W—T—Injury

INDIVISIBLE INJURIES IN MULTIPLE LOSS CLAIMS

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Introduction

The assessment of damages in multiple loss claims has long followed the approach set out by Mr. Justice Robertson in the 1968 decision of Long v. Thiessen, [1968] 65 W.W.R. 577 (B.C.C.A.) at para. 48:

I think that the way in which justice can best be done here is: (a) To assess as best one can what the plaintiff would have recovered against the [first tortfeasor] had this action against them been tried on April 22, 1966 (the day before the second accident), and to award damages accordingly; (b) To assess global damages as of the date of the trial in respect of both accidents; and (c) To deduct the amount under (a) from the amount under (b) and award damages against [the second tortfeasor] in the amount of the difference.

Following the 1996 Supreme Court of Canada decision in Athey v. Leonati, [1996] 3 S.C.R. 458 the law on “indivisible injuries” attracted considerable judicial attention. With the recent decision of Bradley v. Groves, [2010] 8 B.C.L.R. (5th) 247 (C.A.) however, the British Columbia Court of Appeal has restated the law on indivisible injuries and held that the approach set out in Long is no longer applicable.

Principles of Causation: Athey v. Leonati

The 1996 Supreme Court of Canada case of Athey v. Leonati remains the leading Canadian authority in relation to injury causation and apportionment of damages between multiple causes (whether tortious / non-tortious, or multiple tortious causes).

The key issue in Athey was whether the plaintiff’s injury (non-tortious back injury occurring following two earlier motor vehicle accidents) should be apportioned between tortious and non-tortious causes, where both events were considered to be necessary to create the “injury”.

In Athey, Mr. Justice Major stated that, “[I]t has long been established that a defendant is liable for any injuries caused or contributed to by his or her negligence. If the defendant’s conduct is found to be a cause of the injury, the presence of other non-tortious contributing causes does not reduce the extent of the defendant’s liability.”

In writing for the Court, Mr. Justice Major outlined the general principles with respect to causation as follows (paras. 13 – 16):

Causation is established where the plaintiff proves to the civil standard on a balance of probabilities that the defendant caused or contributed to the injury: Snell v. Farrell, 1990 CanLII 70 (S.C.C.), [1990] 2 S.C.R. 311; McGhee v. National Coal Board, [1972] 3 All E.R. 1008 (H.L.).

The general, but not conclusive, test for causation is the “but for” test, which requires the plaintiff to show that the injury would not have occurred but for the negligence of the defendant: Horsley v. MacLaren, 1971 CanLII 24 (S.C.C.), [1972] S.C.R. 441.

The “but for” test is unworkable in some circumstances, so the courts have recognized that causation is established where the defendant’s negligence “materially contributed” to the occurrence of the injury: Myers v. Peel County Board of Education; 1981 CanLII 27 (S.C.C.), [1981] 2 S.C.R. 21, Bonnington Castings, Ltd. v. Wardlaw, [1956] 1 All E.R. 615 (H.L.); McGhee v. National Coal Board, supra. A contributing factor is material if it falls outside the de minimis range: Bonnington Castings, Ltd. v. Wardlaw, supra; see also R. v. Pinske, (1988), 30 B.C.L.R. (2d) 114 (B.C.C.A.), aff’d [1989] 2 S.C.R. 979.

In Snell v. Farrell, supra, this Court recently confirmed that the plaintiff must prove that the defendant’s tortious conduct caused or contributed to the plaintiff’s injury. The causation test is not to be applied too rigidly. Causation need not be determined by scientific precision; as Lord Salmon stated in Alphacell Ltd. v. Woodward, [1972] 2 All E.R. 475, at p. 490, and as was quoted by Sopinka J. at p. 328, it is “essentially a practical question of fact which can best be answered by ordinary common sense”. Although the burden of proof remains with the plaintiff, in some circumstances an inference of causation may be drawn from the evidence without positive scientific proof.

In some circumstances, an inference of causation may be drawn from the evidence, without positive scientific proof. The plaintiff need not establish that the defendant’s negligence was the sole cause of the injury. The law does not excuse a defendant from liability merely because other causal factors for which he or she is not responsible also helped produce the harm. It is sufficient if the defendant’s negligence was a cause of the harm. At paras. 17 – 20 of Athey, Mr. Justice Major further stated this proposition as follows:

It is not now necessary, nor has it ever been, for the plaintiff to establish that the defendant’s negligence was the sole cause of the injury. There will frequently be a myriad of other background events which were necessary preconditions to the injury occurring. … As long as a defendant is part of the cause of an injury, the defendant is liable, even though his act alone was not enough to create the injury. There is no basis for a reduction of liability because of the existence of other preconditions: defendants remain liable for all injuries caused or contributed to by their negligence.

