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PAPER 4.2

Defending Claims Involving the Issue of Divisible versus Indivisible Injury

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DEFENDING CLAIMS INVOLVING THE ISSUE OF DIVISIBLE VERSUS INDIVISIBLE INJURY

I. Introduction

As a result of the relatively recent decision of the Court of Appeal in *Bradley v. Groves*, [2010] B.C.J. No. 1507 (C.A.), leave refused [2010] S.C.C.A. No. 337, the law concerning the assessment of damages for consecutive or successive torts thought to be settled by the Supreme Court of Canada in *Blackwater v. Plint*, [2005] 3 S.C.R. became unsettled. The purpose of this paper is to review the state of the law prior to *Bradley v. Groves*, review *Bradley v. Groves* for purposes of identifying any new issues and to provide some foundation for discussion for counsel in handling cases that raise these complicated issues.

II. Discussion of Relevant Legal Principles

A. The Purpose of Tort Law

For purposes of discussing the divisible versus indivisible injury issue, the following statement on the purpose of tort law is instructive:

> It is trite to point out that a fault-based compensation law compensates victims only where their injuries have been caused by the fault of others. It is important to stress, though, that compensation, for its own sake, is not the purpose of tort law but rather the remedy offered by it, after liability based upon fault has been established. The reasons why the law compensates victims of wrongdoing are what accurately describe the objectives of the fault-based civil justice system.
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> Klar, *Tort Law*, Fifth Edition (2012), at 11

B. Two Parts to Compensation inquiry

There are two parts to the compensation inquiry: *Blackwater v. Plint* at para. 78. In *Klar* at 477, the learned author put it this way:

> Harm or damage is the gist of the action for negligence. In order for the defendant to be held liable in negligence, the defendant's negligence must have injured the plaintiff, thereby violating the plaintiff's right to integrity of its person or property. It is the fact that the defendant caused damage to the plaintiff that gives rise to the defendant's liability. It creates the obligation falling on a specific defendant to compensate an individual plaintiff for that injury.

The first part of the inquiry is the fault-based causation analysis which considers whether the impugned legal injury caused the plaintiff a factual and legal harm. The second part of the inquiry is the assessment of damages analysis which considers the quantum of legally compensable damages resulting from the harm.

W.R.B. v. Plint, [2001] B.C.J. No. 1446 (S.C.) at para. 363, varied [2003] B.C.J No. 2783 (C.A.), aff'd [2005] 3 S.C.R. 3

E.D.G. v. Hammer, [1998] B.C.J. No. 992 (S.C.) at paras. 56 to 57, aff'd [2001] B.C.J. No. 585 (C.A.), aff'd [2003] 2 S.C.R. 459

Mustapha v. Culligan Canada Ltd., [2008] 2 S.C.R. 114 at paras. 3 to 18

The first part of the inquiry is where we consider such causation principles as the reasonable foreseeability of harm/remoteness of damage analysis and indivisible injury as that term is used in *Athey v. Leonati*. We are not concerned with pain and suffering, loss of enjoyment of life, loss of amenities of life and actual pecuniary loss.

Athey v. Leonati, [1996] 3 S.C.R. 458 at paras. 1, 7, 19, 24, 25, 32, 33, 34, 35, and 41

Mustapha, *supra*, at paras. 11 and 16

The second part of the inquiry is where we consider pain and suffering, loss of enjoyment of life, loss of amenities of life and actual pecuniary loss taking into account such principles as the thin skull rule and crumbling skull rule.

Blackwater, *supra*, at paras. 74 to 87

Mustapha, *supra*, at para. 16

III. The Problem of Inconsistent Terminology

The imprecise use of relevant terminology has lead to a lot of the confusion in this area of the law and recently defendants being liable to compensate plaintiffs for damages they did not cause and plaintiff's being denied compensation for damages that they suffered.

As noted above, the starting point is "compensation."

The *New Shorter Oxford English Dictionary* defines "compensation," in part, as :

> 2 A thing that compensates or is given to compensate (*for*); a counterbalancing feature or factor; amends; recompense; *spec*. money given to compensate loss or injury, or for requisitioned property.

"Compensate" is defined to mean, in part:

> 2 v.i. Serve as a recompense or adequate substitute (*for*); make up *for*. M17. 3 v.t. Make amends to, recompense.

"Recompense" is defined to mean, in part:

> 2 b Compensation for a loss, injury, defect, etc. *spec.* (*Sc. Law*) a non-contractual obligation to restore a benefit resulting from another's loss. LME 3 Retribution for an injury or a wrong.

