The Impact of a Subsequent Injury on Causation and Damages

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What happens when a client suffers significant injuries in a motor vehicle accident, but subsequently aggravates his injuries through his own negligence? Are damages for the defendant inflicted injuries still assessable?

Arguably, the second non-tortious injury should not decrease the value of his claim for injuries from the motor vehicle accident, that is, damages should flow from the collision injury on the same path as if he had not suffered the second injury.

The key to success in such an argument is to establish that the injuries from the two incidents and their subsequent impact are indivisible, hanging your hat on *Athey v. Leonati* (1996), 140 D.L.R. (4th) 235 (S.C.C.). In *Athey* Major J. explained that a defendant is fully liable for all injuries so long as the defendant's negligence materially contributed to the harm. Thus, if the resulting harm from the collision injuries and the subsequent injuries are inseparable, your client can argue that the defendant materially contributed to his current condition and is liable to compensate him in full.

Just to review *Athey*, you will recall that in this case the plaintiff suffered back injuries in two motor vehicle accidents, the first in February and the second in April 1991. Later that same year the plaintiff began an exercise program. While stretching he suffered a herniated disc. The medical evidence indicated that the disc herniation was caused by a combination of the motor vehicle injuries and the plaintiff's pre-existing condition. The Supreme Court of Canada considered whether the loss should be apportioned between the tortious and non-tortious causes. Major J., writing for the court, embarked upon a thorough review of the law of causation and liability for damages:

> "The respondent's position is that where a loss is created by tortious and non-tortious causes, it is possible to apportion the loss according to the degree of causation. This is contrary to well-established principles. It has long been

> established that **a defendant is liable for any injuries caused or contributed to by his or her negligence. If the defendant's conduct is found to be a cause of the injury, the presence of other non-tortious contributing causes does not reduce the extent of the defendant's liability.**
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> Causation is established where the plaintiff proves to the civil standard on a balance of probabilities that the defendant **caused or contributed to the injury** ...
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> The general, but not conclusive, test for causation is the 'but for' test, which requires the plaintiff to show that the injury would not have occurred but for the negligence of the defendant ...
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> The 'but for' test is unworkable in some circumstances, so the courts have recognized that causation is established where the defendant's negligence 'materially contributed' to the occurrence of the injury: ... **A contributing factor is material if it falls outside the *de minimus* range** ..." [Emphasis added, citations omitted.] (at para. 12-15)

Major J. went on to clarify that it is not necessary for the defendant's conduct to be the sole cause of the plaintiff's injury:

> "**It is not now necessary, nor has it ever been, for the plaintiff to establish that the defendant's negligence was the *sole cause* of the injury.** There will frequently be a myriad of other background events which were necessary preconditions to the injury occurring. To borrow an example from Professor Fleming (*The Law of Torts*, 8th ed. (Sydney: Law Book Co., 1992) at p. 193), a 'fire ignited in a wastepaper basket is ... caused not only by the dropping of a lighted match, but also by the presence of combustible material and oxygen, a failure of the cleaner to empty the basket and so forth'. **As long as a defendant is *part* of the cause of an injury, the defendant is liable, even though his act alone was not enough to create the injury. There is no basis for a reduction of liability because of the existence of other preconditions: defendants remain liable for all injuries caused or contributed to by their negligence.**
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> This proposition has long been established in the jurisprudence. Lord Reid stated in *McGhee v. National Coal Board*, *supra*, at 1010:
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> > It has always been the law that a pursuer succeeds if he can shew that fault of the defender caused or materially contributed to his injury. **There may have been two separate causes but it is enough if one of the causes arose from fault of the defender.**

