Athey *v.* Leonati, [1996] 3 S.C.R. 458

Jon Athey *Appellant*

v.

Ferdinando Leonati and Kevin Johnson *Respondents*

and between

Jon Athey *Appellant*

v.

Edward Alan Gagne, Dolphin Delivery (1985) Ltd. and Dolphin Transport Ltd. *Respondents*

Indexed as: Athey *v.* Leonati

File No.: 24725.

1996: June 12; 1996: October 31.

Present: Lamer C.J. and La Forest, Sopinka, Cory, McLachlin, Iacobucci and Major JJ.

on appeal from the court of appeal for british columbia

Torts -- Damages -- Personal Injury -- Extent of liability -- Pre-existing condition -- Injuries suffered from two accidents -- Injury complained of occurring during medically sanctioned exercise routine while recovering from second accident -- Whether defendants fully liable.

The appellant, a person with a history of back problems, suffered back and neck injuries in an accident in February 1991. While still recovering from those injuries, he suffered further injury in a second accident which occurred that April. That autumn his doctor suggested in light of his improved condition that he resume his regular exercise routine. He suffered a herniated disc while "warming up" and required surgery. The results were good but not excellent. The appellant obtained other employment that required no heavy physical duties at a reduced salary.

All parties proceeded as if there were only one defendant and only one accident, and no attempt was made to apportion fault between the respondents or between the accidents. The respondents admitted liability. There was no allegation of contributory negligence with respect to the accidents, or negligence by the appellant or his doctor in resuming the exercise program. The only issue was whether the disc herniation was caused by the injuries sustained in the accidents or whether it was attributable to the appellant's pre-existing back problems. The trial judge held that although the accidents were "not the sole cause" of the disc herniation, they played "some causative role" and awarded 25 percent of the global amount of damages assessed. An appeal to the Court of Appeal was dismissed. At issue here was (1) whether the trial judge's apportionment of causation was reversible error, and (2) whether the court of appeal wrongly limited the scope of judicial review by declining to consider the appellant's theory of liability.

Held: The appeal should be allowed.

A defendant is liable for any injuries caused or contributed to by his or her negligence. The presence of other non-tortious contributing causes does not reduce the extent of that liability. Loss cannot be apportioned according to the degree of causation where it is created by tortious and non-tortious causes.

Causation is established where the plaintiff proves to the civil standard that the defendant caused or contributed to the injury. 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. Where the "but for" test is unworkable, the courts have recognized that causation is established where the defendant's negligence "materially contributed" to the occurrence of the injury. In some circumstances an inference of causation may be drawn from the evidence without positive scientific proof. The plaintiff need not establish that the defendant's negligence was the sole cause of the injury. The law does not excuse a defendant from liability merely because other causal factors for which he or she is not responsible also helped produce the harm. It is sufficient if the defendant's negligence was a cause of the harm.

Apportionment between tortious and non-tortious causes is contrary to the principles of tort law because the defendant would escape full liability even though he or she caused or contributed to the plaintiff's entire injuries. The plaintiff would not be adequately compensated, since he or she would not be placed in the original position he or she would be in absent the defendant's negligence.

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. Separation is also permitted where some of the injuries have tortious causes and some 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. Here, the disc herniation was a single indivisible injury so division was neither possible nor appropriate. Any defendant found to have negligently caused or contributed to the disc herniation will be fully liable for it.

The disc herniation was a past event which cannot be addressed in terms of probabilities. Once the plaintiff met the burden of proving that the injuries sustained in the accidents caused or contributed to the disc herniation, causation must be accepted as a certainty. Hypothetical events (such as how the plaintiff's life would have proceeded without the tortious injury) or future events need not be proven on a balance of probabilities and are simply given weight according to their relative likelihood.

An analogy cannot be drawn to those cases where an unrelated event, such as a disease or non-tortious accident, occurs after the plaintiff is injured. The plaintiff's loss is the difference between the original position the plaintiff would have been in absent the defendant's negligence and the plaintiff's position after the tort. Where an intervening event unrelated to the tort affects the plaintiff's "original position", the net loss is not as great as it might have otherwise seemed, so damages would be reduced to reflect this. Here, the disc herniation was found to be the product of the accidents and not an independent intervening event. It accordingly did not affect the assessment of the plaintiff's "original position" and thereby reduce the net loss experienced by the plaintiff.

