awarded on the physical impairment basis, which are not tied to actual loss, should be affected in that case.

I conclude that *ex turpi causa* principles per se do not apply in the workers compensation system. If I am incorrect and these principles are in fact being applied in connection with any of the above provisions, then in my view it is not appropriate to do so. Courts have made it clear that the rule has no application where the injured party is merely seeking compensation for actual loss and that is presumably all that claimants would ever be seeking through the workers compensation process.

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3. **DEEMING OF EMPLOYMENT OPPORTUNITIES IN ASSESSMENT OF LOSS OF EARNINGS PERMANENT PARTIAL DISABILITY PENSIONS**

I have been asked to compare the “deeming” process used in the workers compensation system with the tort model and identify and discuss any differences between the two systems in terms of the level and nature of compensation for loss and the extent to which legal principles of causation and mitigation are applied.

“Deeming” is a term used to describe the process whereby a worker’s future long term employment prospects are evaluated in a theoretical context. This comes up in connection with determining loss of earnings pensions for permanent partial disabilities, as discussed in the
preceding part of this report, where I also outlined the general principles applied in the tort system to assessment of lost earning capacity. Under the loss of earnings method (s.23(3)), the loss of earnings pension is calculated by comparing the worker’s average earnings prior to the injury with the average amount which the worker is earning or is able to earn in some suitable occupation after the injury. The pension will be 75% of the difference between these two figures.

Deeming is used to arrive at an amount which the worker could earn after the injury, where it is not considered feasible or appropriate to base the calculation on the difference between the worker’s pre-injury earnings and actual post-injury earnings. This can arise in circumstances where a worker who is considered employable has not returned to work, or has returned to employment but taken a job which does not maximize his or her long term earnings. For example, a worker may decide for reasons of personal preference to pursue an alternative career which is less remunerative than other available options, or may decide to retire early rather than pursue retraining which would lead to alternative employment.

Detailed guidelines regarding the deeming process are set out in the Manual at #40.12. The stated purpose of the process is “to arrive at a long-term projection of earning capacity of the worker.”

The evidence of the Rehabilitation Consultant should relate to jobs that are suitable and reasonably available to the claimant in the long run and the conclusion of the Adjudicator in Disability Awards should be concerned with such of those jobs as will maximize the claimant’s long-term earnings potential.

As discussed above in connection with causation principles and permanent partial disability pension assessment, adjudicators in both the tort and workers compensation regimes must regularly engage in a certain amount of speculation and guesswork about purely hypothetical or future events. In the tort system, the uncertainties relate to both the likely path a plaintiff’s life will take in the aftermath of the tortious injury and the path it would have taken had the tort not occurred. The same general inquiries must be undertaken in the workers compensation context, but there are a couple of notable distinctions. First, as noted above, the loss of earnings method of pension assessment focuses on actual pre-injury earnings for the first half of the loss calculation formula. What the worker would have earned had the employment-related disability not arisen is not generally considered.

As also noted, the civil litigation process generally gives a plaintiff only one shot at proving the necessary facts to support his or her claim, and thus the consequences of inaccurate guesswork about what the future may hold can be quite drastic. In the workers compensation system, some, though by no means all, of the risks attendant on inaccurate prediction about the future are reduced or eliminated by the possibilities for subsequent appeals, reviews, re-opening and reconsideration. For example, where the deeming process has been applied, there is an automatic review two years later, with the possibility of an earlier review where warranted. Subsequent reviews may be scheduled by the adjudicator, and workers and employers have the right to reconsideration of benefits every ten years pursuant to s.24 of the Act. Thus although the aim is to be as accurate as the process permits, it is less crucial that long range predictions be accurate. In contrast to the tort system, as time passes, those forecasts can be revisited in a number of circumstances.
I note that all other provinces in Canada which provide for loss of earnings pensions have some form of deeming provision. I have not encountered any alternative proposals for projecting earning loss in the circumstances where the deeming process is applied, nor have I been able to think of alternative means for doing this.

