

DOLDEN

WALLACE

FOLICK LLP

INDIVISIBLE INJURIES

Amelia J. Staunton

February 2011

18th Floor – 609 Granville St.
Vancouver, BC
Canada, V7Y 1G5
Tel: 604.689.3222
Fax: 604.689.3777

308 – 3330 Richter Street
Kelowna, BC
Canada, V1W 4V5
Tel: 1.855.980.5580
Fax: 604.689.3777

850 – 355 4th Avenue SW
Calgary, AB
Canada, T2P OJ1
Tel: 1.587.480.4000
Fax: 1.587.475.2083

500 – 18 King Street East
Toronto, ON
Canada, M5C 1C4
Tel: 1.416.360.8331
Fax: 1.416.360.0146

CONTACT LAWYER

Amelia Staunton

604.891.0359

astaunton@dolden.com

Introduction

What happens when a Plaintiff, recovering from injuries sustained as a result of one tortious act, suffers injuries at the hands of another tortfeasor?

Where the Plaintiff has sustained distinctly different injuries in each accident, assessing the Plaintiff's loss is less problematic than when the injuries are similar, or when the second injury could not have occurred but for the first. The BC Court of Appeal has recently released its decision in *Bradley v. Groves*, 2010 BCCA 361, which clarifies that consecutive tortfeasors are jointly and severally liable for the entirety of the injuries sustained by the Plaintiff in both accidents. This new decision will have a significant effect on the assessment of damages in cases involving Plaintiffs who have been injured in multiple accidents.

In our submission, joint and several liability for tortfeasors in cases involving indivisible injuries is potentially unfair. In addition, joint and several liability may be contrary to settled principles of damages for negligence. This area of jurisprudence merits close observation as new case law develops.

Assessment of Indivisible Injuries

When assessing indivisible injuries, it is important to keep two separate concepts in mind. The first concept is that of causation of the injury itself. Why did the Plaintiff suffer injuries? In determining the answer to this question, the courts will ask: 'but for' the defendant's acts, would the damages have been incurred?

If the answer to that question is no, then the defendant will be liable for the Plaintiff's resulting condition. Even if there are tortious and non-tortious causes of the Plaintiff's ultimate condition, the defendant will be liable for the Plaintiff's entire condition (with one notable exception, which will be discussed below).

The second concept is that of damages. In assessing damages, the court will ask: what would the original position of the Plaintiff have been? The difference between that original position and the Plaintiff's current condition is what the judge will use to assess the quantum of damages payable. However, the defendant does not need to put the Plaintiff in a better position than he would have been, had the accident not occurred.¹

The distinction between these two concepts is of particular importance when assessing indivisible injuries because, otherwise, it is easy to disregard the fact that there may be divisible aspects to loss or damage. For example, there may be wage loss incurred as a result of the first tort, which arguably should not be attributed to the second tortfeasor.

Focusing on the injury as compared to the consequential loss is also technically incorrect. The *Negligence Act*, which is the statute that governs liability for injuries (indivisible or not) does not refer to injuries, but does refer to "damages or loss":

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.*

It is not the injury, but the damage or loss resulting from the injury that should be the focus of the defendants.

What is an Indivisible Injury?

Since *Athey v. Leonati*,² the term 'indivisible injuries' has been used as a convenient legal shorthand. But what does it really mean? In our view, an 'indivisible injury' has two primary characteristics.

First, in the simplest terms, an 'indivisible injury' is an injury which has been caused or contributed to by multiple tortfeasors. In other words, the injury is such that the

¹ *Blackwater v. Plint*, [2005] 3 S.C.R. 3, para.78

² [1996] 3 SCR 458.

Plaintiff's resulting overall condition cannot be 'divided' or parcelled out between the tortfeasors.

Obviously, there are many permutations of an 'indivisible injury'. An example of an 'indivisible injury' is the Plaintiff who suffers an injury (e.g. a shoulder sprain) in Accident A, and then suffers a worsening of that injury (e.g. a rotator cuff tear) in Accident B. The Plaintiff would not have suffered the rotator cuff tear without the shoulder sprain, and the Plaintiff's overall condition cannot now be solely attributed to one tortfeasor or the other. The injury is 'indivisible' and the trial judge must allocate responsibility for the Plaintiff's loss between the tortfeasor of Accident A and the tortfeasor of Accident B.

