

Coverage, Causation
and Remoteness:
*A Careful Analysis
Before The Question
Becomes Simply “How
Much?”*

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OVERVIEW

PART 1: Causation and third party liability (coverage):

- *Amos*
- *Herbison and Vytlingham*
- *Harder Estate, Russo, Kopas, Lefor and Hannah*
- Concurrent Coverage

PART 2: Causation, Remoteness and Foreseeability:

- Elements of a negligence action
- Where the psychological meets the physical
- *Mustapha* and actionable injuries

Causation in Third Party Liability Context...

Legislative source

- **239.** (1) Subject to section 240, every contract evidenced by an owner's policy insures the person named therein, and every other person who with the named person's consent drives, or is an occupant of, an automobile owned by the insured named in the contract and within the description or definition thereof in the contract, against liability imposed by law upon the insured named in the contract or that other person for loss or damage,
 - (a) **arising from the ownership or directly or indirectly from the use or operation of any such automobile;** and
 - (b) resulting from bodily injury to or the death of any person and damage to property. R.S.O. 1990, c. I.8, s. 239 (1).

Use/Operation of a Motor Vehicle - *Amos*

- In *Amos v. ICBC* (1995 S.C.C.), the claimant was attacked and shot at by a gang of six people while driving his van. The question before the court was whether Mr. Amos was entitled to accident benefits under the first party no-fault regime in British Columbia.

Amos v. ICBC

Amos Test:

1. Did the accident result from the ordinary and well-known activities to which automobiles are put?
[Purpose Test]
2. Is there some nexus or causal relationship (not necessarily a direct or proximate causal relationship) between the appellant's injuries and the ownership, use or operation of his vehicle, or is the connection between the injuries and the ownership, use or operation of the vehicle merely incidental or fortuitous? [Causation Test]

Amos v. ICBC

- Since Mr. Amos was driving his van down the street, the accident clearly resulted “from the ordinary and well-known activities to which automobiles are put.” Accordingly, the Court found that the first part of the test had been satisfied.
- As to the second part of the test, the Court concluded that, although a bullet rather than a motor vehicle, was the cause of the injury, a motor vehicle need not be the instrument of the injury to satisfy the causal connection requirement. The Court indicated that the shootings were not random, but were the result of the assailants’ failed attempts to gain access to the insured’s vehicle.
- Coverage was found to exist.

The *Amos* Test Applied

- Since *Amos*, two decisions of the Supreme Court of Canada have considered and modified the *Amos* test:

Herbison et al. v. Lumbermens Mutual Casualty Company
(2007 SCC 47)

Vytlingham (Litigation Guardian of) v. Farmer (2007 SCC
46)

Herbison v. Lumbermens Mutual Casualty Company (2007 SCC 47)

- Mr. Wolfe was driving to his hunting stand and when he got out of his vehicle, loaded his hunting rifle, he fired a shot at a “deer”
- Unfortunately, the “deer” was Mr. Herbison, who was catastrophically injured and permanently disabled
- Did these events constitute use/operation?

Vytlingham (Litigation Guardian of) v. Farmer (2007 SCC 46)

- In *Vytlingham*, a vehicle was used to transport boulders to an overpass bridge, which were then dropped on Mr. Vytlingham in his car below, who sustained catastrophic and permanent injuries.
- Did these events constitute the use/operation of an automobile?

What did the Supreme Court do?

- Overturned the Court of Appeal decisions in both *Herbison* and *Vytlingham*
- Arguably a new test for coverage emerges in the third party liability context:
 1. Is the claim in respect of a tort committed in the course of using a motor vehicle as a motor vehicle and not for some other purpose? [**The Purpose Test**]
 2. Is there an unbroken chain of causation linking the injuries to the use and operation of the tortfeasor's vehicle which is shown to be more than simply fortuitous or "but for"? [**The Causation Test**]

The Supreme Court's Approach in *Herbison*

- First branch of test easily disposed with: vehicle used for transportation = ordinary use.
- Second branch – causation – this was the claimant's difficulty:
 - The tortfeasor interrupted his motoring to hunt
 - No complaints about the use or operation of the vehicle, but complaints about the gunshot. The Court agreed that the addition of “directly or indirectly” to s. 239 relaxed the causation requirement.
- Still, a causative link or *unbroken* chain must be found.