This proposition has long been established in the jurisprudence. Lord Reid stated in McGhee v. National Coal Board, supra, at p. 1010:

It has always been the law that a pursuer succeeds if he can show that fault of the defender caused or materially contributed to his injury. There may have been two separate causes but it is enough if one of the causes arose from fault of the defender. The pursuer does not have to prove that this cause would of itself have been enough to cause him injury.

The law does not excuse a defendant from liability merely because other causal factors for which he is not responsible also helped produce the harm: Fleming, supra, at p. 200. It is sufficient if the defendant’s negligence was a cause of the harm: School Division of Assiniboine South, No. 3 v. Greater Winnipeg Gas Co., [1971] 4 W.W.R. 746 (Man. C.A.), at p. 753, aff’d [1973] 6 W.W.R. 765 (S.C.C.), [1973] S.C.R. vi; Ken Cooper-Stephenson, Personal Injury Damages in Canada (2nd ed. 1996), at p. 748.

This position is entrenched in our law and there is no reason at present to depart from it. If the law permitted apportionment between tortious causes and non-tortious causes, a plaintiff could recover 100 percent of his or her loss only when the defendant’s negligence was the sole cause of the injuries. Since most events are the result of a complex set of causes, there will frequently be non-

tortious causes contributing to the injury. Defendants could frequently and easily identify non-tortious contributing causes, so plaintiffs would rarely receive full compensation even after proving that the defendant caused the injury. This would be contrary to established principles and the essential purpose of tort law, which is to restore the plaintiff to the position he or she would have enjoyed but for the negligence of the defendant.

In Athey, Mr. Justice Major rejected the defendants' argument that there ought to be an apportionment between tortious and non-tortious causes, and instead held that when multiple traumatic events materially contribute to an indivisible injury, the defendants are jointly and severally liable for that injury. Specifically, he stated the following (paras. 22 – 23):

The respondents argued that apportionment between tortious and non-tortious causes should be permitted just as it is where multiple tortfeasors cause the injury. The two situations are not analogous. Apportionment between tortious causes is expressly permitted by provincial negligence statutes and is consistent with the general principles of tort law. The plaintiff is still fully compensated and is placed in the position he or she would have been in but for the negligence of the defendants. Each defendant remains fully liable to the plaintiff for the injury, since each was a cause of the injury. The legislation simply permits defendants to seek contribution and indemnity from one another, according to the degree of responsibility for the injury.

In the present case, the suggested apportionment is between tortious and non-tortious causes. Apportionment between tortious and non-tortious causes is contrary to the principles of tort law, because the defendant would escape full liability even though he or she caused or contributed to the plaintiff's entire injuries. The plaintiff would not be adequately compensated, since the plaintiff would not be placed in the position he or she would have been in absent the defendant's negligence.

The respondents submitted that apportionment is permitted where the injuries caused by two defendants are divisible (for example, one injuring the plaintiff's foot and the other the plaintiff's arm): Fleming, supra, at p. 201. Separation of distinct and divisible injuries is not truly apportionment; it is simply making each defendant liable only for the injury he or she has caused, according to the usual rule.

In the present case, there is a single indivisible injury, the disc herniation, so division is neither possible nor appropriate. The disc herniation and its consequences are one injury, and any defendant found to have negligently caused or contributed to the injury will be fully liable for it.

In Athey, the plaintiff had a history of low back pain and was involved in two motor vehicle accidents. After the two motor vehicle accidents the plaintiff returned to the gym, on the advice of his doctor, and while stretching felt a "pop" in his back and was eventually diagnosed with a disc herniation. The disc injury was deemed an indivisible injury and Mr. Justice Major stated as follows (paras. 43 and 48):

The findings of the trial judge indicate that it was necessary to have both the pre-existing condition and the injuries from the accidents to cause the disc herniation in this case. She made a positive finding that the accidents contributed to the injury, but that the injuries suffered in the two accidents were "not the sole cause" of the herniation. She expressly found that "the herniation was not unrelated to the accidents" and that the accidents "contributed to some degree" to the subsequent herniation. She concluded that the injuries in the accidents "played some causative role, albeit a minor one". These findings indicate that it was the combination of the pre-existing condition and the injuries sustained in the accidents which caused the herniation. Although the accidents played a lesser role than the pre-existing problems, the accidents were nevertheless a necessary ingredient in bringing about the herniation.