An essential element for a claim in negligence is harm. Harm may involve personal injuries, property damage or economic loss. Damage includes both personal injuries and property damage. In this paper, the term harm will be used in this sense. "Injuria" or legal injury is the violation of a person's legal right for which the law provides a remedy. This is sometimes referred to as trauma. In this paper, this will be referred to as legal injury. "Damages" is not the plural of damage but the legally recognized heads of compensation for actual pecuniary or non-pecuniary loss resulting from the harm caused by legal injury.

Black's Law Dictionary, Seventh Edition, at 393 to 397 and 789 to 790

Brown v. Douglas, [2011] B.C.J. No. 2421 (C.A.) at paras. 24 to 25

Athey, *supra*, at para. 19

Mustapha, *supra*, at paras. 3 to 11

Thus, in negligence, one receives compensatory damages for actual pecuniary or non-pecuniary loss resulting from harm caused by legal injury.

Ratych v. Bloomer, [1990] 1 S.C.R. 940 at 962 to 964 and 981

Cunningham v. Wheeler, [1994] 1 S.C.R. 359 at 368 and 396

As far as the writer's legal research goes, prior to *Bradley v. Groves*, [2010] B.C.J. No. 1507 (C.A.) there did not appear to be such legal concepts as indivisible damages or overlapping symptoms leading to indivisible injury. There was only indivisible harm: see for example the disc herniation in *Athey*.

Blackwater v. Plint, *supra*, at para. 80

Athey, *supra*, at para. 24

E.D.G. v. Hammer, [2003] 2 S.C.R. 459 at paras. 28 to 33

M.B. v. B.C., [2003] 2 S.C.R. 477 at paras. 52 to 54

K.L.B. v. B.C., [2003] 2 S.C.R. 403 at paras. 60 to 62

M.B. v. 2014052 Ontario Ltd., [2012] O.J. No. 96 (C.A.) at para. 61

At common law, joint tortfeasors and several concurrent tortfeasors, that is tortfeasors whose acts are necessary to produce a single harm were liable in full for the resulting damages, taking into account such concepts as reasonable foreseeability of harm, the thin skull rule and the crumbling skull rule.

Williams, *Joint Torts and Contributory Negligence*, at 3

Horvath v. Thring, [2005] B.C.J. No. 443 (C.A.) at para. 16

Athey, *supra*

On the other hand, where you had consecutive harms the tortfeasors were not so liable.

Williams, *supra*, at 20

Fleming's The Laws of Torts, 10th Ed. (2011) at 301

Reeves v. Arsenault, [1995] P.E.I.J. No. 159 (S.C.T.D.) at para. 17

Economy Foods & Hardware Ltd. v. Klassen, [2001] M.J. No. 47 (C.A.)

Blackwater v. Plint, *supra*, at para. 80

The *Negligence Act*, R.S.B.C. 1996, c. 333, s.. 1 eliminates the complete defence of contributory negligence but codifies the foregoing:

> 1(3) Nothing in this section operates to make a person liable for damage or loss to which the person's fault has not contributed.

It should be noted that "damage" appears to be properly used in the sense of personal injuries or property damage and "loss" in the sense of economic loss, and therefore "harm" as noted above. Thus, fault under the *Negligence Act* is concerned with the first part of the compensation inquiry, not the second part.

E.D.G. v. Hammer, [2003] 2 S.C.R. 459 at para. 32

Cempel v. Harrison Hot Springs Hotel Ltd., [1997] B.C.J. No. 2853 (C.A.) at paras. 16 to 21

The *Negligence Act* in s. 4 converts what were previously several concurrent tortfeasors into joint and several concurrent tortfeasors. They are jointly and severally liable for the "damage or loss" (i.e., the harm not the damages).

Negligence Act, s. 4

Leischner v. West Kootenay Power and Light Co., [1986] B.C.J. No. 117 (C.A.)

Williams v. Kameka, [2009] N.S.J. No. 470 (C.A.) at para. 83

IV. Fault-Based Causation Analysis in Athey v. Leonati

In brief, the Supreme Court did not change the foregoing fault-based causation analysis. The Court made a point of stating it was applying a principle "entrenched in our law and there is no reason to depart from it."

Athey v. Leonati, *supra*, at para. 20

It is essential to the understanding of *Athey* that the Supreme Court held that the legal injury was a necessary cause of the one harm that resulted in the damages. This is the reason why the tortfeasors were fully liable for the damages resulting from the disc herniation and why the Supreme Court used the term indivisible injury. It may have been better to the development of the law if the Supreme Court used the term indivisible harm or damage. What this case is not about was two legal injury and harm resulting in overlapping symptoms.