The Supreme Court's Approach in *Vytlingham*

- Supreme Court decided that the tort (dropping the rocks) was an intervening event wholly “severable” from the use and operation of the third party vehicle.
- While acknowledging that the defendant’s use of his car contributed “in some manner” to his ability to commit the tort, Binie J. held that he did not commit the tort while in the capacity of a “motorist.” The the act of throwing the rock was “entirely severable” from the defendant’s use or operation of his vehicle.
- Liability arose from dropping the rocks, and not carrying or transporting the rocks.

The Supreme Court's Approach in *Vytlingham*

- According to Binnie J.:

...no amount of carrying rocks all over the country for whatever purpose gives rise to one iota of civil liability. Liability comes from dropping those rocks.

- The “but for” test was specifically rejected for the stricter requirement of an unbroken causal chain:

There must be an unbroken chain of causation linking the conduct of the motorist as a motorist to the injuries in respect of which the claim is made.

Lessons from *Vytlingham* and *Herbison* re: “use or operation”

- **Purpose Test: Fairly easily satisfied.**
 - Tort committed in the course of using a motor vehicle as a motor vehicle and not for some other purpose.
- **Causation Test:**
 - An unbroken chain of causation linking the injuries to the use and operation of the tortfeasor’s vehicle which is shown to be more than simply fortuitous or “but for.”
 - To break the chain, the intervening act must be severable from the use of the vehicle as a vehicle.

Post – *Herbison/Vytlingham*: the Causation Test Applied

- The Supreme Court appears to have called for and indeed triggered a re-evaluation of third party liability coverage in the automobile context.
- What we are now seeing are lower courts taking seriously the notion that there must be an unbroken chain of causation between the use/operation of the wrongdoer's motor vehicle and the plaintiff's injuries.

ING Insurance v. Harder Estate, [2008] A.J. No 579

- The action was commenced by the mother of the deceased child, following an incident during which the father shot and killed his son while the pair sat in the cab of the insured truck.
- Decision of the motions judge, who found that the actions of the insured **did** constitute “use or operation” of insured vehicle, was released prior to Supreme Court’s ruling in *Herbison* and *Vytlingham*.

ING Insurance v. Harder Estate, [2008] A.J. No 579

- Alberta Court of Appeal found that there was no unbroken chain of causation connecting the operation of the truck to the shooting of the insured's son. ING had no duty to defend or indemnify insured.
- Court considered the following question, as posed by *Herbison*: *whether the insured's shooting of his son was "fairly within the risk created by this use or operation of the insured truck, or did the use of the truck merely create an opportunity in time and space for the damage to be inflicted..."*

ING Insurance v. Harder Estate, [2008] A.J. No 579

- According to Justice Berger:

No amount of buckling Cole into a car seat and carrying him to a remote location for whatever purpose gives rise to one iota of civil liability. Liability comes from shooting Cole...Harder interrupted his motoring to kill Cole and himself.

Ms. Manuel does not complain about Harder's use and operation of the insured truck. She complains about the gunshot that killed Cole.

Russo v. John Doe, [2008] O.J. No. 2230

- Ms. Russo drove her car into the parking lot of a California Sandwiches restaurant and parked it, leaving the engine running and her daughter in the car while she entered the restaurant.
- She was shot while in the restaurant by the assailants, who shot from an automobile that was driving through the parking lot. She sustained permanent injuries that rendered her a paraplegic.
- She sought under/uninsured motorist coverage from her own insurer, which would be available to her only if the assailants' could have looked to the insurer of the car they were shooting from for third liability coverage.

Russo v. John Doe, [2008] O.J. No. 2230

- According to Allen J. the Supreme Court limited the types of circumstances and acts involving a motor vehicle that can attract liability under s. 239(1) in *Herbison and Vytlingham*.
- On the facts before her, Justice Allen found that the nature of *the involvement of the assailants' vehicle that caused Russo's injuries placed her claim outside the scope of s. 239(1)*.
- No reason to distinguish *Herbison and Vytlingham*; held that the shooting in *Russo* was an independent act that broke the chain of causation.

Russo v. John Doe, [2008] O.J. No. 2230

- Although there was no doubt the assailants' vehicle "contributed in some manner" to Russo's injuries, the shooting was separate and independent from the use and operation of the vehicle.
- The fact that the assailants shot the gun from a motor vehicle did not make that act a "motoring activity" that could attract indemnification. Assailants' vehicle merely provided the situs for the commission of the tortious act.
- Failed to establish an unbroken chain of causation linking injuries to the use and operation of the assailants' vehicle "that was more than simply incidental or fortuitous or "but for."

Russo v. John Doe, (2009) 95 O.R. (3d) 138 (C.A.)