The "crumbling skull" argument does not succeed on the facts as found by the trial judge. This rule simply recognizes that the pre-existing condition was inherent

in the plaintiff's "original position". The defendant need not put the plaintiff in a position better than his or her original position. The defendant is liable for the additional damage but not the pre-existing damage. Here, there was no finding of any measurable risk that the disc herniation would have occurred without the accident, and there was therefore no basis to reduce the award to take into account any such risk.

The loss of chance doctrine whereby the plaintiffs may be compensated where their only loss is the loss of a chance at a favourable opportunity or of a chance of avoiding a detrimental event did not need to be considered here. The factual findings did not support the contention that the loss would be the loss of a chance of avoiding the disc herniation. The finding at trial was that the accidents contributed to the actual disc herniation itself.

The warming-up incident was not a cause but rather the effect. It was the injury. Mere stretching alone was not sufficient to cause disc herniation in the absence of some latent disposition or previous injuries. There was no suggestion of negligence on the appellant's part.

The 25 percent contribution of the two accidents to the disc herniation assessed by the trial judge fell outside the *de minimis* range and therefore constituted a material contribution sufficient to render the defendant fully liable for the damages flowing from the disc herniation. Notwithstanding the plaintiff's back problems before the accident, it was reasonable to infer a causal connection (which was supported by the evidence) between the disc herniation and the two accidents. Once it is proven that the defendant's negligence was a cause of the injury, there is no reduction of the award to reflect the existence of non-tortious background causes. The thin skull rule reinforces that conclusion.

This appeal involved a straightforward application of the thin skull rule. The pre-existing disposition may have aggravated the injuries, but the defendant must take the plaintiff as he finds him. If the defendant's negligence exacerbated the existing condition and caused it to manifest in a disc herniation, then the defendant is a cause of the disc herniation and is fully liable.

Cases Cited

Considered: *Jobling v. Associated Dairies Ltd.*, [1981] 2 All E.R. 752; *Penner v. Mitchell* (1978), 89 D.L.R. (3d) 343; **referred to**: *Snell v. Farrell*, [1990] 2 S.C.R. 311; *McGhee v. National Coal Board*, [1972] 3 All E.R. 1008; *Horsley v. MacLaren*, [1972] S.C.R. 441; *Myers v. Peel County Board of Education*, [1981] 2 S.C.R. 21; *Bonnington Castings, Ltd. v. Wardlaw*, [1956] 1 All E.R. 615; *R. v. Pinske* (1988), 30 B.C.L.R. (2d) 114, aff'd [1989] 2 S.C.R. 979; *Alphacell Ltd. v. Woodward*, [1972] 2 All E.R. 475; *School Division of Assiniboine South, No. 3 v. Greater Winnipeg Gas Co.*, [1971] 4 W.W.R. 746, aff'd [1973] 6 W.W.R. 765 (S.C.C.), [1973] S.C.R. vi; *Mallett v. McMonagle*, [1970] A.C. 166; *Malec v. J. C. Hutton Proprietary Ltd.* (1990), 169 C.L.R. 638; *Janiak v. Ippolito*, [1985] 1 S.C.R. 146; *Schrump v. Koot* (1977), 18 O.R. (2d) 337; *Graham v. Rourke* (1990), 74 D.L.R. (4th) 1; *Lamb v. Kincaid* (1907), 38 S.C.R. 516.

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APPEAL from a judgment of the British Columbia Court of Appeal, [1995] B.C.J. No. 666, 54 A.C.W.S. (3d) 503, dismissing an appeal from a judgment of Boyd J. (1994), 44 A.C.W.S. (3d) 908. Appeal allowed.

Thomas R. Berger, *Q.C.*, and *Frits Verhoeven*, for the appellant.

Patrick G. Foy and *Vincent R. Orchard*, for the respondents.

//*Major J.*//

The judgment of the Court was delivered

1 MAJOR J. -- The appellant suffered back injuries in two successive motor vehicle accidents, and soon after experienced a disc herniation during a mild stretching exercise. The herniation was caused by a combination of the injuries sustained in the two motor vehicle accidents and a pre-existing disposition. The issue in this appeal is whether the loss should be apportioned between tortious and non-tortious causes where both were necessary to create the injury.