Athey v. Leonati, *supra*, at paras. 41 and 43

V. Damages Assessment in Blackwater v. Plint

In brief, the Supreme Court did not change the foregoing damages assessment analysis. The Court made a point of stating it was applying an existing principle of law at para. 74:

> The calculation of damages for sexual assault to Mr. Barney is complicated by two other sources of trauma: (1) trauma suffered in his home before he came to AIRS; and (2) trauma for non-sexual abuse and deprivation at AIRS that was statute barred. In reality, all these sources of trauma fused with subsequent experiences to create the problems that have beset Mr. Barney all his life. Untangling the different sources of damage and loss may be nigh impossible. Yet the law requires that it be done, since at law a plaintiff is entitled only to be compensated for *loss caused by the actionable wrong*. It is the "essential purpose and most basic principle of tort law" that the plaintiff be placed in the position he or she would have been in had the tort not been committed: *Athey v. Leonati*, [1996] 3 S.C.R. 458, para. 32.
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> See also *Athey*, *supra*, at para. 41

What this case was about was two or more legal injury and harm resulting in overlapping symptoms. In such cases there is no such legal principle as overlapping symptoms leading to indivisible injury or indivisible damages.

VI. Post-Athey, Pre Bradley v. Groves

Initially our Court of Appeal interpreted *Athey* consistent with the foregoing. In the five member division decision in *T.W.N.A. v. Clarke*, the Court stated at para. 14:

> The way in which Canada has framed its first ground of appeal suggests that *Athey v. Leonati* established new principles of law, but this is not so. The decision merely summarizes and explains well-settled principles, including those applicable to causation and the assessment of damages.

T.W.N.A. v. Clarke, [2003] B.C.J. No. 2747 (C.A.) at paras. 14 to 43

Hutchings v. Dow, [2007] B.C.J. No. 481 (C.A.) at para. 15

BPB v. MMB, [2009] B.C.J. No. 1650 (C.A.) at paras. 42, 71 and 103

The lone exception prior to *Bradley v. Groves* and the initial assault on the foregoing well-settled principles of the law appears to be *Ashcroft v. Dhaliwal*, [2008] B.C.J. No. 1742 (C.A.). The decision in its narrowest scope is restricted to an application of the rule against double recovery in tort: see para. 26. Unfortunately other issues, including the indivisible injury issue, were raised and for reasons peculiar to the case, not given proper attention. Certainly, the decision could not overrule *Athey* and *Blackwater* which are Supreme Court of Canada cases and *T.W.N.A.* which was a five member division decision of the Court of Appeal. At para. 5, the Court of Appeal noted the trial judge found that the second (consecutive or successive) harm and legal injury merely aggravated damages from the first harm and legal injury. This was not an indivisible injury case, it was an overlapping symptoms case and merited a simple application of *Blackwater v. Plint*.

VII. Bradley v. Groves and Subsequent BC Cases

Bradley v. Groves, [2010] B.C.J. No. 1507 (C.A.)

The background facts show that the plaintiff was involved in two motor vehicle accidents and suffered harm (personal injury) in both. It appears that there was no connection between them such that they were consecutive or successive torts or the second harm was causally related to the first harm (see, for example, *H.L. v. Canada*, [2005] 1 S.C.R. 401 and *Larwill v. Lanham*, [2003] B.C.J. No. 2627 (C.A.)). There were liable tortfeasors who caused each harm such that there were two legal injuries. Applying the law as discussed above, without more this case should have merited a simple application of *Blackwater v. Plint*.

The learned trial judge found that the plaintiff's symptoms from the first accident were the same as the symptoms from the second accident and as a result concluded that these overlapping symptoms meant this was a case of indivisible injury. It is evident the learned trial judge conflated the two parts of the compensation inquiry. At paras. 17 to 25, the Court of Appeal also conflated the two parts and held that these overlapping symptoms meant this was a case of indivisible injury. The effect of such a change in the law is far reaching. It potentially eliminates the distinction between the two parts to the compensation inquiry. It overrules such legal principles as the thin skull rule and crumbling skull rule. It eliminates foreseeability/remoteness of damages principles and returns us not to the "direct damage" approach, but an approach that a tortfeasor is absolutely liable for damages incurred prior to any opportunity to consider whether the tortfeasor's impugned act may reasonably be foreseen as creating a risk of harm.