- Decision upheld by the Ontario Court of Appeal.
- Purpose Test met: Motor vehicle was used to transport passengers and apparatus from one place to another which was a well known and ordinary use of a motor vehicle.
- Causation Test not met: Although drive-by shooting, vehicle merely “created an opportunity in time and space for damage to be inflicted.”

Kopas v. Western Assurance Company,
[2008] O.J. No. 4057

- Jordan Kopas arrived at a local festival in a car with his father and grandfather. As they got out of the car, the adults started unloading the car. A train was passing by just outside the parking area. Jordan went over to watch it by the chain link fence that separates the parking lot from the train tracks.
- As he started back to his father and grandfather, another car backed out of a parking space and ran over young Jordan, killing him.

Kopas v. Western Assurance Company,
[2008] O.J. No. 4057

- Issue was whether the father's automobile insurance policy responded to the claims in negligence against the father and grandfather for failure to supervise.
- They got to the parking lot by car. They were distracted by unloading the car. Was there a sufficient causal nexus between their use of the vehicle and the boy's fatal injuries?

Kopas v. Western Assurance Company, [2008] O.J. No. 4057

- Coverage was not found. According to Corbett J.:

I am satisfied that “use and ownership” of a vehicle includes taking reasonable care to ensure that passengers may disembark safely...But in the circumstances of this case, I do not see how that duty would extend past the immediate area of the car in the parking lot. Jordan safely navigated his way across the lot to the chain link fence...He was then safely “landed” from the car, and supervising him thereafter was a duty that arose from general duties to take care of small children, and not a special duty imposed upon a “motorist.”

Kopas and Lefor – the Vytlingham/Herbison divide

- Interesting to compare facts of *Kopas* with *Lefor (Litigation Guardian of) v. McClure* ([2000] O.J. No. 2244) as post and pre-*Herbison/Vytlingham* decisions
- In *Lefor*, a mother was dropping her children off at their grandmother's house. She parked across the street and was crossing with her children when one of them darted forward and was struck by a passing vehicle.
- Court of Appeal found third party liability coverage for claims against mother for failure to supervise under mother's auto policy.

Kopas, Lefor and Moore's Taxi

- *Lefor* can be contrasted with the Supreme Court's decision in *Law Union & Rock Insurance Co. v. Moore's Taxi Ltd.* ([1960] SCR 80) (*Moore's Taxi*), where a bus driver dropped children off on the wrong side of the street and a child was struck while crossing the street to get to his house.
- Court found that the driver was covered by Moore's CGL policy. The "auto" exclusion was held not to apply as a different duty (non-auto-related) applied after the car was stopped that had nothing to do with the use and operation of the vehicle.
- *Lefor* (post *Amos*) is difficult to reconcile with *Moore's Taxi*

Kopas, Lefor and Moore's Taxi - the Vytlingham/Herbison divide

- In *Kopas*, the Court noted this evolution and said that the scope of indemnity had been clarified by the Supreme Court in *Herbison* and *Vytlingham*, and that the ambit of coverage was limited temporally, spatially, and in terms of “direct or indirect” causative links.

Use/operation and the speed of the automobile...

- In *Chan v. ICBC*, [1996] B.C.J. No. 17 (B.C.C.A.) the plaintiff was injured while riding as a passenger in a car when she was struck by a brick thrown from an oncoming vehicle. The British Columbia Court of Appeal found the brick throwing was not “isolated” from the driving of the assailant's car, and found coverage.
- Although *Chan* was disapproved of by the Supreme Court in *Herbison* (that the throwing of the brick was an intervening event), no evidence was led suggesting that the closing speeds of the car (and brick) would have made a difference.
- This line of argument may still be in play...

Hannah v. John Doe, [2008] B.C.J. No. 1580

- Insured was injured when a person leaning out of a motor vehicle grabbed her purse and she was dragged to the ground. The van did not run into her or bump her. The van did not strike her. It was the passenger that grabbed the purse, and his arm was outside the front passenger seat window.
- It was found that the act causing the alleged injury to the insured was directly caused, and not isolated from or severed from, the use of the vehicle as a vehicle.

Concurrent Coverages?

- Need to consider if there is concurrent coverage of CGL and auto policies?
- Less likely an issue after the Ontario Court of Appeal's decision in *CUMIS General Insurance Co. v. 1319273 Ontario Ltd.*, 2008 ONCA 249, which put the Supreme Court's decision in *Derksen v. 539938 Ontario Ltd.*, 2001 SCC 72, in a very narrow corner.

