LIABILITY ISSUES

The Court assessed liability between a Plaintiff (cyclist) who failed to stop at a stop sign and the driver of a vehicle who did not clearly see the cyclist as a result of a "blind spot" created by a pillar in his vehicle and declined to award damages for injuries related to previous conditions for a crumbling skull plaintiff.

***Heuring v. Smith*, 2018 BCSC 233**

FACTS AND ISSUES:

An action was commenced by Heuring for damages arising from injuries as a result of a motor vehicle accident that happened while he was cycling in October 2011.

Heuring argued that he had stopped approximately 10 feet back from the stop sign or stop line before entering the intersection, and that he had ridden his bicycle through the crosswalk without dismounting.

The Defendant motorist Smith denied liability. Alternatively, Smith argued that Heuring should be held 75% at fault for the accident. Smith submitted that Heuring had not followed traffic rules including disobeying a stop sign, illegally riding across an intersection and veering into the crosswalk where Smith's vehicle came into contact with Heuring. Smith argued that he was proceeding slowly and carefully through the intersection, but had not seen Heuring because of a pillar "blind spot" in his vehicle to observe. Heuring submitted liability should be apportioned in the range of 5 – 15% against him.

Heuring claimed for non-pecuniary damages, past income loss, reimbursement for lost sick benefits, loss of income earning capacity (past and future), cost of future care, and special damages.

Heuring, 59 at the time of the accident, was employed as a steamfitter in a hospital and also took separate union jobs. Heuring returned to work full-time in February 2012, but had some residual limitations and was unable to take an available union job.

He testified he had intended to retire from the hospital in the summer of 2012 to focus solely on union work, but that changed after the accident. Heuring argued that prior to the accident he did not suffer from any ongoing physical complaints, but afterwards had pain in his low back, hips and right knee. He claimed his ability to partake in recreational activities and household chores was limited.

HELD: Liability as 40% to the plaintiff Heuring and 60% against the defendant

Smith. The total award was $112,244, to be reduced by 40% to $67,346.

Apportionment of Liability

a. The concept of contributory negligence was found to have been properly described in John G. Fleming, ***The Law of Torts***, 9th ed. (Sydney: LBC Information Services, 1998) at 302, as follows:

> Contributory negligence is a plaintiff's failure to meet the standard of care to which he is required to conform for his own protection and which is a legally contributing cause, together with the defendant's default, in bringing about his injury. The term "contributory negligence" is unfortunately not altogether free from ambiguity. In the first place, "negligence" is here used in a sense different from that which it bears in relation to a defendant's conduct. It does not necessarily connote conduct fraught with undue risk to others, but rather failure on the part of the person injured to take reasonable care of himself in his own interest. ... Secondly, the term "contributory" might misleadingly suggest that the plaintiff's negligence, concurring with the defendant's, must have contributed to the accident in the sense of being instrumental in bringing it about. Actually, it means nothing more than his failure to avoid getting hurt...

b. Justice Morellato at para. 66 adopted the principle outline in ***Hynna v. Peck***, 2009 BCSC 1057 (CanLII) at para. 88, where it was held that, in such cases, the court is not to assess degrees of causation but, rather, degrees of fault:

> In assessing apportionment, the Court examines the extent of blameworthiness, that is, the degree to which each party is at fault, and not the degree to which each party's fault has caused the loss. Stated another way, the Court does not assess degrees of causation, it assesses degrees of fault: ***Cempel v. Harrison Hot Springs Hotel Ltd.***, 1997 CanLII 2374 (BC CA), [1997] 43 B.C.L.R. (3d) 219, 100 B.C.A.C. 212.

c. The Court further noted that the Alberta Court of Appeal in ***Heller v. Martens***, 2002 ABCA 122 (CAnLII) in assessing relative degrees of fault considered a number of factors:

    1. The nature of the duty owed by the tortfeasor to the injured person...

    2. The number of acts of fault or negligence committed by a person at fault...

    3. The timing of the various negligent acts. For example, the party who first commits a negligent act will usually be more at fault than the party whose negligence comes as a result of the initial fault...

    4. The nature of the conduct held to amount to fault. For example, indifference to the results of the conduct may be more

blameworthy... Similarly, a deliberate departure from safety rules may be more blameworthy than an imperfect reaction to a crisis...

5. The extent to which the conduct breaches statutory requirements. For example, in a motor vehicle collision, the driver of the vehicle with the right of way may be less blameworthy...

On the issue of liability, the Court held that both Heuring and Smith had departed from their respective standards of care and fault was apportioned to each. The plaintiff did not take reasonable care for his own safety. Heuring violated ss. 183(2)(b) and 186(a) of ***Motor Vehicle Act*** and the resulting heightened common law duty of care. Smith should have also have taken greater care. Even though Heuring was not supposed to be cycling though a crosswalk, this was precisely the place where a motorist could reasonably expect an encounter with another user of the road.

Causation

a. The Court held that the evidence established that Heuring's hip and back pain, including higher degree of discomfort and pain in his left hip and the issue of his legs "giving out", existed well before the accident and was continuing up to the time of the accident. The accident was held to have caused soft tissue injuries, but it was not established that the accident accelerated Heuring's pre-existing condition in his hips or back. Expert evidence that Heuring suffered soft tissue injury that did not render his osteoarthritic condition to become symptomatic was accepted by the Court.

b. The Court was not persuaded that the accident caused, contributed to, or accelerated plaintiff's pre-existing osteoarthritis. The Court was persuaded that Heuring's circumstances denoted a "crumbling skull" rather than "thin skull" scenario.

c. The Court held that 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. (***Athey v. Leonati***, [1996] 3 S.C.R. 458 at paras. 35).

COMMENTARY:

The crumbling skull theory is normally presented by defendants who say that the compensation to be paid to the claimant should be limited on account of the fact that the claimant would have suffered symptoms even absent the accident.

The theory takes its name from the idea that a person with a skull that was starting to crumble even before the accident, and would have continued to crumble after the time of the accident, is entitled to no, or reduced, compensation.

Symptoms need not be present before the accident for crumbling skull to apply, but no deduction will be made on account of the crumbling skull principle unless the defendant can prove that the claimant would have suffered symptoms even absent the accident:

> An asymptomatic non-tortious precondition, while not relevant to causation, may be taken into account in assessing contingencies, whether the plaintiff would have become symptomatic at some point as a result of the pre-condition if the tort had not occurred. (*Larwill v. Lanham,* 2003 BCCA 629 at para. 22)

Crumbling skull principles were addressed by Justice Moen in ***Dushynski v Rumsey****,* 2001 ABQB 513 at paras. 167-168:

> "Intervening events that would have caused the same injury even if the negligence had not occurred are to be considered when assessing damages…."
>
> "The principles underlying the application of intervening events is that the plaintiff is to be put in the same position that he or she would have been in, but not a better position…."

Had the Court found Heuring to be a "thin skull" victim it would have characterized him as an individual who was vulnerable to chronic pain syndrome, but had not been suffering from it. In that case, Smith would have been liable for the full extent of the injuries suffered to Heuring.

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 anticipated deterioration can be taken into account in reducing the overall award.

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