The Defence of Inevitable Accident

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Overview

The defence of "inevitable accident" in personal injury litigation is one that posits a non-tortious explanation for an accident. It asserts that where an accident is purely inevitable, and is not caused by the fault of either party, the loss lies where it falls.

According to the authorities, once the plaintiff establishes a *prima facie* case of negligence, the onus will shift to the defendant to prove inevitable accident. In so doing, the defendant is required to show how the accident took place and that the loss of control of the vehicle could not have been avoided by the exercise of the greatest care and skill.[i]

A defendant may thus escape liability by showing one of two things:

(i) the cause of the accident, and the result of that cause was inevitable; or
(ii) all the possible causes, one or other of which produced the effect, and with regard to every one of these possible causes that the result could not have been avoided.

This standard, though certainly a high one, is not a test of perfection.[ii]

In light of the foregoing general principles, a plaintiff seeking to undermine or defeat a defendant's reliance on the defence of "inevitable accident" must challenge – with evidence and argument – the defendant's explanation of how the accident, collision or mishap occurred without his negligence. As is clear from a perusal of the recent jurisprudence, there are definite limitations on the availability of the defence and it is unlikely to prevail if the person seeking to invoke it caused or contributed in any way to the emergency situation.

Some of the factors that will be relevant in considering whether the conduct of a driver can be characterized as negligent, such that the doctrine of inevitable accident ought not to be engaged, include: road conditions, weather, speed, the condition of the vehicle, the intensity of the vehicle's headlights, the driver's experience and his/her familiarity with the roadway, the driver's reaction to the risk presented, any evasive action taken, other traffic on the roadway, and the physical and mental condition of the driver (ie. fatigued, distracted, dizzy, experiencing a medical crisis or condition, etc.).[iii]

General Principles

The defence of "inevitable accident" in personal injury litigation is one that posits a non-tortious explanation for an accident. *Halsbury's Laws of Canada*, Negligence - V.5, characterizes this defence in the following terms:

> "Although once useful as a defence to the action for trespass, today defendants in negligence cases normally do not need to avail themselves of the plea of inevitable accident; all they have to do is deny that they were negligent. Still, courts will invoke this defence on occasion. …
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> It is not easy to escape liability by relying on inevitable accident. …"[iv]

The *Canadian Encyclopedic Digest* (Western), Negligence – III.1, puts the matter this way:

> "**The defence of inevitable accident holds that where an accident is purely inevitable, and not caused by the fault of either party, the loss lies where it falls. Although normally the defendant need not prove inevitable accident but only deny negligence, the defence is still used occasionally. The courts, however, are not quick to accept it.**
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> **An inevitable accident is an occurrence not avoidable by any precaution a reasonable person would be expected to take. The person invoking the defence must show that something happened over which he or she had no control, and the effect of which could not have been prevented by using great skill and care. He or she must show either the cause of the accident and the inevitability of its result, or all the possible causes and the inevitability of the result of each.**

> The standard is not one of perfection; thus, it is wrong for a trial judge to tell the jury the defendant must show the accident could not possibly be prevented by the exercise of reasonable care.
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> It is important to distinguish between the defence of inevitable accident and the defence of explanation. If an automobile collision occurs because of an external factor such as snow or ice on the road, the defence of explanation is available to the defendant driver who can rebut the inference of negligence by merely advancing an explanation of how the collision may have occurred reasonably without negligence. However, where the defendant is claiming inevitable accident because of factors wholly within him or her, such as unconsciousness, the defendant has a heavier burden of proving on a balance of probabilities that his or her driving manner was not a conscious act."[v] (emphasis added)

Other authorities echo these basic propositions. For instance, G.H.L. Fridman in *Law of Torts in Canada*, 3rd Edit., (Toronto: Carswell, c2010), discusses the difficult task of proving inevitable accident in Chapter 18 – Defences to Negligence, beginning at page 439:

> "… The law distinguishes negligence, which involves a failure to exercise reasonable care, from accident, which could not have been avoided even if reasonable care had been taken. Only such an accident is inevitable. But this is a difficult defence to establish. The burden lies on the defendant. He must show that despite the taking of all reasonable precautions, an accident was inevitable. Hence, the defendant must (i) prove the actual cause of what happened and that he was not responsible for it, or (ii) prove all the possible causes of the accident and that he was not responsible for any of them. …"[vi] (citations omitted)

With respect to the onus borne by the parties in circumstances in which the defence of inevitable accident is put forth, the authorities confirm that once the plaintiff establishes a *prima facie* case of negligence, the onus will shift to the defendant to prove inevitable accident. In so doing, the defendant is required to show how the accident took place and that the loss of control of the vehicle could not have been avoided by the exercise of the greatest care and skill.[vii]

Jurisprudence

An excellent overview of the nature of this defence and the manner in which it might be established or rendered inapplicable is found in the recent decision of Barrow J. in *Chow-Hidasi v. Hidasi*, [2011] B.C.J. No. 848; 84 C.C.L.T. (3d) 125 (S.C.). That judgment involved an action by the plaintiff passenger (the wife) against the driver (the husband) of a vehicle involved in an accident. The wife was injured in the accident.

The parties were travelling along a mountain road with which the defendant husband was familiar. He knew it could be treacherous in the winter, so checked the weather before leaving. The temperature was above zero and the roads were mostly bare.

The defendant husband testified that he was travelling 100 kph when he heard a clunking noise and the vehicle suddenly lost braking and steering capacity. The defendant pulled the emergency brake, but the vehicle veered sharply into the concrete barriers, injuring the plaintiff.

The plaintiff did not hear the clunking noise, but felt the vehicle veer sharply and heard the defendant exclaim that he could not brake. The plaintiff argued that the defendant was overdriving the road and had inadequate tires.

In dismissing the plaintiff wife's claim, Justice Barrow observed that the vehicle was equipped with brand new all-season tires, the road conditions were good and the vehicle never lost traction. Moreover, the evidence did not indicate that the plaintiff had expressed any concern with the defendant's speed, which was within the speed limit.

Concluding that the steering and braking was lost due to a mechanical failure, that this failure was unexpected, and that the defendant responded immediately and non-negligently to the mechanical failure, Barrow J. said this in regard to the defence of "inevitable accident":

"The defendant argues that there is evidence from which the court should find that the accident may have happened as a result of events for which the defendant was not legally responsible, mainly a mechanical failure. The real issue is whether there was such a failure, and if so whether it was something that could have been avoided by the exercise of reasonable care. Finally, there is the issue of whether, assuming there is a non-tortious explanation for the accident, the defendant responded to that situation with appropriate care.

. . .

… **[The notion of inevitable accident] posits a non-tortious explanation for an accident. In the matter at hand that explanation is, according to the defendant, the sudden loss of steering and braking ability. Such a mechanical failure is only non-tortious if it could not have been prevented by the exercise of reasonable care. If the exercise of reasonable care could or would have revealed the mechanical problem, then a driver is not absolved of responsibility when the problem becomes manifest. His or her negligence remains a cause of the accident, albeit the negligence rests, at least in part, on a different footing, namely a failure to exercise reasonable care in inspecting and maintaining the vehicle as opposed to negligence in the manner of driving.**

Even if a defendant experiences a sudden mechanical failure which occurred in spite of the exercise of reasonable care in maintaining and servicing a vehicle, that is not necessarily an end of the matter. The issue that remains is whether the defendant exercised reasonable care in responding to the emergency. It is in this way that the concepts of inevitable accident and the agony of collision often arise in the same circumstances. The doctrine of agony of collision does not deal with the cause of or explanation for an accident; rather, it is a summary way of expressing the standard of reasonable care required of a driver faced with an emergency. …

… I have concluded that neither speed nor the condition of his tires were contributory causes of the accident, but there remains the issue of the manner in which he maintained his vehicle, and his driving subsequent to the failure of his breaks and steering.

