Monday, February 08, 2010

Hurt Before and Now Hurt Again in Accident – Can I Sue?

"I was hurt before in an accident and I was just hurt in a new accident. Does my previous accident hurt my chances to sue for damages this time around? Am I allowed to sue for my injuries in this new accident?"

A previous accident should not generally preclude you from suing for injuries in a subsequent accident. If you suffered serious injuries in the subsequent accident, generally a lawsuit should be considered.

The existence of more than one accident affects the manner in which the lawsuit is argued as between the plaintiff and defendant.

The first accident can either be treated as a "pre-existing condition" or it can be included with the new accident as part of a global assessment of damages whereby liability will be apportioned to each accident.

For example, if the first accident happened years prior to the new accident, then likely it will be treated as a pre-existing condition – as part of the plaintiff's general condition leading up to the new accident.

In contrast, if the first accident happens just before the second accident, then usually both accidents will proceed to litigation and be subject to a "global" assessment (i.e. total damages suffered by the plaintiff in both accidents) with each accident being assigned a percentage of responsibility for the overall damages (i.e. first accident is 25% responsible and the second accident is 75% responsible for the global damages).

In the recent case of **Hossny v. Belair Insurance** (2010 Ontario Superior Court of Justice) an interesting situation arose:

• at Trial, the plaintiff was bringing a **motion to strike the jury (Rule 47)** – the Trial was for his 2002 car accident;
• the issue was the plaintiff's 1997 car accident, which went to Trial by Judge alone in late 2001, for which he received the Trial Judge's Reasons for Decision approximately one month before his 2002 car accident occurred; and
• given the resolution of the 1997 car accident, the issue of whether the Jury should be struck based on complexity was raised at this motion.

For unrelated reasons, this specific Trial was adjourned after the second day of Trial. In adjourning this Trial, Spies, J. gave written reasons in order to eventually assist the Trial Judge, where possible.

Spies, J. ruled that the Jury ought not be struck at this stage, because depending on how the plaintiff' entered his evidence at Trial, the issue of assessing damages could, potentially, be left with the jury.

Spies, J., however, thought that the ultimate Trial Judge would likely have to re-hear the motion to strike the jury at the conclusion of the plaintiff's case, to determine at that time whether the evidence was too complex for a Jury to assess.

The analysis of this issue – for which there appears to be no Ontario precedent for the situation in Hossny – is useful for litigators practicing personal injury law.

Gregory Chang
Bougadis, Chang LLP
55 Adelaide Street East, Suite 300

Toronto, Ontario M5C 1K6
www.bcbarristers.com