The Court of Appeal then moved on to overrule *Long v. Thiessen*, [1968] B.C.J. No. 1 (C.A.). It is not clear why this was thought necessary. Assuming the Court of Appeal was correct in concluding Ms. Bradley suffered an indivisible injury, *Long*, a divisible injury case, had no application. The only exceptional feature of *Long* was it was a divisible injury case that considered a fact situation where it was difficult to perform the required apportionment of damages. For other examples of such cases see the lines of authority associated with *Jobling v. Associated Dairies Ltd.*, [1981] 2 All E.R. 752 (H.L.) and *Baker v. Willoughby*, [1969] 3 All E.R. 1528 (H.L.).

Scoates v. Dermott, [2012] B.C.J. No. 663 (S.C.)

The plaintiff was involved in four accidents. Each accident involved harm and legal injury. The first accident was the most significant. The second was also significant. The third and fourth were relatively minor in comparison. The court determined that the legal injury from the first accident and the second accident were both necessary to cause disc herniations and a significant portion of the damages. These two accidents resulted in other harm, five years of pain, the disc herniations, two surgeries, total disability and a lost career with the ambulance service before the third and fourth accidents. The harm in the third and fourth accidents involved exacerbation of previous harm such that there was overlapping symptoms. Applying *Bradley v. Groves*, the learned trial judge held that the overlapping symptoms meant this was a case of indivisible injury and held that all defendants were jointly and severally liable for all non-pecuniary damages.

Inconsistent with the conclusion that this was an indivisible injury case, at para. 164, the learned trial judge held that indivisible injury that dictated joint and several liability for non-pecuniary damages does not mean there is "no reason in principle that a physically indivisible injury may not be divisible for the purposes of specific heads of damage [the learned trial judge meant "damages"]. This meant the jointly and severally liable third and fourth defendants were not liable for pecuniary damages that were incurred pre and post their accidents. The irony of this conclusion is the learned trial judge felt compelled to apply principles of damages assessment pre-*Bradley*.

Inconsistent with the conclusion that this was an indivisible injury case, at para. 169, the learned trial judge held that the second defendant was not liable for the pecuniary damages incurred before his legal injury. The irony of this conclusion is the learned trial judge felt compelled to apply a variation of the *Long v. Thiessen* approach to the assessment of pecuniary damages.

As can be seen from *Scoates*, there are problems with the *Bradley v. Groves* overlapping symptoms equals indivisible injury approach. It is illogical and unfair to find a defendant liable for damages that predate his or her legal injury/tortious act and therefore did not cause.

Bouchard v. Brown Bros. Motor Lease Canada Ltd., [2012] B.C.J. No. 1650 (C.A.)

This case applies the law pre-*Bradley v. Groves.* The learned trial judge held that the motor vehicle accident was a necessary cause of disc herniations and bulges in an otherwise prematurely degenerating spine. This caused a sudden onset of symptoms. The defendant was held to be liable for the resulting damages. In determining damages the learned trial judge held that there was a risk the plaintiff would have suffered serious low back problems in the absence of the accident which would have produced the same symptoms. The learned trial judge reduced the damages by 40%. Applying the unvarnished *Bradley v. Groves*, this was a case of overlapping symptoms equals indivisible injury and the defendant should have been liable for 100% of the damages.

The Court of Appeal did not take issue with the causation analysis but found that the reduction for the risk was too high and the learned trial judge erred in failing to reduce non-pecuniary damages to reflect the pre-existing condition. Again, applying the unvarnished *Bradley v. Groves*, there should not have been a reduction in non-pecuniary damages because there was overlapping symptoms.

Moore v. Kyba, [2012] B.C.J. No. 1796 (C.A.)

The plaintiff injured his right shoulder at work in August 2006, his interscapular area and upper back in a motor vehicle accident in July 2007 and his bicep in a fall in June 2008. The plaintiff and motor vehicle defendant both took the position the injuries were divisible. The plaintiff took the position the reason he left the Navy was the upper back pain. The motor vehicle defendant took the position the reason the plaintiff left the Navy was the right shoulder and biceps injuries. The learned trial judge's charge to the jury appears to have the aggravation of pre-existing symptoms equals indivisible injury new principle. As was the case in *Bradley v. Groves*, the Court of Appeal conflates the foregoing analysis where, at para. 37 it states that the concepts of divisible and indivisible injury are relevant in both parts of the compensation inquiry. At para. 43, the Court of Appeal appears to restrict the crumbling skull rule to indivisible injury. The court purports to provide *Bouchard*, *supra*, in support, but that decision says nothing of the sort. At para. 45, the Court of Appeal complicates matters further by referring to a situation where the three obviously divisible injuries in this case could somehow "combine[] to produce an indivisible injury for which the appellant [motor vehicle defendant] was liable." The court may have been alluding to those cases such as *Jobling*, *supra*, that address difficult damage apportionment situations.