A defendant who advances what is sometimes referred to as a defence of explanation, of which the notion of inevitable accident is an instance, bears the onus of explaining how the motor vehicle accident may have happened without negligence. The defendant does not have to explain how the accident in fact happened; rather, he or she will avoid liability if a non-

> tortious explanation is, on the evidence, an equally probable explanation for the accident. When that is so, the plaintiff cannot succeed because he or she will not have discharged the burden of proving that the accident occurred as a result of the defendant's negligence ..."[viii] (emphasis added)

Ultimately therefore, Justice Barrow confirmed that the evidence established that: (i) the defendant driver had experienced a mechanical failure, (ii) the brake and steering failure he experienced was unexpected and was not discoverable through the exercise of reasonable care, and (iii) his reaction to the circumstances he unexpectedly faced was reasonable. He was thus absolved of liability in negligence.

Another recent judgment is that of *Tom MacDonald Trucking Ltd. v. Avery Estate*, [2010] N.J. No. 40; 294 Nfld. & P.E.I.R. 280 (S.C.T.D.). That action arose out of a motor vehicle collision between a tractor-trailer owned by the plaintiff and operated by the plaintiff's employee King, and a pick-up truck operated by the late Barry Avery.

The Avery vehicle crossed over the centre line of the highway colliding with the tractor-trailer and resulting in the deaths of the four occupants of the Avery vehicle. The plaintiff claimed for damages arising from Avery's negligent operation of the Avery vehicle while, in his denial of the plaintiff's claim, the defendant asserted there was no negligence, on the part of Avery, in the operation of the Avery pick-up truck. It was the defence position the accident occurred as a result of sudden and significant changes, being the formation of ice on the roadway, in the area in which the accident occurred. The defence of inevitable accident was thus pled.

Justice Dunn first considered the question of whether or not the plaintiff had established a *prima facie* case in negligence. Dunn J. then addressed the onus upon the defendant in establishing the defence of inevitable accident: "I agree with the plaintiff, the defendant must show how the accident took place and that the loss of control of the Avery vehicle could not have been avoided by the exercise of the greatest care and skill."[ix]

Then, upon a consideration of all of the evidence, Justice Dunn concluded as follows:

> "In short, there is no question the accident occurred in the plaintiff's eastbound lane of traffic. There is no evidence able to be provided by the occupants of the Avery vehicle as to what occurred prior to the accident, as they are deceased. **The defendant was not able to provide an explanation as to what caused the accident. Even if he had been able to establish black ice existed on the roadway, he was not able to advance evidence as to why Avery would have been unable to maintain control of the Avery vehicle by the exercise of the greatest care and skill. In the result, I conclude the onus upon the defendant to establish inevitable accident has not been met.**"[x] (emphasis added)

In *Bassi (Litigation guardian of) v. Bassi*, [2010] B.C.J. No. 2663; 7 M.V.R. (6th) 113 (S.C.), the defendant driver sought an order dismissing an action brought against him by his wife and three children arising from a motor vehicle accident.

According to the evidence before the court, Bassi had not slept for nearly 24 hours when the accident took place as he drove his family home from a wedding they attended five hours away from their home. It was light out at the time of the accident and the highway was dry.

The accident took place near the end of the drive when Bassi swerved off the travelled portion of the highway across the paved shoulder and onto the gravel shoulder on his right. He then swerved sharply to the left, crossed the entire highway and ended up on the gravel shoulder of the other side. As he sought to correct his van's momentum, the van rolled over completely. Each of the plaintiffs suffered injuries.

Bassi explained the accident occurred at a blind curve in the road. He claimed he was driving around the speed limit of 80 kph and did not slow down for the curve because it was not sharp and there were no signs posted indicating that he should slow down. He claimed a deer jumped into the roadway as his van rounded the curve and that he initially swerved as he tried to steer away from the deer. He also claimed to have stopped two times prior to the accident to ensure he was not too tired to continue the drive.

Cullen J. ruled that Bassi's explanation for the accident did not neutralize the inference that leaving his lane of travel, then crossing the highway to the opposite shoulder, and ultimately losing control of his vehicle and causing it to roll over, involved negligence on his part. In addition, Justice Cullen concluded that there was no clear evidence of what actual crisis Bassi was confronted by as he rounded the curve and saw the deer; that is, it was not clear how close to him the deer was, or if there was some other way he could have avoided hitting it.