I. Facts

2 The appellant, Jon Athey, was injured in two motor vehicle accidents, the first of which took place in February 1991 and the second in April 1991. Before the accidents, he worked as an autobody repairman and body shop manager at Budget Rent-A-Car. He was 43 years old, with a history of minor back problems since 1972.

3 In the first accident, the appellant's vehicle was demolished by front and rear end collisions. He was taken to the hospital, examined and released. Almost immediately, he began to suffer from pain and stiffness in his neck and back. Physiotherapy and chiropractic treatments were prescribed and he was on the way to recovery when the second accident occurred.

4 In the second accident, a semitrailer truck crossed into his lane of traffic and hit his vehicle head-on. His immediate injuries did not appear to be severe. He did not lose consciousness and was able to walk from the wrecked vehicle. He continued to work full time at light tasks and managerial work but did not perform any duties involving heavy labour. The appellant continued his physiotherapy and chiropractic treatment. By the fall of 1991, his condition had improved and he was again on the road to recovery.

5 In light of the improvements in the appellant's condition, his doctor suggested that he try to resume his regular exercise routine. The appellant went to a health club where, while stretching as part of his warm-up, he felt a 'pop' in his back and immediately experienced a great deal of pain. He hobbled to the showers, dressed and returned home. By the next morning, he was unable to move. He was transported by ambulance to the hospital, where he remained for three weeks.

6 His condition was diagnosed as a disc herniation, which was ultimately treated by surgery (a discectomy) and more physiotherapy. The doctor described the result of the surgery as "good, but not excellent". Mr. Athey obtained alternative employment as a manager at another company, where he would not have heavy physical duties. The new job paid him less than the old.

7 The respondents were represented at trial by the same counsel. All parties proceeded as if there were only one defendant and only one accident, and no attempt was made to apportion fault between the respondents or between the accidents. The respondents admitted liability. There was no allegation of contributory negligence with respect to the accidents, or negligence by Mr. Athey or his doctor in resuming the exercise program. The only issue was whether the disc herniation was caused by the injuries sustained in the accidents or whether it was attributable to the appellant's pre-existing back problems.

II. Judicial History

A. *Supreme Court of British Columbia*

8 The trial judge held that although the accidents were "not the sole cause" of the disc herniation, they played "some causative role". She stated:

> In my view, the plaintiff has proven, on a balance of probabilities, that the injuries suffered in the two earlier accidents contributed to some degree to the subsequent disc herniation. I believe, however, that the accidents were but a minor contributing factor. To the extent that such factors can be expressed in terms of percentages, I fix the accidents causation factor as no more than 25%.

9 She assessed the appellant's damages, including past wage loss, future wage loss, non-pecuniary damages and special damages, at $221,516.78. Since she held that the accidents were only a 25 percent cause of the disc herniation, she awarded 25 percent of the global amount to the appellant.

B. *Court of Appeal*, [1995] B.C.J. No. 666

10 Southin J.A. observed that counsel for the appellant put forward a "most interesting argument" that the appellant was entitled to 100 percent of the damages resulting from the disc herniation, given the finding of fact that the negligence of the respondents was a cause of the disc herniation. She declined to consider this argument, at paras. 8 and 9:

> Unfortunately, it is plain to us that the application of those authorities, and more particularly the meaning of the phrase in them of "material contribution", was never put to the learned trial judge.
>
> In my view, it would not be appropriate for us to address a theory of liability for the disc herniation which was not advanced before the learned trial judge who was not, in my view, in her reasons for judgment addressing the concepts of those authorities.

Accordingly, the appeal was dismissed.

III. Issues

11 1. Whether the Court of Appeal erred in failing to hold that the trial judge's apportionment of causation was reversible error.

2. Whether the Court of Appeal erred in limiting the scope of judicial review by declining to consider the appellant's theory of liability.

IV. Analysis

12 The respondents' 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.

A. *General Principles*

13 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: *Snell v. Farrell*, [1990] 2 S.C.R. 311; *McGhee v. National Coal Board*, [1972] 3 All E.R. 1008 (H.L.).

14 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: *Horsley v. MacLaren*, [1972] S.C.R. 441.