By way of comparison, an example of a 'divisible injury' would be a Plaintiff who suffers a shoulder sprain in Accident A and a broken ankle in Accident B. The two injuries are separate and unrelated, and can be considered without reference to the other.

A further example of an indivisible injury is that which was the subject of *Athey, supra*. This case involved a Plaintiff who was injured in two motor vehicle accidents, and subsequently, while recuperating from his injuries, herniated a disc in an exercise routine. The trial judge concluded, as a finding of fact, that the accidents caused or contributed to the disc herniation.

The defendants argued that the disc herniation should be viewed as a "*non-tortious contributing cause*" to the Plaintiff's overall physical condition, and that the overall award should be divided to reflect the tortious and non-tortious causes of the Plaintiff's resultant condition. In response, the Supreme Court of Canada stated that:

The [defendants] 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. The [defendants] are correct that separation is also permitted where some of the injuries have tortious causes and some of the injuries have non-tortious causes: Fleming, supra, at p. 202. Again, such cases merely recognize that the defendant is not liable for injuries which were not caused by his or her negligence.

*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.*³

This is the first principle of tort law: if a defendant caused or contributed to an injury, the defendant will be liable for it.

A second characteristic of an ‘indivisible injury’ lies in the timing of the wrongful acts. An indivisible injury results when there are two wrongful acts contributed to by consecutive tortfeasors, as distinguished from concurrent tortfeasors.

Concurrent tortfeasors are those “*whose torts concur (run together) to produce the same damage*”.⁴ In the latter case, the wrongful acts of the tortfeasors occur at the same time to produce the same result. Although the injuries that result from the wrongful acts of concurrent tortfeasors can also be thought of as a species of indivisible injury, they are less problematic for the purposes of assessment of damages: the trial judge will simply determine the degree of fault of each concurrent tortfeasor, and the tortfeasors can look to each other for contribution and indemnity.

In comparison, consecutive tortfeasors are those whose wrongful acts follow one another in time. These wrongful acts are independent of each other and have a separate effect on the Plaintiff’s physical condition.

Therefore, an ‘indivisible injury’ is:

³ Paragraphs 24 and 25, emphasis added.

⁴ Glanville Williams, *Joint Torts and Contributory Negligence*, as cited by the Honourable Mr. Justice Richard Goepel and Seva Batkin in “Apportionment of Damages Between Multiple Tortfeasors”, *The Advocate*, Vol 61, Part 1, January 2009, at p. 57.

1. an injury whose effects cannot be separated between multiple tortfeasors, and
2. the result of the acts of consecutive tortfeasors.

The Effect of Contributory Negligence

Even if there is an indivisible injury, contributory negligence will 'sever' joint and several liability. Although there have been no reported cases that have specifically addressed the issue of contributory negligence, the courts have commented several times that the *Negligence Act* will have this effect:

*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.*⁵

Similarly, in *Ashcroft v. Dhaliwal*, the court commented that:

*In the absence of contributory negligence, apportionment would be a matter of indifference to the plaintiff, barring special circumstances...*⁶

Again, this is because of the operation of the *Negligence Act*, which provides as follows:

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.*

The *Negligence Act* requires that liability be apportioned between those who contribute to the wrongful act. Therefore, if a Plaintiff is contributorily negligent, liability is apportioned to the Plaintiff as well as to each of the tortfeasors.

⁵ *Bradley v. Groves*, 2010 BCCA 361.

⁶ *Ashcroft v. Dhaliwal*, 2008 BCCA 352, at para.19.

The Effect of Pre-Existing Conditions

As referenced above, there is one exception to the general rule that if the injury is indivisible, the defendants will be liable for the Plaintiff's ultimate condition. That exception can arise if the Plaintiff has a pre-existing condition which would have become manifest in any event of the accidents.

In *Athey, supra*, the court stated:

The respondents argued that the plaintiff was predisposed 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 the victim as the tortfeasor finds the victim, and is therefore liable even though the plaintiff's losses are more dramatic than they would be for the average person.