Had the trial judge concluded (which she did not) that there was some realistic chance that the disc herniation would have occurred at some point in the future without the accident, then a reduction of the overall damage award may have been considered. This is because the plaintiff is to be returned to his “original position”, which might have included a risk of spontaneous disc herniation in the future. However, in the absence of such a finding, it remains “speculative” and need not be taken into consideration: Schrump v. Koot, supra; Graham v. Rourke, supra. The plaintiff is entitled to the full amount of the damages as found by the trial judge.

The Law on “Indivisible” Injuries Following Athey

In Blackwater v. Plint, [2005] 3 S.C.R. 3 the plaintiff suffered physical and emotional abuse at home before he attended a residential school where he was physically and sexually abused. The plaintiff’s claim for psychological injuries caused by the physical abuse was statute-barred while the claim for psychological damages for sexual abuse was allowed. The trial judge found that the abuse the plaintiff suffered at home and the statute-barred physical abuse would have manifested in serious psychological injuries even if the sexual abuse had not occurred. In other words, the trial judge found that the plaintiff’s injuries were divisible.

At paragraphs 45 and 75 of Blackwater, McLachlan C.J.C. stated the following:

The calculation of damages for sexual assault to Mr. Barney is complicated by two other sources of trauma: (1) trauma suffered in his home before he came to AIRS; and (2) trauma for non-sexual abuse and deprivation at AIRS that was statute-barred. In reality, all these sources of trauma fused with subsequent experiences to create the problems that have beset Mr. Barney all his life. Untangling the different sources of damage and loss may be nigh impossible. Yet the law requires that it be done, since at law a plaintiff is entitled only to be compensated for loss caused by the actionable wrong. It is the “essential purpose and most basic principle of tort law” that the plaintiff be placed in the position he or she would have been in had the tort not been committed: Athey v. Leonati, 1996 CanLII 183 (S.C.C.), [1996] 3 S.C.R. 458, at para. 32.

The trial judge followed this principle and sought to exclude damages relating to trauma suffered by Mr. Barney before coming to AIRS and statute-barred wrongs. In his view, the plaintiff’s family background, his institutionalization at AIRS and the non-sexual traumas he suffered, fell to be considered as factors inherent in his position, distinct from the sexual assaults. The trial judge clearly concluded that Mr. Barney’s family life prior to AIRS, as well as other experiences at AIRS, made it likely that he would have suffered serious psychological difficulties even if the sexual abuse had never occurred.

The Athey principles were also applied in the decision of Hutchings v. Dow, 2006 CarswellBC 970. In Hutchings, the plaintiff suffered hemorrhages bilaterally in the frontal lobes of his brain and other physical injuries in a motor vehicle accident. Approximately 18 months after the motor vehicle accident, the plaintiff was subsequently struck in the head by a beer bottle in an assault. In the assault, the plaintiff suffered a focal hematoma in the right fronto-parietal region of his brain and a shear injury in the sub-cortical white matter in his right frontal lobe. The tortfeasors in relation to the assault were not a party to the litigation.

At trial, Mr. Justice Cullen found that the plaintiff could not pursue his career goal of being a firefighter because of the motor vehicle accident brain injury and low back pain. The assault caused the plaintiff to develop a seizure disorder and left hand deficits. Mr. Justice Cullen held that the tortfeasors in the motor vehicle accident were not responsible for the physical injuries the plaintiff suffered as a result of the assault because the motor vehicle accident and the assault could each be sufficient causes of the injuries that followed from each event. Mr. Justice Cullen stated the following (para. 386):

As I previously indicated in these reasons, I am not satisfied on the evidence as a whole and on a balance of probabilities that the Accident caused or materially contributed to the seizure activity experienced by the plaintiff following the Assault. While there was some evidence advanced through Dr. Toyota that the initial shear injuries may have made the plaintiff more susceptible to the subsequent injuries arising from the Assault, the overall ambivalence of his evidence on the issue and the lack of any supporting evidence fell short of proving a causal link to the required degree.

Although Mr. Justice Cullen found that the physical injuries arising from the motor vehicle accident and the assault were divisible, he concluded that the plaintiff's major depressive disorder was the result of both the motor vehicle accident and the assault. As a result of that finding, Mr. Justice Cullen applied the Athey principles and found that the tortfeasors for the motor vehicle accident were 100% liable for the plaintiff's major depressive disorder. Specifically, Mr. Justice Cullen held that (paras. 381-383):

I would attribute the cause of the plaintiff's depression in the proportion of 60% to the Accident and 40% to the Assault. Although the actual onset of the clinical depression began post-Assault, I am satisfied the effects of the Accident were significant factors already building toward the onset of the depression when the Assault occurred. I find the Assault, while traumatic and potentially consequential to the plaintiff and his plans, did not involve the same long-term need to endure difficulties and discover limitations that the Accident's effects did. Hence, I find the Assault was less of a factor, but a factor nonetheless, in the plaintiff's development of a mood disorder.