Derksen and concurrent coverage

- *Derksen* dealt with whether a CGL insurance policy provided coverage for damages caused when a steel base plate flew off a tow bar attached to the back of a supply truck, killing one child and severely injuring three others. During a workplace clean up, an employee had left the base plate on the tow bar instead of storing it in the truck.
- Supreme Court concluded there was concurrent coverage for both the negligent cleanup of the work site which was non-automobile related, and for the negligent operation of the truck, which was automobile-related negligence.

Derksen, Cumis and concurrent coverage

- In *Cumis* a motorist was struck by a ladder when it flew off a truck. Plaintiff sued, alleging that in cleaning up a work site, the ladder was negligently loaded and stored on the truck.
- On Appeal, *Cumis*'s refusal to defend was upheld on the basis that the plaintiff suffered an automobile-related injury and that *Cumis*' policy with the insured excluded coverage for automobile-related risks. No concurrent coverage.
- *Derksen* was very artificially distinguished

CAUSATION, REMOTENESS AND FORESEEABILITY:

Is Mustapha the new frontier?

Elements of a Negligence Action

Four Elements are required to prove negligence:

1. Is a **duty of care** owed by defendant to plaintiff?
2. Have the actions of the defendant breached the **standard of care** owed to the plaintiff?
3. Has the plaintiff suffered **damages as a result of** (but for or material contribution?) the breach of duty by the defendant?
4. Was the damage **reasonably foreseeable** (i.e. remoteness of harm and damages)

Breach of the Standard of Care

- This is where the usual liability fight occurs, i.e. who ran the red light, who crossed the centre line.
- Usually involves engineers and other experts to estimate whether the requisite standard was breached.
- A case of note is *Garratt v. Orillia Power*, 2008 ONCA 422, where the plaintiff was injured when a spider rope attached to an electrical conductor struck her car as she emerged from an overpass. Workers employed by the defendant utility had attached the rope to a guardrail before going for lunch, and a vandal released it. The trial judge found the Power company liable in negligence and awarded approximately \$260K in damages.

Standard of Care and the *Orillia Power* Case

- The Ontario Court of Appeal found that although it was reasonably foreseeable that a careless act by the defendant in its work above the highway could result in injury to users of the highway, so that defendant owed a duty of care, plaintiff failed to establish that defendant breached the applicable standard of care.
- The trial judge erred in relying on “industry standards and/or the company’s own internal standards” as dispositive of the issue.
- The method of rope security had been used by the utility for several years without incident, and while other methods may have reduced the risk of trespassor interference, nothing indicated the possibility or likelihood of such interference.
- Application for leave to appeal to S.C.C. dismissed.

Is a Duty of Care Owed?

- A threshold question to consider in an action for negligence is whether the defendant owes the plaintiff a duty of care.
- This question focuses on the relationship between the parties, and asks whether this relationship is so close that the one may reasonably be said to owe the other a duty to take care not to injure the other: *Donoghue v. Stevenson*, [1932] A.C. 562 (H.L.).

Known Categories

- In many cases, the relationship between the plaintiff and the defendant has already been recognized as giving rise to a duty of care, in which case it is unnecessary to undertake a full-fledged duty of care analysis.
- Recognized categories include:
 - Motorist and public
 - Manufacturer and end user
 - Occupier and person on premises
 - Doctor and patient
 - Commercial host and guest

Where No Recognized Category

- Where the relationship does not fall into a recognized category, determining a duty of care involves the application of the two-step test in *Anns v. Merton London Borough Council*, [1977] 2 All E.R. 492 (H.L.), which was adopted by the Supreme Court of Canada in *Kamloops (City) v. Nielsen*, [1984] 2 S.C.R. 2.
- Two-step test adopted in *Kamloops*:
 - is there a sufficiently close relationship between the parties so that, in the reasonable contemplation of the defendant, carelessness on its part might cause damage to the plaintiff? If so,
 - are there any considerations which ought to negative or limit (a) the scope of the duty; and (b) the class of persons to whom it is owed; or (c) the damages to which a breach of it may give rise?

Childs and the Duty of a Social Host

- In *Childs v. Desormeaux*, [2006] 1 S.C.R. 643 the Supreme Court found that social hosts of parties where alcohol is served do not owe a duty of care to public users of highways.
- The proximity necessary to meet the first stage of the *Anns* test was not established, public policy issues not even considered.
- No duty owed to an adult to ensure the person does not get drunk and harm himself or others.
- Caveat - this is unless the host's conduct implicates them in the creation or exacerbation of the risk. Short of active implication, a host is entitled to respect the autonomy of a guest.