The so-called "crumbling skull" rule simply recognizes that the pre-existing condition was inherent in the plaintiff's "original position". The defendant need not put the plaintiff in a position better than his or her original position. The defendant is liable for the injuries caused, even if they are extreme, but need not compensate the plaintiff for any debilitating effects of the pre-existing condition which the plaintiff would have experienced anyway.⁷

The Supreme Court of Canada's decision in *Blackwater v. Plint* is an example of the application of the 'thin-skull/crumbling-skull' rules. In this case, the subject Plaintiff⁸ was an aboriginal child who was removed from his family and sent to a residential school. He was repeatedly sexually assaulted by an employee of the school. Some of the claims brought by the Plaintiff, including the claims for non-sexual physical abuse, were determined to be statute-barred. In addition, the Plaintiff had suffered trauma in his own home before coming to the residential school.

⁷ Paras 34 – 35.

⁸ There were 4 actions brought by 27 former students of the school, although the Plaintiff's case was the focus of the decision.

The trial judge concluded that he had to consider the trauma experienced by the Plaintiff, as well as the non-sexual physical abuse at the residential school, as factors inherent in the Plaintiff's original position. He concluded that the Plaintiff would have suffered serious psychological problems even if the sexual abuse had not occurred. The Plaintiff appealed this finding.

The Supreme Court of Canada commented that:

[the Plaintiff's] submissions that injury from traumas other than the sexual assault should not be excluded amount to the contention that once a tortious act has been found to be a material cause of injury, the defendant becomes liable for all damages complained of after, whether or not the defendant was responsible for those damages.

At the same time, the defendant takes his victim as he finds him – the thin skull rule. Here the victim suffered trauma before coming to [the residential school]. The question then becomes: What was the effect of the sexual assault on him, in his already damaged condition? The damages are damages caused by the sexual assaults, not the prior condition. However, it is necessary to consider the prior condition to determine what loss was caused by the assaults. Therefore, to the extent that the evidence shows that the effect of the sexual assaults would have been greater because of his pre-existing injury, that pre-existing condition can be taken into account in assessing damages.

*Where a second wrongful act or contributory negligence of the plaintiff occurs after or along with the first wrongful act, yet another scenario, sometimes called the “crumbling skull” scenario, may arise. Each tortfeasor is entitled to have the consequences of the acts of the other tortfeasor taken into account. The defendant must compensate for the damages it actually caused but need not compensate for the debilitating effects of the other wrongful act that would have occurred anyway. This means that the damages of the tortfeasor may be reduced by reason of other contributing causes: *Athey*, at paras. 32 – 36.⁹*

The Court upheld the trial judge's decision to confine damages to loss arising from the trauma of the sexual assaults, and to exclude damages arising from consideration of the effects of the non-sexual physical abuse, as well as the trauma that took place prior to attending at the residential school.

⁹ Paras. 79 -80, emphasis added.

If the Plaintiff would have experienced symptoms of a pre-existing condition in any event, the damages resulting from that condition can be taken into account when the court assesses the loss arising from the indivisible injury. For this reason, the importance of obtaining pre-existing medical records cannot be overemphasized.

If the Plaintiff might have had a pre-existing condition which would have become manifest in any event, expert medical evidence will also be crucial. Expert medical evidence can assist in reducing the quantum of damages payable by:

- (a) providing an estimate of when the condition would have become manifest;
- (b) indicating the symptoms that would have arisen as a result of the condition; and
- (c) indicating the Plaintiff's likely trajectory as a result of the condition.

New Developments in the Assessment of Indivisible Injuries: *Bradley v. Groves*

In *Bradley v. Groves*, the British Columbia Court of Appeal was required to consider damages arising from injuries caused by both a defendant wrongdoer's negligent act, and a subsequent tortious act committed by an independent party.

The plaintiff was injured in two separate motor vehicle accidents. The first accident occurred on March 24, 2006 when the plaintiff's vehicle was rear-ended by a vehicle operated by the defendant. The defendant admitted fault for the first accident.

After the first accident, the plaintiff felt pain in the back of her head and neck. She missed about one week of work and continued to complain about symptoms associated with a soft-tissue injury. She received treatment from her physician, chiropractor and a physiotherapist in respect of her symptoms. On November 15, 2007, the plaintiff commenced the action against the defendant.

On July 26, 2008, the plaintiff was involved in a second motor vehicle accident. The accident occurred when the driver of the vehicle backed into the plaintiff's vehicle in a parking lot. The plaintiff alleged that the second accident aggravated the soft tissue

injuries suffered from the first accident. In her estimation, she had been only 80% recovered from the first accident when the second accident occurred. At the time of trial, she was approximately 65% recovered.