The parties differed on whether the depression should be considered a divisible or non-divisible injury. I conclude it is a non-divisible injury as that term is used in Athey v. Leonati, 1996 CanLII 183 (S.C.C.), [1996] 3 S.C.R. 458 and E.D.G. v. Hammer, 2003 SCC 52 (CanLII), [2003] 2 S.C.R. 459.

In this case there was simply no evidence to suggest the depression was not, although contributed to by distinct causes, of a piece. In other words, there was no evidence that any aspect of the plaintiff's mood disorder was solely caused by either the Accident or the Assault, or by some other non-tortious cause. That being so, I conclude that the plaintiff's depression was a 100% non-divisible injury, and although attributing 60% causation to the Accident and 40% to the Assault, it follows the defendants in this case are jointly and severally liable for the damage or loss flowing from the depression. In reaching this conclusion, I have relied on the comments of McLachlin C.J.C. in E.D.G. Hammer at paras. 28 – 33 which read as follows:

Since I have concluded that the Board is not liable to E.D.G. for any of the damage caused by Mr. Hammer, it is not strictly necessary to consider the issue raised on the Board's cross-appeal. However, because the Board rests its challenge on the claim that Vickers J. misapplied a principle laid out in Athey v. Leonati, 1996 CanLII 183 (S.C.C.), [1996] 3 S.C.R. 458, it will be useful to consider the Board's challenge.

The Board's challenge concerns that portion of the damages that was, in the view of Vickers J., caused jointly by Mr. Hammer and the subsequent abusers. Vickers J. held Mr. Hammer liable for the sum total of these damages, stating that "[a]s long as he [Mr. Hammer] is a part of the cause of the injury, even though his acts alone did not create the entire injury, his responsibility for the [entire] damage that flows from the injury is established" (para. 57). As an authority for this proposition, Vickers J. cited Major J.'s claim in Athey, supra, at para. 17, that "[a]s long as a defendant is part of the cause of an injury, the defendant is liable, even though his act alone was not enough to create the injury" [Emphasis in original].

In the Board's submission, Vickers J. was incorrect in applying this principle to the case at bar. The principle applies, the Board claims, only where the other cause is non-tortious and is a precondition of the injury, not where it is tortious and occurs subsequently.

In my view, the Board's reading of the principle articulated in Athey is overly narrow. After making the claim cited above, Major J. further expanded upon his reasoning, stating at para. 19 that:

The law does not excuse a defendant from liability merely because other causal factors for which he is not responsible also helped produce the harm … It is sufficient if the defendant's negligence was a cause of the harm… [First emphasis added; second emphasis in original].

This principle is not confined to cases involving non-tortious preconditions. It applies to any case in which the injuries caused by a number of factors are indivisible.

The matter is governed by the Negligence Act, R.S.B.C. 1996, c. 333, s. 4, which provides that "[i]f damage or loss has been caused by the fault of 2 or more persons", then "(a) they are jointly and severally liable to the person suffering the damage or loss". This rule implies that Mr. Hammer is liable to E.D.G. for the full cost of any injuries that are indivisible and caused both by Mr. Hammer and by the subsequent tortfeasors.

The Board's real disagreement may lie, not with the principles applied by the trial judge, but with the trial judge's factual conclusions, in particular, his conclusion that 90 percent of the damage was indivisible and was caused both by Mr. Hammer and by the subsequent tortfeasors. This is, however, a finding of fact, and cannot be overturned absent palpable and overriding error. It is not evident to me that the trial judge committed such an error in this case. [Emphasis in original]

The decision of Mr. Justice Cullen was later upheld by the British Columbia Court of Appeal in Hutchings v. Dow, [2007] 5 W.W.R. 264. The defendant argued that Blackwater was applicable and that Mr. Justice Cullen should have considered the plaintiff's "original position" or the position that he would have been in absent the motor vehicle accident. The defendant argued that the plaintiff's damages ought to have been reduced to take into account the injuries suffered in the assault.