15 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: *Myers v. Peel County Board of Education*; [1981] 2 S.C.R. 21, *Bonnington Castings, Ltd. v. Wardlaw*, [1956] 1 All E.R. 615 (H.L.); *McGhee v. National Coal Board*, *supra*. A contributing factor is material if it falls outside the *de minimis* range: *Bonnington Castings, Ltd. v. Wardlaw, supra*; see also *R. v. Pinske* (1988), 30 B.C.L.R. (2d) 114 (B.C.C.A.), aff'd [1989] 2 S.C.R. 979.

16 In *Snell v. Farrell*, *supra*, this Court recently confirmed that the plaintiff must prove that the defendant's tortious conduct caused or contributed to the plaintiff's injury. The causation test is not to be applied too rigidly. Causation need not be determined by scientific precision; as Lord Salmon stated in *Alphacell Ltd. v. Woodward*, [1972] 2 All E.R. 475, at p. 490, and as was quoted by Sopinka J. at p. 328, it is "essentially a practical question of fact which can best be answered by ordinary common sense". Although the burden of proof remains with the plaintiff, in some circumstances an inference of causation may be drawn from the evidence without positive scientific proof.

17 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. 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.

18 This proposition has long been established in the jurisprudence. Lord Reid stated in *McGhee v. National Coal Board, supra,* at p. 1010:

> 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.

19 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: Fleming, *supra*, at p. 200. It is sufficient if the defendant's negligence was a cause of the harm: *School Division of Assiniboine South, No. 3 v. Greater Winnipeg Gas Co.*, [1971] 4 W.W.R. 746 (Man. C.A.), at p. 753, aff'd [1973] 6 W.W.R. 765 (S.C.C.), [1973] S.C.R. vi; Ken Cooper-Stephenson, *Personal Injury Damages in Canada* (2nd ed. 1996), at p. 748.

20 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 causes and non-tortious causes, a plaintiff could recover 100 percent 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 a 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.

B. *Inapplicability of Respondents' Analogies*

21 The respondents attempted to relate the present case to those where apportionment had been made. Consideration of the principles of tort law shows that none of the apportionment cases is analogous to this appeal. A review of the respondents' six analogies will show why apportionment was appropriate in those cases but not here.

(1) Multiple Tortious Causes

22 The respondents argued that apportionment between tortious and non-tortious causes should be permitted just as it is where multiple tortfeasors cause the injury. The two situations are not analogous. Apportionment between tortious causes is expressly permitted by provincial negligence statutes and is consistent with the general principles of tort law. The plaintiff is still fully compensated and is placed in the position he or she would have been in but for the negligence of the defendants. Each defendant remains fully liable to the plaintiff for the injury, since each was a cause of the injury. The legislation simply permits defendants to seek contribution and indemnity from one another, according to the degree of responsibility for the injury.

23 In the present case, the suggested apportionment is between tortious and non-tortious causes. Apportionment between tortious and non-tortious causes is contrary to the principles of tort law, because the defendant would escape full liability even though he or she caused or contributed to the plaintiff's entire injuries. The plaintiff would not

be adequately compensated, since the plaintiff would not be placed in the position he or she would have been in absent the defendant's negligence.

(2) Divisible Injuries

24 The respondents submitted that apportionment is permitted where the injuries caused by two defendants are divisible (for example, one injuring the plaintiff's foot and the other the plaintiff's arm): Fleming, *supra*, at p. 201. 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: Fleming, *supra*, at p. 202. Again, such cases merely recognize that the defendant is not liable for injuries which were not caused by his or her negligence.

25 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.

(3) Adjustments for Contingencies

26 The respondents argued that the trial judge’s assessment of probabilities in causation was similar to the assessment of probabilities routinely undertaken by courts in adjusting damages to reflect contingencies. This argument overlooks the fundamental distinction between the way in which courts deal with alleged past events and the way in which courts deal with potential future or hypothetical events.