The deeming process requires decisions about the types of employment opportunities which are “suitable” and “reasonably available” to the claimant over the long term. Decisions about whether occupations meet both of these requirements are often controversial and have been the subject of many appeals as well as submissions to the commission by workers who feel that they have been unfairly assessed as able to pursue areas of employment which are not in fact, suited to them, within their capabilities, or realistically open to them. These determinations involve questions of fact particular to each individual case and I note that a great many complaints do not take issue with the basic process or principles applied, but simply disagree about whether the results reached are factually accurate assessments of the appropriate range of occupations.

However, problems with underlying principle are alleged with respect to issues such as the factors unrelated to disability which are considered in assessing available jobs, the time frame over which available employment opportunities are assessed, and the scope of a claimant’s obligations to consider occupations deemed “suitable” by adjudicators.

With respect to the first point, employers often argue that the deeming process takes account of too many factors which are unrelated to the worker’s disability, such as general economic conditions, or personal factors such as the worker’s age, level of education or language skills. As noted in the part of this report dealing with legal causation issues, in the tort context the general principle is that the tortfeasor “takes his victim as he finds him.” Thus, if the victim happens to be a person a who has more limited job opportunities because of a factor such as lack of fluency in english, the tortfeasor cannot argue that he only caused the loss of the victim’s current job and is not responsible for the fact that language problems preclude the victim finding alternative employment. Neither the victim’s right to compensation nor the tortfeasor’s obligation to pay are altered by such personal factors and the same appears to be true in the workers compensation system.

In a somewhat similar vein, a tortfeasor could not argue that he or she is not responsible for general poor economic conditions which might hinder the plaintiff’s ability to find alternate employment, and should therefore not have to pay any damages. However, the tortfeasor could argue along somewhat similar lines that a deduction should be made from the damages award to take account of the contingency that the plaintiff would have become unemployed in the future irrespective of the tort. In very poor economic conditions, for example, or where the worker is employed in an industry suffering a general and apparently long-term slowdown, there may be quite a significant likelihood of and consequent contingency adjustment for such factors.

In contrast, since the workers compensation system never actually measures what the claimant would have earned in the absence of the work-related disability and assesses the claimant’s future opportunities in light of all factors including existing economic conditions, a similar adjustment is very unlikely to be made. (I note though that if at the time of assessment a worker is actually
unemployed for reasons unrelated to disability, that may be considered in determining whether there is any potential earning loss. Manual, section #40.10, rule 6, page 6-22.) As a result of this, some workers will receive greater compensation under the workers compensation system than the tort system because the latter would adjust for the possibility that their employment opportunities would have been curtailed irrespective of their injury. However, addressing this difference by bringing the process of contingency assessment into pension assessments would be quite a dramatic alteration to the system. It is questionable whether that is warranted. On a “collective justice” basis, the current approach may well strike the best balance in eliminating consideration of contingencies. Since neither positive nor negative contingencies are factored in and the result is that some pensions are higher and some are lower.

The deeming process aims at measuring the employment opportunities which are reasonably available to the worker on average over the long term. As noted in the preceding part of this report, this can result in overcompensation or undercompensation of claimants whose employment prospects are apt to undergo significant changes which are not part of the “long term.” On the whole, the question of what is reasonably available over the long term is significantly different from the question posed in the tort system, which requires proof on a balance of probabilities as to what the plaintiff will actually be able to earn over the whole remainder of their working life. Injured parties whose earnings are likely to fluctuate during that period are more likely to be fully compensated in the tort system, where both short term and long term projected earnings would be considered in the calculation. However, again this is a factor which will result in higher awards for some and lower for others.

“Reasonableness” in the context of “reasonably available” occupations is a rather vague standard, but would certainly seem to fall short of the probability standard required in tort law. Workers who take issue with an adjudicator’s decision as to which opportunities are “reasonably available” may be placed in the position of effectively having to establish on appeal that certain occupations are not open to them at all in order to show that they are not “reasonably” available.