The Court of Appeal rejected this argument on the basis that the learned trial judge made a finding of fact that the plaintiff would not have suffered the depression, notwithstanding the assault, in the absence of the motor vehicle accident. On behalf of the Court of Appeal, Prowse J.A. held that (paras. 14 – 17):

The appellants rely on Blackwater as delineating the correct approach to issues of causation and damages where there are multiple successive tortfeasors responsible for various injuries suffered by a plaintiff. The appellants place particular reliance on para. 74 of that decision which, in their submission, requires trial judges to separate out the different sources of damage arising from multiple torts in order to properly assess damages.

In this case, however, the evidence and findings of the trial judge do not support the proposition that Mr. Hutchings would likely have suffered from depression if the accident had never occurred. This is the critical fact distinguishing this case from Blackwater (and other cases relied on by the appellants) and likening it to Hammer. Here, the accident and the subsequent assault were necessary causes which merged together to produce the depression, which, to use the trial judge's language, was "of a piece". Thus, it was not possible (or logical) on the evidence to determine Mr. Hutchings' original position with respect to his depression in the absence of the accident.

The difficulty of determining a plaintiff's original position in relation to indivisible injuries contributed to by multiple causes was referred to by Mr. Justice Major, speaking for the Court in Athey (at paras. 25, 33 and 48):

In the present case, there is a single indivisible injury, the disc herniation, so division is neither possible nor appropriate. The disc herniation and its consequences are one injury, and any defendant found to have negligently caused or contributed to the injury will be fully liable for it.

In the present case, there was a finding of fact that the accident caused or contributed to the disc herniation. The disc herniation was not an independent intervening event. The disc herniation was a product of the accidents, so it does not affect the assessment of the plaintiff's "original position" and thereby reduce the net loss experienced by the plaintiff.

Had the trial judge concluded (which she did not) that there was some realistic chance that the disc herniation would have occurred at some point in the future without the accident, then a reduction of the overall damage award may have been considered. This is because the plaintiff is to be returned to his 'original position', which might have included a risk of spontaneous disc herniation in the future. However, in the absence of such a finding, it remains 'speculative' and need not be taken into consideration: [citations omitted]. The plaintiff is entitled to the full amount of the damages as found by the trial judge.

Similarly, there was no evidence or finding in this case that Mr. Hutchings would have suffered from depression absent the combined effect of the accident and the assault. Thus, contrary to the submission of the appellants, there was no basis for reducing his damages in that regard.

The Court of Appeal in Hutchings, supra, also considered the appropriate test for causation being either the "but for" test or the "material contribution" test, in light of the Supreme Court of Canada decision of Resurfice Corp. v. Hanke, [2007] 1 S.C.R. 333. Prowse J.A. held that (paras. 19 – 20):

In Resurfice, the Supreme Court of Canada took the opportunity (albeit in obiter dicta) to clarify the relationship between the "but for" test and the "material contribution" test with respect to causation. Since the appellants rely on the distinction between those tests as being determinative of this appeal against Mr. Hutchings, I will quote from the Resurfice decision in some detail (at paras. 20-25):

Much judicial and academic ink has been spilled over the proper test for causation in cases of negligence. It is neither necessary nor helpful to catalogue the various debates. It suffices at this juncture to simply assert the general principles that emerge from the cases.

First, the basic test for determining causation remains the "but for" test. This applies to multi-cause injuries. The plaintiff bears the burden of showing that "but for" the negligent act or omission of each defendant, the injury would not have occurred. Having done this, contributory negligence may be apportioned, as permitted by statute.

This fundamental rule has never been displaced and remains the primary test for causation in negligence actions. As stated in Athey v. Leonati, at para. 14, per Major J., "[t]he general, but not conclusive, test for causation is the 'but for' test, which requires the plaintiff to show that the injury would not have occurred but for the negligence of the defendant." Similarly, as I noted in Blackwater v. Plint, at para. 78, "[t]he rules of causation consider generally whether 'but for' the defendant's acts, the plaintiff's damages would have been incurred on a balance of probabilities."

The "but for" test recognizes that compensation for negligent conduct should only be made "where a substantial connection between the injury and defendant's conduct" is present. It ensures that a defendant will not be held liable for the plaintiff's injuries where they "may very well be due to factors unconnected to the defendant and not the fault of anyone": Snell v. Farrell, at p. 327, per Sopinka J.

However, in special circumstances, the law has recognized exceptions to the basic “but for” test, and applied a “material contribution” test. Broadly speaking, the cases in which the “material contribution” test is properly applied involve two requirements.