White v. Gebricke, [2013] B.C.J. No. 445 (S.C.)

The plaintiff was involved in a slip and fall and suffered significant injuries. She was involved in two subsequent motor vehicles accidents within a month of each other and which were the subject matter of the same action and trial. The plaintiff settled her claims arising out of the slip and fall and must have used a BC Ferry type of agreement which included pleading in the motor vehicle action that she waived any right to recover any portion of her damages found to be attributable to the slip and fall. The plaintiff argued her motor vehicle accident injuries were divisible so that they would be attributed only to the motor vehicle defendants. The defendants argued the plaintiff's motor vehicle caused injuries involved minor aggravation of the slip and fall injuries and were divisible from the slip and fall injures. As noted above, post *Bradley v. Groves* such an argument is no longer available in BC. The learned trial judge held that a number of the plaintiff's injuries were caused in the slip and fall and were therefore divisible. Some injuries were caused in the first motor vehicle accident and were divisible. Similarly so for the second motor vehicle accident. The aggravation of some of the slip and fall injuries in the motor vehicle accidents were held to be indivisible and not compensable because of the settlement. Thus, the plaintiff was not compensated for what used to be compensable injuries. The plaintiff was fortunate that this was only a minor source of damages in the motor vehicle actions. If it were otherwise the plaintiff would have be significantly undercompensated.

VIII. Defending Claims in Light of Bradley v. Groves

The appellant in *Bradley v. Groves* sought leave to appeal to the Supreme Court of Canada. It is the writer's understanding that the plaintiff chose not to take part in the appeal. This fact and the fact that the second tortfeasor was never a real party prior to the Court of Appeal decision may have been a factor in the decision to refuse leave. Assuming the foregoing analysis is a correct assessment of the law, the Supreme Court of Canada will eventually have to address *Bradley v. Groves* and will either have to overrule it or confine it to its "peculiar facts," or overrule some of its own decisions or confine them to their "peculiar facts." Until then, counsel will have to do the best they can to reconcile the law pre and post *Bradley v. Groves*.

In any particular case, there will be a number of factors to consider before concluding whether to argue divisible versus indivisible injury:

(a) Where the defendant has unlimited resources and such a defendant determines that a prior tortfeasor has obtained a release which contains an agreement on the plaintiff's part not to make claim or take proceedings against a person who may claim contribution or indemnity, such a defendant should argue indivisible injury and issue third party proceedings against the released tortfeasor compelling that tortfeasor to apply to have the plaintiff's claim dismissed.

(b) Where the situation is the same as "a," except for a BC Ferry type of agreement and amendment to the pleadings, such a defendant should argue indivisible injury and that there is no claim for the second legal injury (*White*).

(c) Where the situation is the same and the plaintiff has obtained judgment against the other tortfeasor, the defendant should argue indivisible injury and as a jointly liable defendant judgment against one jointly liable defendant releases all (*Law and Equity Act*, R.S.B.C. 1996, c. 253, s. 53 and *Drucker, Inc. v Gui*, [2009] B.C.J. No. 808 (S.C.)).

(d) Where the defendant does not have unlimited resources, there may be occasions when the defendant will join with the plaintiff in an effort to prove indivisible injury against another tortfeasor and jointly and severally liable so as to bring more resources to the table. Serious consideration must be given to whether arguing indivisible injury could "backfire" on such a defendant.

(e) Where the insured defendant has sufficient coverage such that the insurer does not have to be concerned about arguing indivisible injury "backfiring" on the insured defendant and there is another tortfeasor with resources or insurance, the insurer may wish to argue indivisible injury to share the exposure to pay damages.

(f) Where there is benefit to a defendant in seeking to deduct an earlier settlement, such a defendant may wish to argue indivisible injury (*Ashcroft*).

(g) Assuming *Moore* does stand for the proposition that the crumbling skull argument is restricted to indivisible injury, where there is a significant pre-existing condition, such a defendant should argue indivisible injury.

(h) Where the plaintiff is not contributory negligent in the defendant's action, but is significantly contributory negligent in another action, the defendant may wish to argue indivisible injury and that the defendant gets the benefit of the plaintiff's several liability under s. 1 of the *Negligence Act*.

In summary, the divisible versus indivisible injury issue has unsettled the law on the assessment of damages. Until such time as the Supreme Court of Canada addresses the issue, there will continue to be a significant amount of uncertainty and plaintiffs being undercompensated compared to the past and defendants being liable for damages that they did not caused compared to the past.