> The pursuer does not have to prove that this cause would of itself have been enough to cause him injury.
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> **The law does not excuse a defendant from liability merely because other causal factors for which he is not responsible also helped produce the harm**: ... It is sufficient if the defendant's negligence was a cause of the harm: ...
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> This position is entrenched in our law and there is no reason at present to depart from it. If the law permitted apportionment between tortious and non-tortious causes, a plaintiff could recover 100 per cent of his or her loss only when the defendant's negligence was the *sole* cause of the injuries. Since most events are the result of complex set of causes, there will frequently be non-tortious causes contributing to the injury. Defendants could frequently and easily identify non-tortious contributing causes, so plaintiffs would rarely receive full compensation even after proving that the defendant caused the injury. This would be contrary to established principles and the essential purpose of tort law, which is to restore the plaintiff to the position he or she would have enjoyed but for the negligence of the defendant." [Emphasis added, citations omitted.] (at para. 17-20)

The court considered the respondent's argument that the injuries were divisible, thereby permitting apportionment of damages to tortious and non-tortious causes. On the facts of the case, the court found that the injury was not divisible:

> "The respondents submitted that apportionment is permitted where the injuries caused by two defendants are divisible (for example, one injury the plaintiff's foot and the other the plaintiff's arm): ... **Separation of distinct and divisible injuries is not truly apportionment; it is simply making each defendant liable only for the injury he or she has caused, according to the usual rule.** The respondents are correct that separation is also permitted where some of the injuries have tortious causes and some of the injuries have non-tortious causes: ... Again, such cases merely recognize that the defendant is not liable for injuries which were not caused by his or her negligence.
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> In the present case, there is a single indivisible injury, the disc herniation, so division is neither possible nor appropriate. **The disc herniation and its consequences are one injury, and any defendant found to have negligently caused or contributed to the injury will be fully liable for it.**" [Emphasis added, citations omitted.] (at para. 24-25)

Later in the judgment Major J. summarized the applicable causation principles:

> The applicable principles can be summarized as follows. **If the injuries sustained in the motor vehicle accidents caused or contributed to the disc herniation, then the defendants are fully liable for the damages flowing from the herniation.** The plaintiff must prove causation by meeting the 'but for' or material contribution tests. Future or hypothetical events can be factored into the calculation of damages according to the degrees of probability, but causation of the injury must be determined to be proven or not proven. This has the following ramifications:
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> 1. If the disc herniation would likely have occurred at the same time, without the injuries sustained in the accident, then causation is not proven.
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> 2. **If it was necessary to have *both* the accidents *and* the pre-existing back condition for the herniation to occur, then causation is proven, since the herniation would not have occurred but for the accidents.** Even if the accidents played a minor role, the defendant would be fully liable because the accidents were still a *necessary* contributing cause.
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> 3. If the accidents alone could have been a sufficient cause, and the pre-existing back condition alone could have been a sufficient cause, then it is unclear which was the cause-in-fact of the disc herniation. The trial judge must determine, on a balance of probabilities, whether the defendant's negligence materially contributed to the injury." [Emphasis added.] (at para. 41)

On the facts, Major J. concluded that it was necessary to have both the pre-existing condition and the injuries from the accidents to cause the disc herniation. Although the accidents played a lesser role, they were a necessary ingredient in bringing about the disc herniation. This material contribution was sufficient to render the defendant fully liable for damages flowing from the disc herniation.

Turning to fact analogous cases, the Ontario Court of Appeal had an opportunity to consider and comment upon the impact of the Supreme Court's causation analysis in *Athey v. Leonati* in *Alderson v. Callaghan* (1998), 40 O.R. (3d) 136 (C.A.). In an assessment of damages for an alleged brain injury resulting from a car accident, there was evidence that the plaintiff's mental condition was worsened by subsequent assaults. The trial judge instructed the civil jury to assess the plaintiff's overall condition and then decide what portion of her condition was directly

attributable to the car accident. On appeal, the Ontario Court of Appeal set aside the jury's verdict on the ground that the trial judge ought to have instructed the jury in accordance with *Athey v. Leonati*. Moldavar J.A. for the court, said:

> "In light of *Athey, supra*, the jury should have been told that **if Alderson's overall condition resulted from the cumulative effect of the injuries sustained in the August 10th accident, the multiple beatings inflicted upon her thereafter, and her pre-existing psychological condition, she would nonetheless be entitled to full compensation so long as the jury was satisfied, on a balance of probabilities, that the injuries sustained in the August 10th accident materially contributed to her overall condition.** The jury should then have been told that if they were not so satisfied, they should assess the plaintiff's damages based upon the nature and extent of her injuries, which, in their opinion, were directly attributable to the motor vehicle accident.
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> **The fact that Alderson's overall condition may have been exacerbated by subsequent tortious acts does not relieve the defendant from full responsibility.** Rather, as *Athey, supra*, points out at pp. 240-41, where the plaintiff's injuries are attributable to multiple tortfeasors, the *Negligence Act*, R.S.O. 1990, c. N-1 permits defendants to seek contribution and indemnity from one another, according to the degree of responsibility for the injury. The fact that this remedy may have been a hollow one in the particular circumstances of this case is no reason to depart from the governing principles codified in the *Negligence Act*." [Emphasis added.] (at para. 10-11)

In *E.D.G. v. Hammer* (2003), 230 D.L.R. (4th) 554, 2003 SCC 52 McLachlin J., writing for the court, confirmed that Major J.'s comments in *Athey* about other causes was not restricted to non-tortious proceedings. The plaintiff suffered a depression caused by a combination of injuries received from sequential sexual assaults. Although the court found that the Board of Education was not vicariously liable for the defendant's actions, the court proceeded to consider the question of apportionment:

> "Since I have concluded that the Board is not liable to E.D.G. for any of the damage caused by Mr. Hammer, it is not strictly necessary to consider the issue raised on the Board's cross-appeal. However, because the Board rests its challenge on the claim that Vickers J. misapplied a principle laid out in *Athey v. Leonati*, [1996] 3 S.C.R. 458, it will be useful to consider the Board's challenge.
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> The Board's challenge concerns that portion of the damages that was, in the view of Vickers J., caused jointly by Mr. Hammer and the subsequent abusers.

> **Vickers J. held Mr. Hammer liable for the sum total of these damages, stating that "[a]s long as he [Mr. Hammer] is a part of the cause of the injury, even though his acts alone did not create the entire injury, his responsibility for the [entire] damage that flows from that injury is established**" (para. 57). As an authority for this proposition, Vickers J. cited Major J.'s claim in *Athey*, *supra*, at para. 17, that "[a]s long as a defendant is part of the cause of an injury, the defendant is liable, even though his act alone was not enough to create the injury" (emphasis in original).
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> In the Board's submission, Vickers J. was incorrect in applying this principle to the case at bar. The principle applies, the Board claims, only where the other cause is non-tortious and is a precondition of the injury, not where it is tortious and occurs subsequently.
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> In my view, the Board's reading of the principle articulated in *Athey* is overly narrow. After making the claim cited above, Major J. further expanded upon his reasoning, stating at para. 19 that:
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> > The law does not excuse a defendant from liability merely because other causal factors for which he is not responsible also helped produce the harm . . . . It is sufficient if the defendant's negligence was a cause of the harm . . . . [First emphasis added; second emphasis in original.]
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> **This principle is not confined to cases involving non-tortious preconditions. It applies to any case in which the injuries caused by a number of factors are indivisible.**
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> The matter is governed by the *Negligence Act*, R.S.B.C. 1996, c. 333, s. 4, which provides that "[i]f damage or loss has been caused by the fault of 2 or more persons", then "(a) they are jointly and severally liable to the person suffering the damage or loss". **This rule implies that Mr. Hammer is liable to E.D.G. for the full cost of any injuries that are indivisible and caused both by Mr. Hammer and by the subsequent tortfeasors.**" [Emphasis added.] (at para. 28-32)

The British Columbia Court of Appeal applied these principles to affirm the trial judge's decision in *Hutchings v. Dow*, [2007] 5 W.W.R. 264, 2007 BCCA 148, affirming [2006] B.C.J. No. 891, 2006 BCSC 629, leave to appeal to the Supreme Court of Canada denied. The plaintiff was seriously injured in a motor vehicle accident in November 2001, resulting in ongoing cognitive difficulties, low back pain, among other injuries. In July 2003 the plaintiff was further injured in an assault. The trial judge found that the plaintiff's depression was an indivisible

injury which was contributed to in a material way by both the accident and the assault, with the result that the tortfeasors in the accident and the assault were jointly and severally liable for the entirety of the damages flowing from that injury.