At trial, the judge found that the plaintiff's injuries from the first accident had persisted for the intervening three years, and were aggravated by the second accident. In the judge's words:

The aggravation brought about by the July 2008 accident, I find, was as acute as it was because the first accident left Ms. Bradley, who was not then fully recovered from the effects of the first accident, in a somewhat more vulnerable position and exposed to injury to a greater extent because of the incomplete recovery from the first accident.¹⁰

The trial judge then concluded that the injuries in the second accident were indivisible from the injuries in the first accident:

The plaintiff has testified, as I have said, that this second accident set her back to square one in terms of her recovery. Dr. Woodburn has said that the complaints of injury from the second accident were essentially in the same pattern as the first accident and that his findings after the second accident were similar to his findings after the first accident but perhaps less traumatic. The plaintiff generally said that the areas of pain and suffering were the same after the second accident.¹¹

Given the judge's conclusion that the injuries suffered by the plaintiff in both accidents were indivisible, the judge determined that the defendant was 100% liable for the damages flowing from both accidents.

On appeal, the defendant argued that the trial judge misapplied the law and should have assessed damages for each accident separately. Once damages were assessed separately, the defendant argued that each defendant should be liable only to the extent of the harm they created. In other words, the trial judge was wrong in failing to apportion damages for the first and second accident.

¹⁰ *Ibid.* at para. 8.

¹¹ *Ibid.* at para. 9.

The defendant relied on the “formulaic” approach which was earlier adopted by the British Columbia Court of Appeal in *Long v. Thiessen*,¹² and was traditionally applied by the courts in British Columbia to determine damages in cases of indivisible injury. This approach involved a three-step process:

- (a) To assess as best one can what the plaintiff would have recovered against the defendant responsible for the first tort had the action been tried on the day before the second tort was committed by the other wrongdoer.
- (b) To assess global damages as of the date of the trial in respect of both torts.
- (c) To deduct the amount under (a) from the amount under (b) in order to calculate the damages to be paid by the defendant responsible for committing the second tort.

The Court of Appeal reviewed the principles established by the Supreme Court of Canada in *Athey v. Leonati* and concluded that the formulaic approach is no longer valid in British Columbia. The Court of Appeal explained its reasoning as follows:

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 approach to apportionment in Long v. Thiessen is therefore no longer applicable to indivisible injuries. ...¹³

The Court of Appeal noted that this was not a situation where the Court was overturning itself, because aspects of *Long v. Thiessen* were necessarily overruled by the Supreme Court of Canada in *Athey*.

¹² (1968), 65 W.W.R. 577 (B.C.C.A.)

¹³ *Supra* note 18 at paras. 32 and 33, emphasis added.

While the Court of Appeal left open the possibility that the aggravation of a specific injury resulting from several tortious acts may in fact be divisible, the Court indicated that this was unlikely:

*...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.*¹⁴

In light of the findings above, the Court of Appeal found that there was no basis to interfere with the trial judge's decision, and the plaintiff's appeal was dismissed.

The Court of Appeal decision in *Bradley* represents a significant development in British Columbia. It confirms that where a plaintiff suffers an indivisible injury as a result of separate and independent torts, then liability as between each of the wrongdoers is joint and several. In other words, each wrongdoer is liable to the plaintiff for 100 percent of the plaintiff's damages provided that the plaintiff is not contributory negligent. The wrongdoers, however, may claim contribution and indemnity from each other based on their proportionate degrees of fault.

This case is significant because it likely represents an extension of pecuniary liability for wrongdoers who commit independent torts which contribute to an indivisible injury. Rather than applying the old formulaic approach which would result in the Courts determining each wrongdoer's share of the injury, wrongdoers now face being exposed for 100 percent of the plaintiff's damages.

Problems Arising from *Bradley v. Groves*

The term "indivisible injuries" is somewhat misleading, as it focuses on the physical injury rather than on the loss arising from the injury.¹⁵ The general rule is that where

¹⁴ *Ibid.* at para. 37.

¹⁵ G. Ritchey, "Indivisible Injuries and the Allocation of Responsibility for Damages in Cases Involving Multiple Consecutive Torts", CLEBC Personal Injury Conference, October 15, 2010.

multiple tortfeasors have caused or contributed to the same injury, they are jointly and severally liable for the damage that results. However, where multiple consecutive tortfeasors cause or contribute to the same injury, it does not necessarily follow that each tortfeasor is, or should be, liable for the entirety of the pecuniary loss or damage arising from that injury.