27 Hypothetical events (such as how the plaintiff's life would have proceeded without the tortious injury) or future events need not be proven on a balance of probabilities. Instead, they are simply given weight according to their relative likelihood: *Mallett v. McMonagle*, [1970] A.C. 166 (H.L.); *Malec v. J. C. Hutton Proprietary Ltd.* (1990), 169 C.L.R. 638 (Aust. H.C.); *Janiak v. Ippolito*, [1985] 1 S.C.R. 146. For example, if there is a 30 percent chance that the plaintiff's injuries will worsen, then the damage award may be increased by 30 percent of the anticipated extra damages to reflect that risk. A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation: *Schrump v. Koot* (1977), 18 O.R. (2d) 337 (C.A.); *Graham v. Rourke* (1990), 74 D.L.R. (4th) 1 (Ont. C.A.).

28 By contrast, past events must be proven, and once proven they are treated as certainties. In a negligence action, the court must declare whether the defendant was negligent, and that conclusion cannot be couched in terms of probabilities. Likewise, the negligent conduct either was or was not a cause of the injury. The court must decide, on the available evidence, whether the thing alleged has been proven; if it has, it is accepted as a certainty: *Mallett v. McMonagle*, *supra*; *Malec v. J. C. Hutton Proprietary Ltd*., *supra*, Cooper-Stephenson, *supra*, at pp. 67-81.

29 This point was expressed by Lord Diplock in *Mallett v. McMonagle*, *supra*, at p. 176:

> The role of the court in making an assessment of damages which depends upon its view as to what will be and what would have been is to be contrasted with its ordinary function in civil actions of determining what was. In determining what did happen in the past a court decides on the balance of probabilities. Anything that is more probable than not it treats as

> certain. But in assessing damages which depend upon its view as to what will happen in the future or would have happened in the future if something had not happened in the past, the court must make an estimate as to what are the chances that a particular thing will or would have happened and reflect those chances, whether they are more or less than even, in the amount of damages which it awards.

30 In this case, the disc herniation occurred prior to trial. It was a past event, which cannot be addressed in terms of probabilities. The plaintiff has the burden of proving that the injuries sustained in the accidents caused or contributed to the disc herniation. Once the burden of proof is met, causation must be accepted as a certainty.

(4) Independent Intervening Events

31 The respondents also sought to draw an analogy with cases where an unrelated event, such as a disease or non-tortious accident, occurs after the plaintiff is injured. One such case was *Jobling v. Associated Dairies Ltd.*, [1981] 2 All E.R. 752 (H.L.), in which the defendant negligently caused the plaintiff to suffer a back injury. Before the trial took place, it was discovered that the plaintiff had a condition, completely unrelated to the accident, which would have proved totally disabling in a few years. Damages were reduced accordingly. In *Penner v. Mitchell* (1978), 89 D.L.R. (3d) 343 (Alta. C.A.), damages for loss of income for 13 months were reduced because the plaintiff had a heart condition, unrelated to the accident, which would have caused her to miss three months of work in any event.

32 To understand these cases, and to see why they are not applicable to the present situation, one need only consider first principles. The essential purpose and most basic principle of tort law is that the plaintiff must be placed in the position he or she would have been in absent the defendant's negligence (the "original position").

However, the plaintiff is not to be placed in a position better than his or her original one. It is therefore necessary not only to determine the plaintiff's position after the tort but also to assess what the "original position" would have been. It is the difference between these positions, the "original position" and the "injured position", which is the plaintiff's loss. In the cases referred to above, the intervening event was unrelated to the tort and therefore affected the plaintiff's "original position". The net loss was therefore not as great as it might have otherwise seemed, so damages were reduced to reflect this.

33 In the present case, there was a finding of fact that the accident caused or contributed to the disc herniation. The disc herniation was not an independent intervening event. The disc herniation was a product of the accidents, so it does not affect the assessment of the plaintiff's "original position" and thereby reduce the net loss experienced by the plaintiff.

(5) The Thin Skull and "Crumbling Skull" Doctrines

34 The respondents argued that the plaintiff was predisposed to disc herniation and that this is therefore a case where the "crumbling skull" rule applies. The "crumbling skull" doctrine is an awkward label for a fairly simple idea. It is named after the well-known "thin skull" rule, which makes the tortfeasor liable for the plaintiff's injuries even if the injuries are unexpectedly severe owing to a pre-existing condition. The tortfeasor must take his or her victim as the tortfeasor finds the victim, and is therefore liable even though the plaintiff's losses are more dramatic than they would be for the average person.