First, it must be impossible for the plaintiff to prove that the defendant’s negligence caused the plaintiff’s injury using the “but for” test. The impossibility must be due to factors that are outside of the plaintiff’s control; for example, current limits of scientific knowledge. Second, it must be clear that the defendant breached a duty of care owed to the plaintiff, thereby exposing the plaintiff to an unreasonable risk of injury, and the plaintiff must have suffered that form of injury. In other words, the plaintiff’s injury must fall within the ambit of the risk created by the defendant’s breach. In those exceptional cases where these two requirements are satisfied, liability may be imposed, even though the “but for” test is not satisfied, because it would offend basic notions of fairness and justice to deny liability by applying a “but for” approach.

In this case, the appellants submit that the trial judge should have applied a “but for” test in determining causation and that his failure to do so requires that the action be remitted to the trial court for a new trial. While I agree that a “but for” test was the appropriate test to apply in these circumstances, I do not agree that the trial judge’s failure to frame his reasons in “but for” language is fatal to his conclusions. Rather, I am satisfied that the trial judge’s reasoning and findings support his conclusions on the basis of a “but for” analysis. In my view, it is implicit in his reasons that the trial judge was satisfied that “but for” the accident the depression would not have occurred, and “but for” the assault the depression would not have occurred. In other words, both the accident and the assault were necessary, but not sufficient, conditions giving rise to Mr. Hutchings’ depression. The trial judge was not persuaded that any of the other factors relied on by the appellants (including personal and economic problems, and a period of drug use) played any significant causative role in Mr. Hutchings’ depression and, in my view, the evidence supports his conclusion in that regard. In the result, I would not give credence to this ground of appeal. [Emphasis added]

The Athey principles were also applied in Ashcroft v. Dhaliwal, [2007] 10 W.W.R. 326. In Ashcroft, the plaintiff sustained soft tissue injuries to her neck and back, along with some psychological injury in a motor vehicle accident. The plaintiff was working full time, but was experiencing some ongoing symptoms when she was involved in a second motor vehicle accident. At some point, the plaintiff went on to develop post-traumatic stress disorder and depression. It was disputed as to when the psychological injuries first appeared in relation to the two motor vehicle accidents.

Mr. Justice Shaw ultimately accepted the opinion of the plaintiff’s psychiatrist who opined that the post-traumatic stress disorder, major depressive episode and chronic pain disorder were present prior to the second motor vehicle accident. After the second motor vehicle accident, the plaintiff went off work and did not return to any employment.

Mr. Justice Shaw held that Athey is the authority with respect to situations where a subsequent event follows a tortious accident (para. 26):

Athey v. Leonati is the leading case in Canada on the subject of subsequent events which aggravate injuries received in a tortiously caused accident. The case recognizes that there may be more than one material cause of injuries and holds that if injuries caused by a tortfeasor are found to be a material contributing cause of the exacerbation of those injuries by a subsequent event, then the original tortfeasor may be liable for not only the initial injuries, but also for their subsequent exacerbation.

The significance of Athey v. Leonati is that it includes within the scope of causation subsequent injuries that are related to vulnerability caused by the initial injuries. In Athey, the Supreme Court of Canada upheld the trial judge’s ruling that there was a causal connection between Mr. Athey’s initial

injuries and a later [notorious] disc herniation suffered while doing exercises. In so doing, the Court applied a practical common sense approach to causation. Major J., for the Court, said at para. 16:

In Snell v. Farrell, supra, this Court recently confirmed that the plaintiff must prove that the defendant's tortious conduct caused or contributed to the plaintiff's injury. The causation test is not to be applied too rigidly. Causation need not be determined by scientific precision; as Lord Salmon stated in Alphacell Ltd. v. Woodward, [1972] 2 All E.R. 475, at p. 490, and as was quoted by Sopinka J. at p. 328, it is "essentially a practical question of fact which can best be answered by ordinary common sense". Although the burden of proof remains with the plaintiff, in some circumstances an inference of causation may be drawn from the evidence without positive scientific proof. [Emphasis added]

Mr. Justice Shaw further held that, "Athey draws a line between divisible and indivisible injuries in the sense that all injuries caused or materially contributed to by a tort are said to be indivisible, and injuries where causal connection to the tort is not established are said to be divisible." (para. 29).