In the end result Justice Cullen found that, in all the circumstances (including the fact Bassi was driving with no sleep for almost five hours at the time of the accident), the plaintiffs had established on a balance of probabilities that the accident was a product of Bassi's negligence.

Cullen J. stated:

> "As I see it, the issue in the present case is whether the defendant's explanation of the accident, involving as it does the mechanism of a deer running onto the highway from his left, neutralizes the inference that by leaving his lane of travel onto the right gravel shoulder, then crossing both lanes of the highway to the opposite gravel shoulder, and ultimately losing control of his vehicle and causing it to roll over involved negligent driving on his part. In my view, it does not. **Although the deer running onto the highway presents a basis for an explanation that the accident could have happened without negligence, the explanation actually advanced by the defendant is inadequate to offset the inference that his negligence had a significant role in the accident.** [xi]

And further:

> "The defendant's explanation also lacks any indication that he considered or attempted any other means of avoiding the accident such as by braking either when he first saw the deer or as he veered off the road to the right. There is no evidence of any skid marks, brake marks, distances, or reaction times that would aid in understanding how the accident took place

> or whether the defendant's explanation could adequately account for what occurred.
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> In my view, this is a case in which the plaintiffs have established a *prima facie* case of negligence and, while the defendant has offered an explanation of what occurred, it lacks cogent detail and is not sufficiently full, complete, or consistent with the existing conditions to neutralize the inference of negligence arising from the circumstances of the accident. In short, the defendant's explanation does not adequately ground a non-negligence version of how and why he came to lose control of his vehicle.
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> I conclude that all the circumstances, including the evidence that the defendant had not slept for nearly 24 hours and had driven for about four-and-a-half hours through the night before the accident occurred, establishes on a balance of balance of probabilities that the accident was a product of his negligence notwithstanding the explanation he advanced involving his reaction to seeing a deer coming onto the highway from his left. I, therefore, find liability in favour of the plaintiffs." [xii]

The defence of inevitable accident was also unsuccessfully invoked in the Newfoundland case of *Baker v. Russsell*, [2008] N.J. No. 286; 281 Nfld. & PEIR 247 (C.A.); leave to appeal refused, [2008] S.C.C.A. No. 494 (S.C.C.). In that case, the appellant was a motor vehicle passenger who was severely injured in a collision between the vehicle and a moose. The appellant sued the respondent driver in negligence.

The trial judge concluded that there was no negligence on the driver's part that caused or contributed to the accident. The appellant, however, alleged errors in the findings respecting vehicle speed and the significance of a moose warning sign in determining the driver's standard of care and argued that a finding of negligence was warranted.

In allowing the appeal, the appellate Court confirmed, first, that a determination that the driver was negligent in driving at an unreasonable speed was insufficient in and of itself to establish liability. Rather, it had to be determined whether the driver's breach of his duty of care caused the appellant's damages.

Based on its review of the evidence in the case, the Court concluded that the respondent's negligence lay in failing to decrease his speed appreciably in the moose warning area in

the particular conditions. With respect to the potential application of the defence of inevitable accident, the Justices opined as follows:

> "We have further considered whether the defence of inevitable accident was established. In our view the evidence, being principally that of Dr. Smith, does not establish inevitable accident. Dr. Smith's reports and testimony focused on Russell's ability to see and react to the presence of the third moose. He did not address whether a reduction in speed upon entering the moose warning area, as we have found was warranted, would have enabled better avoidance or defensive measures upon Russell observing the first two moose. Accordingly it has not been proven that the accident was "not avoidable by any precaution a reasonable man would be expected to take". L.N. Klar, Remedies in Tort, looseleaf, Vol. 2 (Toronto: Carswell, 2008) at para. 196.
>
> Applying the foregoing it is clear that Russell, having failed upon entering the moose warning area to take the reasonable precaution of speed reduction to prevent significant injury were there moose on the highway, is liable for the consequences of the highway accident that occurred." [xiii]

In *Johnson v. Coombs,* [2007] B.C.J. No. 939 (S.C.), the plaintiff sought damages for fatal injuries sustained by her husband in a motor vehicle accident. The defendant, a diabetic, had lost consciousness behind the wheel due to low blood sugar, had veered into oncoming traffic and collided with an oncoming vehicle in which the plaintiff's husband had been a passenger. The defendants, who included the individual defendant's employer because he was operating the employer's vehicle when the accident occurred, argued that the defendant was not negligent as his lapse into unconsciousness was unforeseeable.