Prowse J.A., writing for the court, summarized the trial judge's findings and quoted from the trial judgment:

> "As earlier stated, the trial judge found that Mr. Hutchings' depression was contributed to, in a significant way, by both the accident and the assault. He used the language of "material contributing cause" in coming to that conclusion; that is, **he found that both the accident and the assault were material contributing causes giving rise to the depression.** He specifically rejected the appellants' argument that the assault constituted a *novus actus interveniens* (which finding is not challenged on appeal). He then went on to discuss whether the depression was an indivisible injury, and the consequences of such a finding, at paras. 382-383 of his decision:
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> > The parties differed on whether the depression should be considered a divisible or non-divisible injury. **I conclude it is a non-divisible injury** as that term is used in *Athey v. Leonati*, [1996] 3 S.C.R. 458 and *E.D.G. v. Hammer*, 2003 SCC 52, [2003] 2 S.C.R. 459 (*Hammer*).
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> > In this case there was simply no evidence to suggest the depression was not, although contributed to by distinct causes, of a piece. In other words, **there was no evidence that any aspect of the plaintiff's mood disorder was solely caused by either the Accident or the Assault, or by some other non-tortious cause.** That being so, **I conclude that the plaintiff's depression was a 100% non-divisible injury**, and although attributing 60% causation to the Accident and 40% to the Assault, it follows the **defendants in this case are jointly and severally liable for the damage or loss flowing from the depression**. ..." [Underlining in original; bold emphasis added.] (at para. 10-11)

The appellants in *Hutchings* argued that the plaintiff's original position should take into account the assault that happened after the accident. The court of appeal rejected this argument:

> "In this case, however, the evidence and findings of the trial judge do not support the proposition that Mr. Hutchings would likely have suffered from depression if the accident had never occurred. This is the critical fact

> distinguishing this case from *Blackwater* (and other cases relied on by the appellants) and likening it to *Hammer*. Here, **the accident and the subsequent assault were necessary causes which merged together to produce the depression, which, to use the trial judge's language, was "of a piece". Thus, it was not possible (or logical) on the evidence to determine Mr. Hutchings' original position with respect to his depression in the absence of the accident.**
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> Similarly, **there was no evidence or finding in this case that Mr. Hutchings would have suffered from depression absent the combined effect of the accident and the assault.** Thus, contrary to the submission of the appellants, there was **no basis for reducing his damages** in that regard." [Emphasis added.] (at para. 15 -17)

Another helpful analysis is that provided by Shaw J. in *Ashcroft v. Dhaliwal*, [2007] 10 W.W.R. 326, 2007 BCSC 533. The plaintiff was seriously injured in a motor vehicle collision in October 2003. She was injured again in a subsequent collision one year later. The injuries from the first accident were not resolved at the time of the second accident. As a result of both accidents, she experienced constant pain, stress, clinical depression and post-traumatic stress disorder.

The plaintiff's claim for damages resulting from the second accident was settled out of court. Shaw J. considered her claim for damages as a result of the injuries suffered in the first accident. The judge found that the injuries suffered in the first accident were major contributors to her current condition, both mental and physical, and made her more vulnerable to the injuries she then suffered in the second accident:

> "Based upon the foregoing medical reports and the evidence that supports the **reports it is clear that the injuries Mrs. Ashcroft suffered in the first accident were major contributors to her condition, both mental and physical,** following upon the second accident. **As a result of the first accident she was left vulnerable and at risk of further trauma exacerbating and aggravating her physical injuries and mental condition caused by the first accident. The second accident made that risk a reality**. Mrs. Ashcroft was still under treatment and trying to recover from the first accident when the second accident intervened, aggravating and exacerbating the very injuries which had rendered her fragile." [Emphasis added.] (at para. 24)

Shaw J. set out his interpretation of A*they v. Leonati*, namely that the original tortfeasor is liable if his or her actions materially contributed to the plaintiff's ultimate condition, regardless of whether there was subsequent tortious or non-tortious causes of harm:

> "*Athey v. Leonati* is the leading case in Canada on the subject of subsequent events which aggravate injuries received in a tortiously caused accident. The case recognizes that **there may be more than one material cause of injuries and holds that if injuries caused by a tortfeasor are found to be a material contributing cause of the exacerbation of those injuries by a subsequent event, then the original tortfeasor may be liable for not only the initial injuries, but also for their subsequent exacerbation."** [Emphasis added.] (at para. 26)

Shaw J. also considered the distinction between divisible and indivisible injuries:

> "*Athey* draws a line between divisible and indivisible injuries in the sense that **all injuries caused or materially contributed to by a tort are said to be indivisible, and injuries where causal connection to the tort is not established are said to be divisible.**
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> On the facts of this case, I conclude that the *Athey v. Leonati* approach should prevail. The dominant factual elements which lead me to this conclusion are: (1) that at the time of the second accident, Mrs. Ashcroft **had not yet recovered from the injuries she suffered in the first accident**; (2) the first accident injuries **made her vulnerable to any further accident exacerbating her condition;** and, (3) the **injuries she received in the second accident were within the scope of her vulnerability.** In this sense, the injuries and consequences resulting from the second accident are, I find, indivisible from the original tort (the first accident) and its consequences.
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> ...
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> In the present case the injuries suffered by Mrs. Ashcroft in the two accidents are indivisible. **All the injuries suffered by Mrs. Ashcroft in the second accident were causally connected to the first accident and the injuries it caused.**" [Emphasis added.] (at para. 29, 32, & 35)

Shaw J. concluded that the injuries Mrs. Ashcroft suffered in the first accident were the foundation upon which the injuries in the second accident caused exacerbation and aggravation. The defendant was liable for all the plaintiff's injuries; however, to avoid double recovery the plaintiff was required to account for the damages received in settlement of the second accident.

See also *Santoro v. Raban* (2000), 265 A.R. 1 (Q.B.) in which the plaintiff was injured in a motor vehicle accident in December 1990. She then further injured her back in a work injury two years later in December 1992. In March 1993, the plaintiff was in a second motor vehicle accident. Sulyma J. found that the evidence as a whole established that the 1990 accident caused the neck and back injury and materially contributed to the consequent chronic pain and depression that the plaintiff had endured to date. The judge came to this conclusion despite the intervening work injury to the plaintiff's back. The judge found that the back injuries were indivisible, and that the work injury was not an independent, intervening event, breaking the chain of causation:

> "...In this case **the existing incapacities of pain and depression result from the original injuries and are caused by those injuries. This is so even though the work injury aggravated the effects of the original injury to the back and prolonged the period of incapacity.** None of the physicians could state that the nature and extent of the work injury as a medical trauma would itself result in the dysfunction she now displays. **Put another way, none could state that that injury alone would have created its own separate chronic pain syndrome and reactive depression. But for the motor vehicle accident, the plaintiff would not have suffered from the pain and depression which quickly resulted and which continues to date.**" [Emphasis added.] (at para. 58)

Conclusion

Although the Supreme Court of Canada has recently addressed the law governing causation in *Resurfice Corp*. v. *Hank* , [2007] S.C.J. No. 7; 2007 SCC 7; (2007), 278 D.L.R. (4th) 643, the principles of *Athey* are affirmed in *Resurfice*[2], and are key to an argument that a plaintiff suffering a second non-tortious injury should not decrease the value of his claim for injuries from the tortious incident, such as a motor vehicle accident. Damages should flow from the collision

injury on the same path as if he had not suffered the second injury if the injuries from the two incidents and their subsequent impact are indivisible.

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[1] With thanks to Nicky Brink for her research behind this article.

[2] Per *Resurfice*:

> ¶ 22 This fundamental rule has never been displaced and remains the primary test for causation in negligence actions. As stated in *Athey v. Leonati*, at para. 14, *per* Major J., "[t]he general, but not conclusive, test for causation is the 'but for' test, which requires the plaintiff to show that the injury would not have occurred but for the negligence of the defendant." …