While s.40.12 of the Manual gives some guidance as to what is reasonable in terms of the worker’s fitness to perform the duties and geographical location, little guidance is available with respect to whether position is “reasonably” available in the sense that there are actually apt to be openings and the worker would be favourably considered by employers in competition with other applicants. This is of course a highly speculative area, made more so since one is considering the long term rather than the more easily assessed present and short term future. Taken together, these features can place workers at a considerable disadvantage not shared by plaintiffs in the tort system.

One issue which the Commission may wish to consider is whether rather than inquiring into occupations reasonably available over the long term, it might be more appropriate to inquire instead into occupations which are probably available to the worker over the long term and which it would be reasonable to the worker to undertake. “Reasonableness” seems a more appropriate standard to apply with respect the worker’s duty to mitigate by pursuing all suitable alternatives than with respect to forecasting the range of suitable occupations actually available. This approach would be more in keeping with the tort system and with the expressed aim of assessing actual earning losses in connection with loss of earnings pensions.
The final major area of controversy arises with respect to decisions about what occupations are “suitable” for the worker. While this overlaps to some extent with issues arising from the determination of “reasonably available” occupations, “suitability” primarily raises mitigation issues. As noted in the preceding part of this report, an injured party’s duty to mitigate arises not only with respect to taking reasonable steps to minimize the physical impact of an injury caused by tortious conduct, but also taking reasonable steps to pursue alternative employment in order to minimize consequential income loss.

In the tort context, a plaintiff who is unable to continue in his or her previous employment is not automatically entitled to recover 100% of his or her resulting wage loss if he or she is able to replace some of that loss. Relevant factors in assessing what is reasonable are not limited to maximization of earnings and include such factors as the plaintiff’s “residual disability, the types of job available, the need for retraining, potential remuneration and possible disruption of family and home.” (Cooper-Stephenson, Personal Injury Damages in Canada, at 889.)

While many of these same principles are applied in the workers compensation context, in my view, the latter system imposes heavier obligations to mitigate upon injured parties than the tort system does. For example, the deeming process takes account of the occupations which would maximize a worker’s earnings. (Indeed, the worker’s pursuit of employment which does not maximize earnings is one of the reasons for applying the deeming process rather than simply comparing pre- and post-disability earnings.) In the tort system, a plaintiff is not necessarily obliged to take the employment which results in the highest possible earnings in order to comply with the duty to mitigate. Instead, the plaintiff is simply required to act reasonably and is entitled to some extent to take various factors such as personal preference into account in pursuing alternative employment. This is particularly so where the tort has required the plaintiff to give up an occupation which provided satisfaction, convenience or other non-monetary rewards. A plaintiff is not necessarily required by mitigation principles to forego all such rewards in new employment simply because the remuneration may not be quite as high. On the other hand, a plaintiff will not meet the duty to mitigate by replacing a high-paying job with a low-paying job with allows him or her to continue doing the same type of work, if reasonable and more remunerative opportunities are available. The issue involves a balancing of all relevant factors in each case.

As noted above, in the medical mitigation context, a plaintiff is not required to pursue the best possible course of treatment, but is entitled to make choices between a range of reasonable alternatives. The workers compensation system appears to require no more than that of claimants when it comes to medical mitigation. It is not clear why more stringent mitigation obligations should be required in the case of non-medical mitigation.

Similarly, the Commission has been referred to situations where workers who had a particular pre-injury earning level at a part time job might be deemed able to replace that income with a range of reasonably available and suitable full time jobs. In a similar vein, workers also argue that the system should only deem as suitable jobs which are qualitatively comparable to pre-disability employment. (A hypothetical example which was cited a number of times in submissions before the Commission involved whether a position as a “Wal-Mart greeter” should be deemed suitable
for a trained millwright who could no longer work in the latter occupation.) Again, mitigation principles in the tort law context do not go this far. A plaintiff who is unable to return to a prior occupation may be obliged to undertake retraining in order to pursue a new line of work, but is generally entitled to consider only positions which are broadly comparable in terms of nature, duties and hours to the position lost.

