THE LAW OF CAUSATION: A REVIEW AND AN UPDATE

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By: Andrew C. Murray
Lerners LLP
Barristers & Solicitors
PO Box 2335
London Ontario N6A 4G4
Phone: 519.640.6313

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Introduction

This paper reviews the current state of the law of causation in personal injury actions.

Causation - Background and Overview

In 1996, the Supreme Court of Canada released its decision in *Athey v. Leonati*[1]. This case related to an individual, Jon Athey, who had suffered injuries in two separate car accidents in 1991 which resulted in pain and stiffness in his back. His previous medical history included minor back complaints going back to 1972.

Mr. Athey was able to return to the lighter aspects of his employment as an autobody repairman and shop manager soon after the accidents, only being restricted from the heavy labour components of the job. Because his recovery was progressing, his doctor suggested that he return to his regular exercise routine. Mr. Athey went to a health club and, while stretching, felt a "pop" in his back accompanied by immediate pain. Mr. Athey had suffered a herniated disc. He ultimately underwent a discectomy. The only issue before the Supreme Court of Canada was whether the disc herniation was caused by the injuries sustained in the car accidents or whether it was attributable to Mr. Athey's pre-existing back problems.

The seven-judge panel was comprised of Chief Justice Lamer and Justices La Forest, Sopinka, Cory, McLaughlin, Iacobucci, and Major. The majority decision was written by Major J. There was no dissent. Consequently, most have viewed *Athey v. Leonati* as the definitive decision on the law of causation.

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[1][1996] 3 S.C.R. 458

While a detailed review of the decision is beyond the scope of this paper, in summary, the court reviewed the following issues:

- general principles of causation
- multiple tortious causes
- adjustments for contingencies
- independent intervening events
- the thin skull and "crumbling skull" doctrines
- the loss of chance doctrine

An annual re-reading of the entire case is a must for any personal injury lawyer. You will always be reminded of a subtlety or nuance that has been forgotten with the passage of time.

Having considered the issues noted above and the specific facts relating to Mr. Athey, the court developed a summary and framework of applicable principles:

1. 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:
    a. If the disc herniation would likely have occurred at the same time, without the injuries sustained in the accident, then causation is not proven.
    b. If it was necessary to have <u>both</u> the accidents <u>and</u> 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.

c. 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.

2. The trial judge made a finding that the accidents constituted a material contribution to the subsequent disc herniation. This finding of material contribution was sufficient to render the defendant fully liable for the damages flowing from the disc herniation

3. A finding of 25% contribution falls outside the *de minimus* range and is, therefore, a material contribution. It is sufficient to trigger liability.

4. The court viewed the appeal as a straightforward application of the thin skull rule. Mr. Athey's 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.

5. 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.

Application of *Athey* by the Ontario Court of Appeal

Alderson v. Callaghan

In *Alderson v. Callaghan*[2], the central issue on the appeal was whether the trial judge misdirected the jury on the issue of contributory contribution. At trial, liability had been conceded and the only live issue was damages. The plaintiff, Linda Alderson, claimed she suffered serious brain damage in a car accident. The defence took the position that her extensive brain damage was due to a series of post-accident assaults inflicted by her common-law spouse, and a further assault inflicted by a stranger.

The trial judge instructed the jury as follows:

> Other evidence that you will want to take into account is that of the members of her family and of her friends. They have indicated that in their observation the motor vehicle accident was something of a watershed. We cannot but be struck by the photograph of the plaintiff which is Exhibit 13 and the comparison between her appearance in that photograph and as you see her today. That there has been a change seems to be generally agreed. The question that you have to consider is whether or not that change is due to this accident.
>
> Now, I would say to you that if you were of the view that this condition were directly attributable to this accident, the figure suggested of $200,000 for general damages by Mr. Sternberg would not be too high. It would be generous, and perhaps you might feel inclined that it should be somewhat less than that, but in my view that figure does not seem too large to me if you accept that this condition is directly attributable to the accident. It is possible for you, however, to come to the conclusion, and I would say this as much as anything based on Dr. Horsey's evidence, that you may have a cumulative effect. He referred to the boxer who receives a number of blows in the head over a period of time. This could well mean

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[2](1998), 40 O.R. (3d) 136

> that you could find that the truth lies somewhere in between the two positions and that there may have been some contributing factor from this accident and that the accident does not tell the whole story. [Emphasis added by Moldaver J.A.]

On appeal, it was held that the instruction to the jury was not in accord with the principles of statutory causation set forth in *Athey v. Leonati*. Moldaver J. stated:

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

Mizzi v. Hopkins

Mizzi v. Hopkins[3] was a jury case involving local counsel. The appeal concerned the adequacy of the trial judge's instruction to the jury on contributory causation for damages in a civil action arising from a car accident.

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[3]The case was on appeal from the judgment of Justice Douglas Coo of the Superior Court of Justice, sitting with a jury. Trial counsel was Nick Fursman for the plaintiff and Vince Calzonetti for the defence. Appellate counsel was Jim Virtue for the plaintiff/appellant and Earl Cherniak for the defendant/respondent. The Court of Appeal panel was comprised of Cronk J.A., Borins J.A. and Armstrong J.A. and the unreported decision was released May 7, 2003.

On appeal, the appellant argued that the trial judge erred by failing to instruct the jury that she was entitled in law to full compensation from the respondents for her overall condition following the accident if the jury was satisfied that her condition was the cumulative result of both her pre-existing condition and the accident, and that the accident materially contributed to her overall post-accident condition. The appellant further argued that the trial judge erred by failing to instruct the jury that a "material contribution" is a contribution which is not "*de minimis*".