Douglas v. Kinger and the Duty of Care

- In *Douglas v. Kinger*, 2008 ONCA 452, a fire had been accidentally caused by Kinger, a 13-year-old neighborhood boy whom plaintiff had hired to perform tasks around his property. At issue was whether the plaintiff could recover from the boy either in tort or in contract. Trial judge dismissed the action on the basis of policy considerations relating to unskilled employees that negated the imposition of a duty of care.
- Ontario Court of Appeal found that a duty of care could not be imposed for the boy's ordinary negligence. The expectation of the parties regarding exposure to liability was considered. The residual policy considerations analysis also weighed against the imposition of a duty of care.
- Unusual fact scenario and results-driven decision. Application for leave to appeal to S.C.C. dismissed.

Test for Causation in a Negligence Action – *Resurfice* and the ‘but for test’

- In *Hanke v. Resurfice*, 2007 SCC 7, the plaintiff was operating an ice-resurfacing machine when he was badly burned when hot water overflowed the gasoline tank of the machine releasing vapourized gasoline which was then ignited by an overhead heater. An explosion and fire resulted.
- Sued the manufacturer and the distributor of the machine, alleging that the gasoline and water tanks were similar in appearance and placed too close together on the machine, making it easy to confuse the two.

Test for Causation in a Negligence Action – *Resurfice*

- In dismissing the action, trial judge found that plaintiff did not establish that the accident was caused by the negligence of the defendants.
- Court of Appeal ordered a new trial, concluding that the trial judge had erred in finding that the “material contribution” test was the proper test for causation.
- Supreme Court found that the plaintiff was responsible for his own injuries and that the plaintiff failed to prove that the alleged design defects were responsible for his injuries.
- Supreme Court allowed appeal and affirmed that the basic causation remains the “but for” test.

Causation in a Negligence Action – the ‘but for’ test

- Supreme Court in *Resurfice*:

Much judicial and academic ink has been spilled over the proper test for causation in cases of negligence...the basic test for determining causation remains the “but for” test...the plaintiff bears the burden of showing that “but for” the negligent act or omission of each defendant, the injury would not have occurred.

[Paras 20 and 21]

Test for Causation in a Negligence Action

- In special circumstances the law has applied a “material contribution” test when it is **impossible** for the plaintiff to prove that the defendant's negligence caused the plaintiff's injury using the “but for” test, and plaintiff's injury fell within the ambit of the risk created by the defendant's breach of his duty of care owed to the plaintiff.
- The material contribution test is imposed where the “but for test” cannot be satisfied, and this would offend basic notions of fairness and justice.

Test for Causation in a Negligence Action

- Thus, there is more than one way to prove causation in a negligence action.
- However, Court has made clear that a defendant is not responsible for damage not caused by defendant's wrongful conduct.