Lastly, as noted, tort law may require retraining but again this depends upon what is reasonable in all the circumstances. Obligations to retrain for an entirely new line of work tend to become less onerous in proportion to the age of the plaintiff so that a very young plaintiff would be expected to be far more open to retraining than a plaintiff entering the final few years of working life. That is in part because retraining tends to be less problematic for younger plaintiffs and in part because steps toward mitigation will have a lesser effect on the global damage award, the fewer the working years a plaintiff has left. In assessing what is reasonable, courts compare the relative effort involved in mitigation and the effect that it is likely to have on reduction of damages.

Workers often complain that in contrast to this balancing under the tort system, the deeming process is predicated on the assumption that they should undertake unreasonably onerous retraining which is deemed necessary in order to maximize earnings. As I gather that the average age of loss of earnings pension recipients is in the mid-fifties, many workers affected would be in the range where the tort system imposes a less onerous obligation to retrain. While the process appears to work in much the same way generally as the tort system, there does appear to be a somewhat heavier obligation to mitigate by seeking retraining in the workers compensation setting.

Not only does the duty to mitigate loss of earnings appear to be a more stringent one in the workers compensation context, but the consequences of a failure to mitigate may be more severe than in the tort system. As a rule, a plaintiff who is found to have failed to mitigate his or losses has the damages adjusted accordingly. However, the plaintiff may still get damages reflecting the chance that the loss would not have been reduced had the plaintiff taken the steps necessary to fulfill the duty. That calculation is generally omitted from the workers compensation process along with other contingency-related assessments.

For example, in Janiak v. Ippolito (1985) 16 D.L.R. (4th) 1 (S.C.C.), a case involving medical mitigation obligations, the plaintiff refused to undergo surgery. The refusal was found in the circumstances to be unreasonable and therefore constituted a failure to mitigate. However, the evidence showed that the surgery in issue had a 70% chance of success. The Supreme Court of Canada rejected the argument that a balance of probabilities test should be applied to determine what would have happened had the plaintiff undergone the surgery, holding that such tests are confined to determining what in fact happened in the past.

In assessing damages the court determines not only what will happen, but what would have happened by estimating the chance of the relevant event occurring, which chance is then to be directly reflected in the amount of damages. (At p. 20)
Claimants in the workers compensation system are not afforded the benefit of any such adjustment since there is no requirement that the specific likelihood that particular occupations will in fact be available to them be measured.

Where differences exist between the tort and workers compensation systems with respect to issues arising out of the deeming process, the result is generally reduced complexity in inquiries undertaken in the latter setting, with a corresponding reduction of claims on resources. In many cases, the resulting pensions will be lower as well, such as where there is no reduction for the possibility that mitigation would be ineffective. Thus, the more onerous mitigation rules may be based on part on issues relating to administrative feasibility and cost.

In terms of policy rationales, there may be greater justification for more onerous mitigation rules in the workers compensation context in light of various factors. One factor is the much greater emphasis placed on rehabilitation by the workers compensation system, an issue which is largely disregarded in the tort regime.

Another factor is, of course, the role of fault. It is one thing to require a tortfeasor to pay more so that the injured party can retain some of the non-monetary rewards of work which he or she has lost because of the tortfeasor’s wrongful act or forego the sacrifices inherent in retraining. There, the distributive justice function of the tort system again comes into play and it may seem more equitable for the wrongdoer to bear certain costs and consequences than the innocent victim. No such rationale applies in a no-fault system, where the costs, monetary and otherwise, of a worker losing a chosen occupation may instead be apportioned between equally innocent parties (or even, in light of the general absence of contributory negligence principles, between blameless employers and a worker who has been the primary cause of his or her own injuries).

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