CAUSATION AND LOSSES

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(Based on Klar, *Tort Law*, 4th ed at 457 - 466, and Klar "Causation And Apportionment of Losses, Alberta Court of Queen's Bench Conference, November 14, 2008)

In order for there to be liability, a defendant's negligence must have caused the plaintiff some injury or damage. Once a defendant is found liable, the extent of its responsibility to the plaintiff for those losses which allegedly flow from those injuries must be determined. Although there is the tendency to treat both of these issues together as part of one causation inquiry, it is useful to keep them distinct and thereby to avoid confusion.

Harm or damage is the gist of the action for negligence. In order for the defendant to be held liable in negligence, the defendant's negligence must have injured the plaintiff, thereby violating the plaintiff's right to the integrity of its person or property. It is the fact that the defendant caused an injury to the plaintiff that gives rise to the defendant's liability. It creates the obligation falling on a specific defendant to compensate an individual plaintiff for that injury. The inquiry is basically an historical one. It looks at what happened. As well, once it is proved, on the "but for" or a modified test, that there was a causal connection, this is accepted as a given fact. Conversely, if it is not proved, it is taken that there was no connection. There is no middle ground. It is an all or nothing issue.

What is an injury? A useful definition of injury comes from Brenner C.J.'s judgment in *W.R.B. v. Plint* (2001), B.C.J. No. 1446 - " an initial physical or mental impairment of the person".

In the vast majority of negligence cases the existence of a compensable injury is not in question. We know, however, that this is not true in all cases. It is well established, for example, that distress, sorrow or grief which does not amount to a recognized psychological illness is not a compensable injury.

An interesting recent case where plaintiffs' actions were dismissed because of the absence of an injury is *Grieves v. F.T. Everard* [2007] UKHL 30. The claimants were exposed to asbestos and developed "pleural plaques" on the membranes of their lungs. These plaques, however, were harmless. They signified that there had been asbestos exposure, but they were not threatening in any way to the health of the claimants. The Lords thus decided that the claimants had not been injured and their actions were dismissed.

Assuming that the plaintiff had suffered a compensable injury, the liability issue is whether the injury was caused by the defendant's negligence. The leading cases, such as *McGhee v. National Coal Board, Snell v Farrell, Athey v Leonati, Fairchild v Glenhaven Funeral Services, Resurfice Corp. v Hanke* were all focussed on the matter of the causal connection between the defendant's negligence and the plaintiff's injury. The questions to be answered in those cases were whether the plaintiffs' injuries, namely, dermatitis, blindness, a disc herniation, mesothelioma, or catastrophic burns were caused by the defendants' allegedly negligent acts.

A second type of causation inquiry is whether the plaintiff has suffered, or will in the future suffer, *losses* as a result of his or her injuries, compensation for which should be the defendant's responsibility. In other words, can the plaintiff establish a sufficient causal connection between the injuries which the defendant caused the plaintiff and the losses which allegedly flowed, or will flow, from these injuries to require the defendant to pay for them? This is essentially a question of causation that goes to the allocation of loss issue. The principles which the courts must apply to this question are different than those applied in the liability portion of the suit. It is therefore critical to distinguish between these two different causal questions.

The purpose of the principle that a defendant is only liable for the losses that flow from the injury is the compensation goal of tort law. The plaintiff is entitled to be put back into the same position it was in before the tort occurred. The plaintiff is not required to accept a worsened state. Similarly, the defendant is not required to put the plaintiff into a better position. Thus, the plaintiff's losses must be assessed as precisely as possible. This is not a matter that is approached on an "all or nothing upon a balance of probabilities" way. Courts must not only look at what actually happened to the plaintiff as a result of the injury and other non-related factors, whether wrongful or innocent, up to the time of trial, but also must speculate as to what might happen to the plaintiff in the future after trial. Speculation regarding future possibilities is not only permitted in the assessment stage, it is demanded. In this assessment, courts must be concerned not only with tortious causes, but non-tortious causes as well.

This distinction between determining liability and assessing damages has been well articulated in a number of judgments. For example, in *W.R.B. v. Plint* (2001) B.C.J. No. 1446 at para. 363, Brenner C.J.B.C stated.:

"Once a sexual assault has been proven the court must consider (a) the extent to which the act has caused plaintiff an injury and further, (b) whether that injury has caused plaintiff a loss. The former is concerned with establishing the existence of liability, the latter with the extent of that liability."

In the Supreme Court of Canada's judgment in *Blackwater v. Plint* (2005), 258 D.L.R. (4th) 275 at 296 (S.C.C.) McLachlin C.J.C. also explained the distinction between injuries and losses as follows:

"It is important to distinguish causation as the source of the loss and the rules of damage assessment in tort. The 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. Even though there may be several tortious and non-tortious causes of injury, so long as the defendant's act is a cause of the plaintiff's damage, the defendant is fully liable for that damage. The rules of damages then consider what the original position of the plaintiff would have been. The governing principle is that the defendant need not put the plaintiff in a better position than his original position and should not compensate the plaintiff for any damages he would have suffered anyway: *Athey*."

Sorting out which injuries ought to be attributed to which causal events, as well as which losses ought to be allocated to which injuries or incidents, can be a nightmare for courts when dealing with a plaintiff who has been involved in a series of successive culpable accidents or non-tortious conditions prior to trial.

