BC Court Of Appeal Clarifies Law Of Compensation For Injuries With Multiple Causes

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Very important reasons for judgement were released today by the BC Court of Appeal making it easier for a Plaintiff involved in multiple not at fault traumas to be properly compensated for their injuries.

In today's case (Bradley v. Groves) the Plaintiff was injured in 2 BC motor vehicle collisions. The first happened in 2006. She was not at fault. She suffered from various soft tissue injuries which were recovering (but not recovered) when she was involved in a second collision in 2008. She was faultless for this crash which aggravated the soft tissue injuries from the first crash.

The Plaintiff sued the motorist in the first crash. The trial judge found that the injuries were "*indivisible*" and that the two crashes "*were both necessary causes of the indivisible injuries*". The trial judge valued the Plaintiff's non-pecuniary damages of $30,000 for the entirety of her injury. The Plaintiff was awarded damages for the whole amount with the trial judge stating that since the Plaintiff was not at fault for either event and since her injuries were indivisible this was the correct approach.

The Defendant appealed arguing that the judge should have apportioned damages between the two crashes and only awarded the Plaintiff damages for the crash that she was suing for. The Court of Appeal disagreed and upheld the trial judgment. In doing so the Court clarified this important area of law which will now make it easier for not at fault Plaintiff's injured through multiple events to be properly compensated for their loss. The BC High Court provided the following useful reasons:

[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.

[33] The approach to apportionment in Long v. Thiessen is therefore no longer applicable to indivisible injuries. The reason is that Long v. Thiessen pre-supposes divisibility: Longrequires courts to take a single injury and divide it up into constituent causes or points in time, and assess damages twice; once on the day before the second tort, and once at trial. Each defendant is responsible only for their share of the injury and the plaintiff can recover only the appropriate portion from each tortfeasor.

[34] That approach is logically incompatible with the concept of an indivisible injury. If an injury cannot be divided into distinct parts, then joint liability to the plaintiff cannot be apportioned either. It is clear that tortfeasors causing or contributing to a single, indivisible injury are jointly liable to the plaintiff. This in no way restricts the tortfeasors' right to apportionment as between themselves under the Negligence Act, but it is a matter of indifference to the plaintiff, who may claim the entire amount from any defendant.

[35] This is not a case of this Court overturning itself, because aspects of Long v. Thiessen were necessarily overruled by the Supreme Court of Canada's decisions in Athey,E.D.G., and Blackwater. Other courts have also come to this same conclusion: see Misko v. Doe, 2007 ONCA 660, 286 D.L.R. (4th) 304 at para. 17.

[36] It may be that this represents an extension of pecuniary liability for consecutive or concurrent tortfeasors who contribute to an indivisible injury. We do not think it can be said that the Supreme Court of Canada was unmindful of that consequence. Moreover, apportionment legislation can potentially remedy injustice to defendants by letting them claim contribution and indemnity as against one another.

[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 SCC 7, [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.