The Ontario Court of Appeal reviewed *Athey v. Leonati* in its decision, interpreting the meaning of various paragraphs from the decision. For the majority, Cronk J. A. said:

> *Athey v. Leonati* confirms that once it is proven that a defendant's negligence was a cause of the plaintiff's injury, whether demonstrated directly or by inference of a causal connection, a damages award should not be reduced to recognize the contribution of non-tortious causes to the plaintiff's loss. In establishing that principle, the Supreme Court restated, and affirmed, many basic tort law principles and the earlier judgment of that court in *Snell v. Farrell*, [1990] 2 S.C.R. 311.

The Ontario Position

Following upon *Athey v. Leonati*, the Ontario Court of Appeal in 1998 and again in mid-2003 has stated that, so long as a tortious activity has materially contributed to a plaintiff's loss, the damages award should not be reduced to take into account non-tortious contributions to the plaintiff's loss. The Ontario Court of Appeal has been clear in stating that, so long as the negligent cause of the loss is beyond the *de minimus* range, the entirety of the plaintiff's losses are compensable.

British Columbia - Recent Developments

The British Columbia Court of Appeal has recently engaged in its own examination and interpretation of *Athey v. Leonati. T.W.N.A. v. Canada (Ministry of Indian Affairs)*[4] related to sexual assaults of students at native residential schools in the 1960s and 1970s.

The B.C. Court of Appeal undertook a thorough analysis of the law of causation and the assessment of damages. Key findings include:

- Determining the cause of loss and damage must be kept separate from the assessment of damages to compensate for that loss and damage, since different principles govern the two questions.
- The thin skull rule is a rule of liability relating to legal causation. The court referred to *Athey v. Leonati*, quoting with favour the notion that the defendant must take the plaintiff as he finds him.
- Once causation has been proven, the tortfeasor is fully liable for whatever damage his or her wrongful conduct has caused the plaintiff. The extent of the defendant's liability is determined in an assessment of damages.
- A pre-existing condition, whether it is quiescent or active, is part of the plaintiff's original position. Both latent and active pre-existing conditions must be taken into account. The court noted that in *Athey v. Leonati*, there was no finding of any measurable risk that the disc herniation would have occurred with the car accidents, and there was therefore no reason to reduce the award to take into account this risk. It was for this reason alone that the plaintiff was entitled to full compensation for his losses.

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[4]2003 BCCA 670, judgement released December 5, 2003

- Unrelated intervening events must be taken into account in the same was as pre-existing conditions. If such an event would have affected the plaintiff's original position adversely in any event, the net loss attributable to the tort will not be as great and damages will be reduced proportionately.

Having outlined these general principles of causation and damage assessment, the B.C. Court of Appeal reviewed the trial decision and determined that the trial judge conflated the questions of liability and compensation in his analysis. Once he determined that the sexual assaults were a material cause of the plaintiffs' psychological difficulties, he wrongly concluded that pre-existing and inherent conditions and unrelated intervening events were irrelevant to the assessment of damages unless it could be shown with certainty that they would have led to the plaintiffs' problems in any event.

The B.C. Court of Appeal concluded that the trial judge erred by essentially putting the plaintiffs into a position that was even better than their original position, because it assumed no impact from the pre-existing contributing conditions or independent intervening causal events. The Appeal Court said that it was wrong for the trial judge to conclude that non-tortious causal factors were irrelevant unless they had already become manifest in a disabling condition and unless the defendants could prove that they would have inevitably led to the plaintiffs' present conditions.

The trial judge had referred himself to an earlier B.C. Court of Appeal decision, *M.(M.) v. F.(R.)*[5] in making his findings on causation and damages. The B.C. Court of Appeal overruled itself, saying:

> I have concluded, with respect, that on this issue the decision of this court is in error and should be overruled on the ground that it does not accord with the principles of assessment of damages as laid down in *Athey v. Leonati*. (When the Court said),
>
> > "....Even if it could be said that other non-tortious causes contributed to the plaintiff's condition, so long as the tort was a material contribution to the harm..., the plaintiff is entitled to full recovery from the wrongdoers"
>
> (it) misapplie(d) the finding in *Athey v. Leonati* by overlooking the fundamental principle in damages that a plaintiff is not entitled to be put in a better position than his or her original position: the plaintiff is entitled to "full recovery" only for the damage caused by the wrongful conduct, and not for damage or loss that would have occurred in any event.

What's Next?

T.W.N.A. v. Canada (Ministry of Indian Affairs) stands in conflict with the Ontario Court of Appeal decisions in *Alderson v. Callaghan* and *Mizzi v. Hopkins.* The Ontario cases have interpreted *Athey v. Leonati* very widely while the B.C. Court of Appeal has adopted a much narrower interpretation. Since 1996 when *Athey* was released, no further cases of this nature have made their way to the Supreme Court of Canada. Rumour has it, however, that Justice Major, who penned the *Athey* decision, has been concerned about the extent to which the *Athey* has been applied since its release.

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[5](1997), 52 B.C.L.R. (3d) 127

While the plaintiffs in *T.W.N.A.* had no stomach for an appeal[6], there is at least one companion action in which leave to appeal to the Supreme Court of Canada has already been granted and another companion action in which leave has been sought (by both the plaintiffs and the defence). There is a high chance that at some point in the future this matter will be back before the Supreme Court of Canada for clarification. Watch out for this developing area of the law.

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[6]I am grateful to Diana Soroka, one of the members of the plaintiff's legal team, for speaking to me about this case.