35 The so-called "crumbling skull" rule simply recognizes that the pre-existing condition was inherent in the plaintiff's "original position". The defendant need not put

the plaintiff in a position better than his or her original position. The defendant is liable for the injuries caused, even if they are extreme, but need not compensate the plaintiff for any debilitating effects of the pre-existing condition which the plaintiff would have experienced anyway. The defendant is liable for the additional damage but not the pre-existing damage: Cooper-Stephenson, *supra*, at pp. 779-780 and John Munkman, *Damages for Personal Injuries and Death* (9th ed. 1993), at pp. 39-40. Likewise, if there is a measurable risk that the pre-existing condition would have detrimentally affected the plaintiff in the future, regardless of the defendant's negligence, then this can be taken into account in reducing the overall award: *Graham v. Rourke*, *supra*; *Malec v. J. C. Hutton Proprietary Ltd.*, *supra*; Cooper-Stephenson, *supra*, at pp. 851-852. This is consistent with the general rule that the plaintiff must be returned to the position he would have been in, with all of its attendant risks and shortcomings, and not a better position.

36 The "crumbling skull" argument is the respondents' strongest submission, but in my view it does not succeed on the facts as found by the trial judge. There was no finding of any measurable risk that the disc herniation would have occurred without the accident, and there was therefore no basis to reduce the award to take into account any such risk.

(6) The Loss of Chance Doctrine

37 The respondents submitted that the accidents merely increased the risk of herniation, and that the defendant is liable only for that increase in risk. This is an application of the "loss of chance" doctrine which is the subject of considerable controversy: see Joseph H. King, "Causation, Valuation, and Chance in Personal Injury Torts Involving Preexisting Conditions and Future Consequences" (1981), 90 *Yale L.J.*

1353; John G. Fleming, "Probabilistic Causation in Tort Law" (1989), 68 *Can. Bar Rev.* 661.

38 The doctrine suggests that plaintiffs may be compensated where their only loss is the loss of a chance at a favourable opportunity or of a chance of avoiding a detrimental event. In this case, the loss would arguably be the loss of a chance of avoiding the disc herniation. However, this contention is not supported by the factual findings. The trial judge made no findings suggesting that the injury was a loss of chance of avoiding a disc herniation. The finding at trial was that the accidents contributed to the actual disc herniation itself. It is therefore unnecessary to consider the loss of chance doctrine, and these reasons neither approve nor disapprove of the doctrine.

C. *Application of Principles to Facts*

39 A matter to be resolved is the identification of the competing causes. Some of the trial judge's comments suggest that the "Fitness World incident" was a possible cause of the herniation. The "Fitness World incident" was not a cause; it was the effect. It was the injury. Mere stretching alone was not sufficient to cause disc herniation in the absence of some latent disposition or previous injuries. There was no suggestion that it was negligent of the appellant to attempt to exercise or that he exercised in a negligent manner.

40 Some latent weakness spontaneously manifested itself during the stretching, and the issue is whether the weakness was because of the accidents or a pre-existing condition. The reasons of the trial judge show that she understood this. She referred to the appellant's poor spinal health, his history of back problems, and to the fact that there had been no herniation or injury to the disc prior to the accidents. The competing causes

in this case were the injuries sustained in the accidents and a pre-existing disposition to back problems.

41 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 test. Future or hypothetical events can be factored into the calculation of damages according to degrees of probability, but causation of the injury must be determined to be proven or not proven. This has the following ramifications:

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.

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.

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.

42 The findings of the trial judge are slightly ambiguous. She awarded only 25 percent of the global damages because she held that the accidents were a "causation factor" of 25 percent. Taken out of context, this could be read as meaning that there was a 25 percent chance that the injury was caused by the accidents, and a 75 percent chance that it was caused by the pre-existing condition. In that case, causation would simply not be proven. However, it is clear from the reasons for judgment that this is not what the trial judge concluded.

43 The findings of the trial judge indicate that it was necessary to have both the pre-existing condition and the injuries from the accidents to cause the disc herniation in this case. She made a positive finding that the accidents contributed to the injury, but that the injuries suffered in the two accidents were "not the sole cause" of the herniation. She expressly found that "the herniation was not unrelated to the accidents" and that the accidents "contributed to some degree" to the subsequent herniation. She concluded that the injuries in the accidents "played some causative role, albeit a minor one". These findings indicate that it was the combination of the pre-existing condition and the injuries sustained in the accidents which caused the herniation. Although the accidents played a lesser role than the pre-existing problems, the accidents were nevertheless a necessary ingredient in bringing about the herniation.

