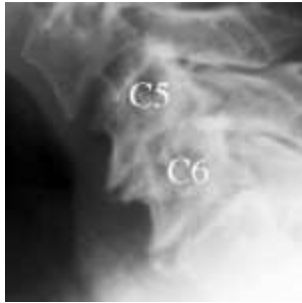


ICBC Claims And Pain Triggered In Pre-Existing Asymptomatic Conditions

September 10th, 2010



As I've previously written, a common occurrence after a car crash is the onset of pain in a pre-existing but asymptomatic condition. When this occurs it is no defence for the at-fault party to argue that the pre-existing condition is more responsible for the symptoms than the crash. This principle was demonstrated in reasons for judgement released today by the BC Supreme Court, Vancouver Registry.

In today's case (Neumann v. Eskov) the Plaintiff was involved in a rear-end collision in 2006. The Defendant admitted fault. The trial focused on the value of the Plaintiff's claim.

Prior to the crash the Plaintiff has osteoarthritis in his hip and asymptomatic degenerative changes in his spine. After the crash these conditions became painful and the Plaintiff went on to develop a chronic-pain syndrome. The Defendant hired a doctor who gave evidence that the car crash was not the main cause of the Plaintiff's chronic pain, rather it was mostly the fault of the pre-existing degenerative changes.

The Defence lawyer then argued that the Plaintiff's compensation should be relatively modest to account for this pre-existing condition. Mr. Justice Brooke disagreed and went on to award the Plaintiff \$90,000 in non-pecuniary damages (*money for pain and suffering and loss of enjoyment of life*) for his chronic pain syndrome. In doing so the Court provided the following useful comments:

[13] I also refer to the decision of the B.C. Court of Appeal in *B.P.B. v. M.M.B.*, 2009 BCCA 365 where Mr. Justice Chaisson, at paragraphs 42 and 43, says this:

[42] In my view, the trial judge in this case failed to determine whether the plaintiff's injury was divisible or indivisible. She appears not to have distinguished "between causation as the source of the loss and the rules for the assessment of damages in tort" as mandated by the Supreme Court of Canada in para. 78 of *Blackwater*. The liability question is whether the conduct of the defendant caused injury. The assessment of damages requires a determination whether the injury derived from multiple sources and whether it is divisible. If it is, responsibility is allocated to the individual sources of the injury.

[43] If the injury is indivisible, the court must consider the possible application of the thin skull or crumbling skull rules in the context of the victim's original condition. If the crumbling skull rule applies, it forms part of returning the victim to his or her original condition and the tortfeasor is not responsible for events that caused the crumbled skull. Absent the application of the crumbling skull rule, where the injury is indivisible, all tortfeasors who caused or contributed to the injury are 100% liable for the damages sustained by the victim.

See also the decision of the B.C. Court of Appeal in *Bradley v. Groves*, 2010 BCCA 361, which was decided after the trial of this action.

[14] I am satisfied that before the accident and despite the asymptomatic degenerative conditions, the plaintiff was not only functioning adequately, but also at a very high physical level. But for the accident and the injury sustained to his neck, the plaintiff would not have sustained the chronic pain syndrome from which he now suffers. I am satisfied that the plaintiff's long and commendable work history was interrupted by the injury sustained by him in the accident, and that despite the plaintiff's best efforts he continues to suffer from chronic pain which is moderated somewhat by medication. I am also satisfied that the medication itself has an adverse aspect in addition to its therapeutic effect in that the plaintiff now suffers from sleep apnea and fatigue. Pain and fatigue on a continuing or chronic basis can and do dramatically impair the quality of life and the enjoyment of life. The work that Mr. Neumann now does is well paying and secure, but Mr. Neumann worries that he may not be able to continue indefinitely. Worry is burdensome and can also impair the enjoyment of life. I find that an appropriate award for non-pecuniary damages is \$90,000.