Mr. Justice Shaw also considered whether the Athey approach or the approach outlined in Long was applicable. In rejecting the latter, Mr. Justice Shaw adopted the Athey principles to conclude that the injuries and the consequences resulting from the second motor vehicle accident were indivisible from the first motor vehicle accident and its consequences and therefore all of the injuries the plaintiff suffered in the second motor vehicle accident were causally connected to the first motor vehicle accident. At paragraph 32, Mr. Justice Shaw stated the following:

On the facts of this case, I conclude that the Athey v. Leonati approach should prevail. The dominant factual elements which lead me to this conclusion are: (1) that at the time of the second accident, Mrs. Ashcroft had not yet recovered from the injuries she suffered in the first accident; (2) the first accident injuries made her vulnerable to any further accident exacerbating her condition; and, (3) the injuries she received in the second accident were within the scope of her vulnerability. In this sense, the injuries and consequences resulting from the second accident are, I find, indivisible from the original tort (the first accident) and its consequences. [Emphasis added]

The plaintiff subsequently appealed with respect to Mr. Justice Shaw's decision to deduct a settlement the plaintiff previously received from the damage award. The Court of Appeal upheld the trial decision. On behalf of the Court of Appeal, Madam Justice Huddart held that ([2008] 11 W.W.R. 579 (B.C.C.A.) at para. 42):

The two causes of action are not separate: they are linked by the indivisible injury the trial judge found to have been caused by the separate torts. That link brings into play not only joint and several liability, but also the rule against double recovery.

The Decision in Bradley

In Bradley v. Groves (leave for appeal refused by the Supreme Court of Canada on April 14, 2011), a unanimous B.C. Court of Appeal held that Long v. Thiessen does not apply to indivisible injuries. Specifically, the Court of Appeal held that (para. 32):

There can be no question that Athey requires joint and several liability for indivisible injuries. Once a trial judge has concluded as a fact that an injury is indivisible, then the tortfeasors are jointly liable to the plaintiff. They can still seek apportionment (contribution and indemnity) from each other, but absent contributory negligence, the plaintiff can claim the entire amount from any of them.

The Court of Appeal further commented upon the Athey principles and specifically held that an "aggravation" of injuries and "indivisible" injuries do not require different legal approaches (para. 37):

We are also unable to accept the appellant's submission that "aggravation" and "indivisibility" are qualitatively different, and require different legal approaches. If a trial judge finds on the facts of a particular case that subsequent tortious action has merged with prior tortious action to create an injury that is not attributable to one particular tortfeasor, then a finding of indivisibility is inevitable. That one tort made worse what another tort created does not automatically implicate a thin or crumbling skull approach (as in Blackwater), if the injuries cannot be distinguished from one another on the facts. Those doctrines deal with finding the plaintiff's original position, not with apportioning liability. The first accident remains a cause of the entire indivisible injury suffered by the plaintiff under the "but for" approach to causation endorsed by the Supreme Court of Canada in Resurfice Corp. v. Hanke, [2007] 1 S.C.R. 333. As noted by McLachlin C.J.C. in that case, showing that there are multiple causes for an injury will not excuse any particular tortfeasor found to have caused an injury on a "but-for" test, as "there is more than one potential cause in virtually all litigated cases of negligence" (at para. 19). It may be that in some cases, earlier injury and later injury to the same region of the body are divisible. While it will lie for the trial judge to decide in the circumstances of each case, it is difficult to see how the worsening of a single injury could be divided up.

The Court of Appeal further referred to the decision of B.P.B. v. M.M.B., [2010] 3 W.W.R. 628, wherein the majority of the Court of Appeal adopted the Athey approach to apportionment and held the joint tortfeasors jointly liable. At paragraphs 27 - 30, the Court of Appeal outlined the relevant portions of the B.P.B. decision that pertain to application of the Athey principles:

Justice Chiasson set out the joint liability approach to indivisible injury in his reasons:

In a case such as this where there are multiple causes of a plaintiff's injury, the core question is whether the injury is divisible. If it is, a plaintiff can recover from a defendant only the damages attributable to the injury caused by that defendant. If the injury is indivisible, subject to considerations I shall discuss, a plaintiff can recover 100% from the defendant of the damages attributable to the injury which is caused or contributed to by the defendant regardless of the contribution to the injury by others (Athey, paras. 17-20).

Justice Smith concurred with this approach to indivisibility and provided a useful explanation for the imposition of liability for global damages on a subsequent tortfeasor where the injuries are not divisible.