Consider the example of the Plaintiff who sustains soft tissue injuries to her back and neck in a motor vehicle accident. She is off work for some six months while she recovers. On the verge of returning to work, she is injured in another motor vehicle accident, sustains further injuries to her back and neck, and remains off work for another six months. By implication from the reasoning set out in *Bradley*, the second tortfeasor would be responsible for all the losses arising from the first accident, including those pecuniary losses particular to only the first accident (wage loss, special damages).

The Court of Appeal commented on this apparent unfairness in its decision:

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.¹⁶

In our submission, imposing joint and several liability for tortfeasors in cases involving indivisible injuries is potentially unfair.

In addition, joint and several liability may be contrary to settled principles of damages for negligence. Subsequent to *Athey*, the Supreme Court of Canada released its decision in *E.D.G. v. Hammer*.¹⁷ The Plaintiff in *Hammer* was a child who was sexually assaulted by a janitor (Hammer) at her school. She was also subsequently sexually assaulted by

¹⁶ *Ibid.* at para 36.

¹⁷ [2003] 2 SCR 459.

several uncles and cousins on her reserve. The trial judge commented that the Plaintiff could not recover from the defendant “for the damage caused solely by the actions of other abusers”. The trial judge concluded that 90% of the Plaintiff’s resultant damage was indivisible as between the sexual assaults committed by Hammer and those committed by others. This result was upheld at the Supreme Court of Canada.

As the Court commented in *Blackwater, supra*:

Each tortfeasor is entitled to have the consequences of the acts of the other tortfeasor taken into account.

The court’s comments in *Bradley* appear to be inconsistent with this rule. Consider the likely outcome in *Bradley* had the action proceeded against the second tortfeasor instead of the first. The second tortfeasor would have been liable for pecuniary damages (such as wage loss) which were completely unrelated to his or her wrongdoing.

However, until *Bradley* is clarified or overruled, unfortunate defendants who are the second tortfeasor in an indivisible injury will likely bear responsibility for the entirety of the Plaintiff’s loss, on the authority of *Bradley*.

How to Minimize Exposure in Claims Involving an Indivisible Injury

We suggest that the following may be used to minimize exposure in claims involving an indivisible injury:

1. Conduct a thorough investigation to determine whether there is contributory negligence. Liability will then become joint and several.
2. Determine whether there is a pre-existing condition. If there is a pre-existing condition that would have become manifest in any event of the accident(s), then that condition can be used to reduce the amount of damages payable in any event.
3. If there is neither contributory negligence or a pre-existing condition, then:
 - a. Pursue any third party claims against potential tortfeasors;

- b. Focus on distinguishing the injur(ies) sustained in the first accident from the second accident;
- c. Argue that pecuniary losses sustained in the first accident are distinguishable from losses sustained in the second.

With respect point to 3(b), the Court of Appeal in *Bradley* has left the door slightly open to a claim that even an indivisible injury could be separated between tortfeasors:

*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.*¹⁸

Again, expert evidence will be crucial in making this argument, as judges will likely be reluctant to conclude, except in the case of overwhelming evidence to the contrary, that a 'similar' injury is divisible between two tortfeasors.

Settlements in the Case of Indivisible Injury

How do you protect your insured against future claims, or claims for contribution and indemnity, in the event of a settlement with the Plaintiff?

In most cases, the solution will be a BC Ferries agreement, which confines the Plaintiff's judgment at trial to the loss solely attributable to the fault of the defendants who appear at trial.¹⁹ There is a specific format which this agreement must take and certain content which must be contained in that agreement, in order for it to be valid.

The settling defendant must require that the Plaintiff advise the court of the settlement and waive its right to recover damages for that portion of the claim. This usually occurs by way of amendment of the pleadings, coupled with the advice of counsel at the outset of the trial.

¹⁸ At para.37, emphasis added.

¹⁹ *British Columbia Ferry Corp. v. T&N plc*, (1995) 16 B.C.L.R. (3d) 115 (C.A.)

Secondly, the settling defendant ought to require that the Plaintiff must appoint counsel to represent the settling defendant in any third party claim, or indemnify the defendant for its legal fees, expenses, and disbursements. This protects the insured from defending against any third party claims for relief, including declaratory relief (a declaration that the settling defendant is responsible for a certain percentage of the judgment).