Kozak v. Funk[1] is illustrative of one of these nightmarish cases.[2] The plaintiff was involved in car accident 1 in 1986. As a result of this accident, he suffered a whiplash injury. The accident was defendant 1's fault. The plaintiff experienced a variety of symptoms, and missed several months of work. In 1987, the plaintiff injured his neck and shoulders in an accident at work, caused by his own negligence. The injury was diagnosed as a recurrence of the injury suffered in the prior car accident. A disc herniation was subsequently diagnosed. In 1988, the plaintiff was involved in car accident 2, caused by defendant 2's fault. He suffered a soft tissue injury with renewed pain. After accident 2, the plaintiff was laid off from work for unrelated reasons; his pain symptoms and depression worsened. He was diagnosed as having "chronic pain syndrome". The plaintiff sued defendant 1 and 2.

In determining liability for the injuries and responsibility for the plaintiff's losses in a case such as this the following principles must be applied:

(i) A defendant should be liable only for the injuries that he caused the plaintiff. In this case, defendant 1 clearly caused the whiplash injury. As well, if any of the subsequent injuries suffered by the plaintiff, e.g., the disc herniation, the soft tissue injury, or the chronic pain syndrome, fell within the risk set in motion by the defendant's negligence, the defendant's liability would extend to them. If these subsequent injuries were unrelated to the injuries suffered due to the defendant's negligent driving, the defendant should not be liable for them. In this case, these subsequent injuries seem not to have been related in this way.

(ii) The same principle applies to injuries which the plaintiff suffered prior to the injury caused by the defendant. Thus, in *Blackwater v. Plint* (2005), 258 D.L.R. (4th) 275 (S.C.C.) the Supreme Court held that the trial judge did not err in taking into account trauma suffered by the plaintiff as a result of abuse which occurred prior to the sexual assault committed against him in an Aboriginal residential school. These acts of prior abuse were independent from the abuse suffered at the school and produced their own serious psychological difficulties. Even though McLachlin C.J.C. conceded that "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 only entitled to be compensated for *loss*

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1 (1995), 28 C.C.L.T. (2d) 53, [1996] 1 W.W.R. 79 (Sask. Q.B.), varied (1997), [1998] 5 W.W.R. 232 (Sask. C.A.).

2 Unfortunately there seem to be many such cases and other illustrations might have been used. See for example *Dushynski v. Rumsey*, [2001] 9 W.W.R. 327 (Alta. Q.B.). The plaintiff was involved in four successive car accidents, none of them being her fault.

caused by the actionable wrong" at para. 74.

(iii) If the injury suffered in any accident is more severe than what ordinarily would have resulted due to a latent vulnerability or susceptibility of the plaintiff, the defendant remains liable for the more severe injury. This is known as a "thin skull" case.

(iv) If the injury suffered in an accident is an exacerbation of a manifest, on-going pre-existing injury, or the acceleration of an existing degenerative process, the defendant should only be liable for the "new" injury. This is known as a "crumbling skull" case.

(v) Keeping these above points in mind, defendant 1 should have been responsible to compensate the plaintiff for any of the losses that flowed from the whiplash injury that he caused. In this case, this would clearly have included loss of work, and pain and suffering.

(vi) If the subsequent non-tortious events, for example, the work place accident, or the dismissal from work, would have created the *same* losses that the plaintiff was suffering from as a result of the injuries suffered in car accident 1, even if that accident had not occurred, they would extinguish defendant 1's continuing responsibility for these losses. To the extent that subsequent non-tortious events did not overlap with the original losses, and the original losses continued, defendant 1 would remain responsible for them.

(vii) If the subsequent tortious events, for example, car accident 2, would have created the *same* losses that the plaintiff was suffering from as a result of car accident 1, even if that first car accident had not occurred, the court must decide which of the three options it prefers. One approach is to hold both defendants liable jointly for the continuing losses, another to hold defendant 1 liable for the losses occurring up to the time of the second tort and defendant 2 liable for all of the continuing losses occurring thereafter, and a third to hold defendant 1 liable for the continuing losses and defendant 2 liable only to the extent that its negligence exacerbated those losses.

(viii) Finally, in assessing the damages recoverable from defendant 1, the court is entitled to consider non-tortious contingencies that might affect the plaintiff's future well being. Thus, for example, plaintiffs with "thin skulls" might have their damages reduced due to their heightened susceptibility to future injuries.

The same principles apply in determining the damages recoverable from defendant 2 or any subsequent wrongdoer. Defendants will be liable for any new losses that the plaintiff suffered as a result of the injuries that they caused. They also might be responsible for the continuing losses caused by both accidents, as discussed above.

QUESTIONS

Apportionment liability for an injury and allocating losses to various events raises difficult issues and gives rise to the following questions:

(1) When you have multiple wrongdoers whose concurrent or successive torts cause the plaintiff an “indivisible” injury, which of the defendants is responsible for the losses which flow from that injury, can these losses be apportioned between those defendants, and if so on what basis?

(2) If the plaintiff’s own negligence is partly responsible for creating the injury, how will this affect the allocation of responsibility as between the various parties?

(3) Where a plaintiff suffers an injury which is significantly more severe due to a pre-existing condition or susceptibility, is the defendant still fully liable for that injury? If so, in assessing the losses which flow from that injury, and allocating responsibility for them, can a court take into account the pre-existing susceptibility? If there is a reduction in the award, on what basis is this reduction to be made?

(4) What is the theoretical and practical difference, if any, between saying that a plaintiff has a “thin skull” or a “crumbling skull”?

(5) Where you have successive events which produce “divisible injuries” but “overlapping losses”, how should a court apportion responsibility for these losses among the various parties?

Consider the following hypotheticals which raise some of these questions.