44 The trial judge's conclusion on the evidence was that "[i]n my view, the plaintiff has proven, on a balance of probabilities, that the injuries suffered in the two earlier accidents contributed to some degree to the subsequent disc herniation". She assessed this contribution at 25 percent. This falls outside the *de minimis* range and is therefore a material contribution: *Bonnington Castings, Ltd. v. Wardlaw*, *supra*. This finding of material contribution was sufficient to render the defendant fully liable for the damages flowing from the disc herniation.

45 The finding of material contribution was not unreasonable. Although the plaintiff had experienced back problems before the accidents, there was no evidence of herniation or insult to the disc and no history of complaints of sciatica. When a plaintiff has two accidents which both cause serious back injuries, and shortly thereafter suffers a disc herniation during a mild exercise which he frequently performed prior to the accidents, it seems reasonable to infer a causal connection.

46 The trial judge found that the plaintiff's condition was improving when the herniation occurred, but this also means that the plaintiff was still to some extent suffering from the back injuries from the accidents. The inference of causal link was supported by medical evidence and was reasonable.

47 This appeal involves a straightforward application of the thin skull rule. The pre-existing disposition may have aggravated the injuries, but the defendant must take the plaintiff as he finds him. If the defendant's negligence exacerbated the existing condition and caused it to manifest in a disc herniation, then the defendant is a cause of the disc herniation and is fully liable.

48 Had the trial judge concluded (which she did not) that there was some realistic chance that the disc herniation would have occurred at some point in the future without the accident, then a reduction of the overall damage award may have been considered. This is because the plaintiff is to be returned to his "original position", which might have included a risk of spontaneous disc herniation in the future. However, in the absence of such a finding, it remains "speculative" and need not be taken into consideration: *Schrump v. Koot, supra*; *Graham v. Rourke, supra*. The plaintiff is entitled to the full amount of the damages as found by the trial judge.

D. *Conclusion*

49 The trial judge erred in failing to hold the defendant fully liable for the disc herniation after finding that the defendant had materially contributed to it. Once it is proven that the defendant's negligence was a cause of the injury, there is no reduction of the award to reflect the existence of non-tortious background causes. In this case, the thin skull rule reinforces that conclusion.

50 The Court of Appeal erred in failing to reverse the trial judge's error. The Court of Appeal refused to consider the appellant's arguments because they had not been advanced before the trial judge. If the Court of Appeal intended to suggest that the appellant's theory was novel, with respect that is not so. It is a well-established principle that a defendant is liable for any injuries for which the defendant's negligence is a cause.

51 In any event, the Court of Appeal erred in refusing to consider the appellant's arguments on the grounds they were not raised at trial. The general rule is that an appellant may not raise a point that was not pleaded, or argued in the trial court, unless all the relevant evidence is in the record: John Sopinka and Mark A. Gelowitz, *The Conduct of an Appeal* (1993), at p. 51. In this case, all relevant evidence was part of the record. In fact, all the requisite findings of fact had been made. The point raised by the appellant was purely a question of law.

52 Most importantly, the respondents did not suffer prejudice, since they would not have proceeded any differently even if the appellant had expressly relied on *McGhee v. National Coal Board* and *Bonnington Castings, Ltd. v. Wardlaw*, *supra*, from the very

beginning. The defence theory was that the disc herniation was not causally related in any way to the injuries suffered in the motor vehicle accidents. The respondents could not have made any more emphatic defence than this. This was a case where "had the question been raised at the proper time, no further light could have been thrown upon it": *Lamb v. Kincaid* (1907), 38 S.C.R. 516, at p. 539, *per* Duff J. (as he then was). Given that the appellant's arguments raised an issue of law which did not require any further evidence (or indeed any further findings of fact) and which would not have caused any prejudice to the respondents, it was an error for the Court of Appeal to refuse to consider the argument.

53 The appeal is allowed. Judgment is entered for the appellant for the full global amount of $221,516.78 plus interest and costs throughout.

Appeal allowed.

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Solicitors for the respondents: Ladner, Downs, Vancouver.