B.P.B. concerned a claim by a daughter against her father for physical and emotional abuse. The plaintiff was subsequently sexually abused by an uncle. The father contended that the trial judge was correct in apportioning the responsibility for damages between the father and the uncle, who was not a party. Justices Smith and Chiasson held that apportionment where the injury was indivisible was an incorrect application of Athey. Smith J.A. held:

On the other hand, tortfeasors whose tortious acts combine to produce the same injury are jointly and severally liable to the full extent of the injury: Athey v. Leonati, 1996 CanLII 183 (S.C.C.), [1996] 3 S.C.R. 458 at paras. 17 - 20; Blackwater v. Plint, 2005 SCC 58 (CanLII), [2005] 3 S.C.R. 3 at para. 78; Joint Torts at 3 - 4; Negligence Act, R.S.B.C. 1996, c. 333, s. 4(2)(a). Accordingly, a tortfeasor whose tortious conduct is part of the cause of an injury is liable to the full extent of the injury even though other tortious or non-tortious causal factors for which he is not responsible helped to produce the harm: Athey at para. 19, adopted in E.D.G. v. Hammer, 2003 SCC 52 (CanLII), [2003] 2 S.C.R. 459 at paras. 30 - 32, Blackwater at para. 78.

Where injury has been done to the plaintiff and the injury is indivisible, any tortfeasor whose act has been a proximate cause of the injury must compensate for the whole of it. As between the plaintiff and the defendant it is immaterial that there are others whose acts also have been a cause of injury and it does not matter whether those others have or have not a good defence. These factors would

be relevant in a claim between tortfeasors for contribution, but the plaintiff is not concerned with that; he can obtain judgment for total compensation from anyone whose act has been a cause of his injury. If there are more than one of such persons, it is immaterial to the plaintiff whether they are joint tortfeasors or not. If four men, acting severally and not in concert, strike the plaintiff one after another and as a result of his injuries he suffers shock and is detained in hospital and loses a month's wages, each wrongdoer is liable to compensate for the whole loss of earnings. If there were four distinct physical injuries, each man would be liable only for the consequences peculiar to the injury he inflicted, but in the example I have given the loss of earnings is one injury caused in part by all four defendants. It is essential for this purpose that the loss should be one and indivisible; whether it is so or not is a matter of fact and not a matter of law. If, for example, a ship is damaged in two separate collisions by two wrongdoers and consequently is in dry dock for a month for repairs and claims for loss of earnings, it is usually possible to say how many days' detention is attributable to the damage done by each collision and divide the loss of earnings accordingly.

These are elementary principles and readily recognizable as such in the law of damage for physical injury.

These remarks are, in my view, entirely consistent with what the Supreme Court of Canada has said in Athey and in other cases that bear on these issues. I adopt them as a lucid exposition of the legal principles applicable in the case at bar.

In Bradley v. Groves, the Court of Appeal ultimately dismissed the defendant's appeal on the basis that without a finding of divisibility the defendant's arguments could not succeed. Specifically, the Court of Appeal concluded that, "the trial judge found as a fact that the plaintiff's injuries from the first accident and the second accident were indivisible" (para. 38).

Recent Consideration of Bradley

In Thomas v. Thompson, 2011 BCSC 1049, a recent decision of the BC Supreme Court, the plaintiff sued for damages arising out of a 2005 motor vehicle accident. Mr. Justice Brooke held that the plaintiff's injuries were indivisible from injuries sustained in a 2002 motor vehicle accident (for which the plaintiff had previously settled his claim for $10,000). Following trial, the defendant submitted that the settlement of $10,000 ought to be deducted from the award of $75,000 for non-pecuniary damages.

Mr. Justice Brooke declined to make the deduction, stating that the assessment of non-pecuniary damages had taken into account the plaintiff's pre-existing injuries arising out of the 2002 motor vehicle accident (para. 7):

I did not accept the evidence of the plaintiff that he had made a full recovery from the 2002 accident. In assessing non-pecuniary damages for the effects of the accident of June 27, 2005, I took the plaintiff in the position he then occupied; that is, as continuing to make recovery from the earlier injuries. I did not treat him as if he were whole at the time of the second accident. Thus, I reject the submission that the settlement funds paid to the plaintiff following the first accident be deducted from the award for the damages sustained in the second accident. There is no double recovery.

However, it is implicit in his decision that if the appropriate evidence were before the trier of fact, a deduction may be allowed (para. 10):

While I accept that I have discretion to reopen the trial, I am not satisfied that it is right and just to do so.

Conclusion

For cases involving multiple loss claims, one of the primary considerations in assessing quantum is whether the losses have resulted in injuries that are "indivisible" or "divisible". While the courts in British Columbia have traditionally applied the formulaic approach set out in Long v. Thiessen, the law as set out in Bradley v. Groves is now clear that once there is a finding of fact that an injury is indivisible, then the tortfeasors are jointly and severally liable for the damages sustained by the plaintiff.

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