

ICBC Claims and the Thin Skull and Crumbling Skull Principles

Reasons for judgement were released yesterday by the BC Supreme Court (Pavlovic v. Shields) awarding a Plaintiff just over \$134,000 in total damages as a result of injuries sustained in 2 separate motor vehicle collisions.

The first collision was in 2006 and the second in 2007. Both were rear-end crashes and the Plaintiff was faultless in both collisions. Often in ICBC Injury Claims involving multiple collisions where fault is not at issue damages are assessed on a global basis and that is what occurred in this case.

Mr. Justice Rice found that the Plaintiff had pre-existing back and shoulder pain before these accidents that that even without these accidents the Plaintiff would have continued to have pain in these areas. The Court made the following findings with respect to the Plaintiff's injuries and awarded \$40,000 for her non-pecuniary loss (pain and suffering / loss of enjoyment of life):

[59] *In this case, the plaintiff had back and shoulder pain pre-dating both accidents. This is a “crumbling skull” situation. It is more probable than not that the plaintiff would have experienced ongoing problems with back pain, for which she had already seen a Dr. Ansel Chu on several occasions in 2003. The plaintiff claims these injuries were fully resolved, and relies on Dr. Chu’s report of August 14, 2003, in which he states that the plaintiff had had good relief from pain following a series of trigger point injections. However, Dr. Chu does not state that her injuries had resolved, merely that she was “doing quite well” and that she could make a further appointment with him if the pain flared up again. That the plaintiff made no further appointments is likely explained by the fact that she went to Europe for an extended period shortly after her last appointment with Dr. Chu.*

[60] *The evidence from Dr. Petrovic’s report is that only two permanent injuries from the accidents are likely: the TMJ and the right hip. He would defer to the experts on those and has a guarded prognosis for the remainder of her injuries. Dr. Epstein testified that the TMJ injury is likely to improve with continued treatment. Dr. Smit was of the opinion that the right hip would require surgery.*

[61] *I accept that the plaintiff had no pre-existing hip or jaw complaints and that these are her principal injuries. The hip may require surgery and her jaw will require ongoing management and treatment. The defendants are fully liable for these injuries. Her other injuries – the neck, shoulder and back pain – are likely to improve over the next year. The effects of the concussion resolved nine months after the accident. Taking these factors into account, I consider an award of \$50,000 in non-pecuniary damages appropriate in the circumstances, the bulk of which reflects the injuries to the jaw and hip, discounted by 20% to reflect the plaintiff’s pre-existing chronic back pain, for a total of \$40,000.*

Mr. Justice Rice also did a good job explaining 2 legal principles which often arise in ICBC Injury Claims - the ‘thin-skull’ principle vs. the ‘crumbling skull’ principle. He summarized these as follows:

[54] *The defendant does not go so far as to deny that the accident caused or contributed to the plaintiff’s injuries. The concern is as to the extent. The issue is whether this is a “thin skull” or a “crumbling skull” situation. Both address the circumstances of a pre-existing condition and its effect upon the accident victim. The law is that the defendant need not compensate the plaintiff for any debilitating effects of a pre-existing condition if the plaintiff would have experienced them regardless of the accident: **Athey v. Leonati**, [1996] 3 S.C.R. 458 at para. 35, 140 D.L.R. (4th) 235. The court requires “a measurable risk” or “a real or substantial possibility and not speculation” that the pre-existing condition would have manifested in the future regardless of the plaintiff’s negligence. The measurable risk need not be proven on a balance of probabilities, but given weight according to the probability of its occurrence: **Athey v. Leonati**, at para. 27.*

[55] *The injury is deemed “thin skull” when there is a pre-existing condition that is not active or symptomatic at the time of the accident, and that is unlikely to become active but for the accident. If the injury is proven to be of a thin skull nature, then the defendant is liable for all the plaintiff’s injuries resulting from the accident.*

[56] *A “crumbling skull” injury is also one where there is a pre-existing condition, but one which is active or likely to become active regardless of the accident. If the injury is proven to be of a crumbling skull nature, then the plaintiff is liable only to the extent that the accident caused an aggravation to the pre-existing condition.*