

ICBC Injury Claims And Pre-Existing Conditions

March 31st, 2009

Imagine being injured as a result of the carelessness of another in a BC Car Crash. You advance an ICBC tort claim for compensation for your injuries and loss. You are able to come to an agreement with ICBC with respect to the value of your injuries and losses but then ICBC wants to reduce the the pain and suffering settlement by 25% to account for a pre-existing medical condition that you have. Is this fair?

The answer depends on the nature and severity of the pre-existing condition. BC Courts generally categorize pre-existing conditions in 2 categories: the '*thin skull*' category and the '*crumbling skull*' category. In a thin skull situation a Plaintiff has a pre-existing condition that makes them susceptible to injury however the condition would not otherwise become symptomatic absent the trauma. In thin skull situations the pre-existing condition does not reduce the value of the claim. The thin skull principle is sometimes referred to as the '*you take your victim as you find them*' principle meaning it is no defence to an injury claim to say that a healthier victim with no pre-existing condition would have suffered less injury.

This can be contrasted with the '*crumbling skull*' situation where the Plaintiff has a pre-existing condition which is active or likely to become active even without the trauma. In crumbling skull situations the value of the injuries and losses must be reduced to reflect the fact that a Plaintiff would have likely had some problems in any event.

Reasons for judgement ([Gohringer v. Hernandez-Lazo](#)) were released today by the BC Supreme Court explaining and applying these principles.

In today's case the Plaintiff was injured when her car was struck head on by a street sweeper in April, 2005. As a result of this significant BC Car Crash she suffered various injuries. The Plaintiff did, however, have pre-existing back and neck injuries. In valuing the Plaintiff's pain and suffering at \$75,000 Madam Justice Russell explained and applied the law of thin skull v. crumbling skull as follows:

Pre-existing condition and independent intervening event

[90] *It is trite law that the general purpose in assessing damages is to restore the plaintiff to their original, or pre-accident, position. Through an award of damages a plaintiff is entitled to be restored to his or her original position, but they are not entitled to be placed in a better position: **Athey v. Leonati**, [1996] 3 S.C.R. 458 at para. 32, 140 D.L.R. (4th) 235. Generally speaking, this requires the court to determine the plaintiff's original position and position subsequent to the negligent act, and award damages to reflect the difference: **Athey** at para. 32; **Barnes v. Richardson**, 2008 BCSC 1349 at para. 84. In situations where the plaintiff has a pre-existing condition the thin skull or crumbling skull rule must inform the court's assessment of damages.*

[91] *In a thin skull situation, the plaintiff's pre-existing condition has not manifested, or in other words is not active or symptomatic, prior to the event in question. As the tortfeasor takes his or her victim as they find them, the tortfeasor is liable for all injuries even if the injuries are "unexpectedly severe owing to a pre-existing condition", as a result of their actions: **Athey** at para. 34.*

[92] *In a crumbling skull situation, as in this case, the plaintiff has a pre-existing condition which is active, or likely to become active. The pre-existing condition "does not have to be manifest or disabling at the time of the tort to be within the ambit of the crumbling skull rule": **Barnes** at para. 89, citing **A. (T.W.N.) v. Clarke**, 2003 BCCA 670, 22 B.C.L.R. (4th) 1 at para. 62. In crumbling skull situations, the defendant is only liable for damages caused by the accident and responsible for returning the plaintiff to their original position. As Major J. stated in **Athey**: the defendant is liable for the additional damage but not the pre-existing damage: at para. 35. The defendant is therefore not liable for the effects of the pre-existing condition that the plaintiff would have experienced in any event: **A. (T.W.N.)** at para. 52. If there is a "measurable risk" that the pre-existing condition*

would have impacted the plaintiff in the future then, regardless of the defendant's negligence, a court can take this into account in awarding damages: at para. 35.

[93] In addition, the defendant claims an independent intervening event, subsequent to the Accident, also had significant impact on the plaintiff. An independent intervening event is an unrelated event, such as disease or a non-tortious accident, that occurs after the plaintiff is injured. The impact of such events is taken into account in the same manner as pre-existing conditions: **Barnes** at para. 96. Thus, the plaintiff is only entitled to damages which flow from the difference between his or her original position and their "injured position": **Athey** at para. 32. If the unrelated event would have impacted the plaintiff's original position adversely, the "net loss" attributable to the accident at issue will not be as great and damages will be reduced proportionately: **Barnes** at para. 96.

[94] I note that our Court of Appeal has stated that a reduction in damages to reflect the impact of independent intervening events or pre-existing conditions applies equally to non-pecuniary and pecuniary damages: **A. (T.W.N.)** at paras. 36-37; **Barnes** at para. 90.

[95] In this case the defendant does not contest that the plaintiff suffered injuries as a result of the Accident. The defendant does however contest the severity of those injuries and the impact that those subsequently had on the plaintiff's physical and emotional health, as well as her employment situation.

[96] The plaintiff had pre-existing back and neck injuries and suffered a knee injury subsequent to the Accident. At issue is the impact of such injuries on the plaintiff's ability to continue her position as a skating instructor, or whether the injuries resulting from the Accident were responsible for causing her to change positions.

[97] The pre-existing conditions and knee injury caused the plaintiff to miss a number of months of work when they occurred. I accept the evidence contained in Dr. MacIntosh's report (January 26, 2005) that the plaintiff's pre-existing neck and back injuries would have materially impacted the plaintiff's ability to continue working as a skating instructor, given the physical demands of that position. Likewise, I find the knee injury would have further impacted her ability to continue that job into the future. Prior to the Accident, the plaintiff had complained, of neck pain resulting from teaching four classes in one day. Further, the plaintiff left her position at Sportsplex soon after she returned to work following her knee injury as she was not able to perform her duties to the same level as previously.

[98] I accept however, that the injuries from the Accident also impacted the plaintiff at work. The evidence indicated that a number of her duties at Sportsplex aggravated the injuries suffered in the Accident. While the evidence did not demonstrate that those injuries alone caused the plaintiff's departure from Sportsplex, the evidence did show that the plaintiff's abilities to perform her job duties were adversely affected as a result.

[99] I conclude there was a real and significant chance that the plaintiff's pre-existing injuries and the injury suffered after the Accident would have shortened the plaintiff's career as a skating instructor, regardless of the injuries from the Accident. These injuries ultimately affect the plaintiff's original position and must be taken into account in the assessment of damages. The risk that these injuries would have reduced the plaintiff's chosen career will be taken into account based on its relative likelihood in determining the overall assessment of damages: **McKelvie v. Ng**, 2001 BCCA 341, 90 B.C.L.R. (3rd) 62 at para. 17. Accordingly, non-pecuniary damages should be reduced by 10% to reflect such a risk.

[100] In assessing all of the relevant evidence, I conclude the injuries continue to adversely affect the plaintiff in a number of ways and award \$75,000 for non-pecuniary damages. I will deduct 10% as a contingency to reflect the plaintiff's pre-existing condition and the effect of the subsequent knee injury.