The court found that the defendant driver was habitually driving to his lunch time meeting place with, to his knowledge, dangerously low blood sugar. He was well aware of the potential loss of consciousness associated with hypoglycaemia yet he failed to take the necessary precautions to avoid the possibility of falling into a condition of hypoglycaemia unawareness, and ultimately had a reaction resulting in unconsciousness.

Thus, in failing to apply his knowledge and avail himself of those means to avoid the possibility of such a reaction, he failed in his duty of care to other motorists. Negligence was established by his failure to test his blood sugar before driving.

And finally, a judgment in which the defence of inevitable accident was pled (in relation to an accident involving a collision with wildlife), but was not ultimately engaged, is that of *Racy v. Leaske*, [2011] B.C.J. No. 1204 (S.C.). There, upon considering all the circumstances in the case, Justice Ker concluded that a collision with a moose was not occasioned by any negligence or want of care on the defendant driver. She had not been driving at an excessive speed given the conditions and she was not negligent in failing to apply the vehicle brakes more forcefully or in failing to take any other evasive action such as pulling or swerving to the right or the left of her lane of travel. As the plaintiff failed to establish on a balance of probabilities the defendant was negligent in her response to seeing the moose on the highway, the plaintiff's case failed and the action was dismissed.

Conclusion

Members of the plaintiffs' personal injury bar have commented to the authors recently that the defence of inevitable accident seems to be a gambit more frequently raised by the defence bar. As the above review suggests, however, it is a difficult defence to mount successfully. It is our hope that this review will establish the general principles for you, and flag some recent jurisprudence that may be helpful.

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[i] Reference: *Rintoul v. R and Radium Industries Ltd.*, [1956] S.C.J. No. 43; [1956] S.C.R. 674 (S.C.C.); *Tom MacDonald Trucking Ltd. v. Avery Estate*, [2010] N.J. No. 40; 294 Nfld. & PEIR 280 (S.C.)

[ii] Reference: *Halsbury's Laws of Canada*, Negligence - V.5, QL, at para. HNE-81; *Canadian Encyclopedic Digest* (Western), Negligence – III.1, at para. 284-287

[iii] Reference: *Chow-Hidasi v. Hidasi*, [2011] B.C.J. No. 848; 84 C.C.L.T. (3d) 125 (S.C.); *Bassi (Litigation guardian of) v. Bassi*, [2010] B.C.J. No. 2663; 7 M.V.R. (6th) 113 (S.C.); *Baker v. Russsell*,

[2008] N.J. No. 286; 281 Nfld. & PEIR 247 (C.A.); *Johnson v. Coombs*, [2007] B.C.J. No. 939 (S.C.); *Racy v. Leaske*, [2011] B.C.J. No. 1204 (S.C.)

[iv] QL, at para. HNE-81

[v] QL, at paras. 284-287

[vi] at pp. 439-440

[vii] Reference: *Rintoul v. R and Radium Industries Ltd.*, [1956] S.C.J. No. 43; [1956] S.C.R. 674 (S.C.C.), at p. 677; *Tom MacDonald Trucking Ltd. v. Avery Estate*, [2010] N.J. No. 40; 294 Nfld. & PEIR 280 (S.C.), at para. 32-33; *Waters v. Mariash*, [2012] B.C.J. No. 1296 (S.C.), QL, at para. 18

[viii] QL, at paras. 16, 23-25

[ix] QL, at para. 32

[x] QL, at paras. 42-45

[xi] QL, at para. 20

[xii] QL, at paras. 25-27

[xiii] QL, at paras. 40-41