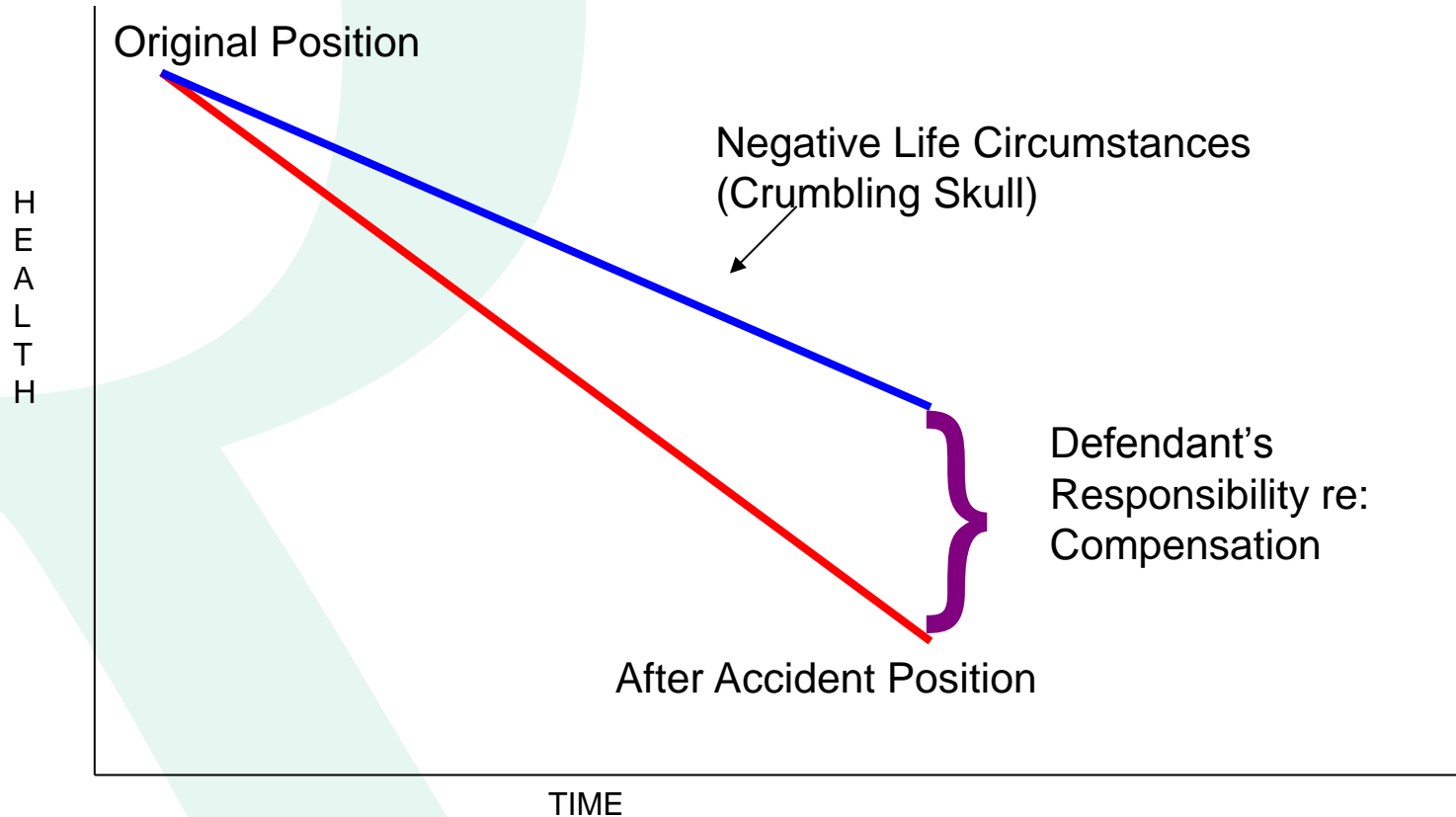
Test for Causation in a Negligence Action – *Athey*

- Following *Athey v. Leonati*, [1996] 3 S.C.R. 458, plaintiff is to be put in the position they would have been “but for” the accident; not put in the position before the accident (has been a distraction since *Athey*)
- But, plaintiff not to be placed in a position better than their original position. Necessary to determine both plaintiff’s position after the tort and to assess what the “original position” would have been. Difference between these positions is the plaintiff's loss.

Causation and the Thin and Crumbling Skull

- “Thin skull” rule makes a tortfeasor liable for plaintiff’s injuries even if they are unexpectedly severe owing to a pre-existing condition - tortfeasor must take his or her victim as they are found.
- “Crumbling skull” rule recognizes a pre-existing condition inherent in the plaintiff's “original position” and that a defendant need not put a plaintiff in a position better than their original position. Defendant is liable for the injuries caused, but need not compensate the plaintiff for effects of a pre-existing condition which the plaintiff would have experienced in any event.

Causation and the Thin and Crumbling Skull



Causation and the Thin and Crumbling Skull

- In *Graham v. Rourke*, [1990] O.J. No. 2314, the Ontario Court of Appeal reduced an award for loss of future earning capacity and future care costs to reflect the plaintiff's pre-existing condition ("crumbling skull") for which the defendant's tortious actions were not causative as they would have resulted in any event.
- There was evidence that the plaintiff "*would not have withstood the bumps and strains which are part of everyone's existence.*"
- Even if satisfy the test for causation (whatever test is applied) still have an argument with respect to remoteness and foreseeability of the resulting harm or damage, particularly in the aftermath of *Mustapha*.

Was Damage Reasonably Foreseeable?

- Argument here is that, even if a duty is owed and there is a breach of that duty which caused the plaintiff's injuries, if that damage was not within the reasonable contemplation of the defendant, it is too remote to be recoverable.
- The injury may be caused "in fact", but not "in law" by the defendant's conduct.
- A potentially refreshing approach to remoteness may be taken after *Mustapha*.

Mustapha v. Culligan of Canada Ltd. (2008) SCC 27

- Mr. Mustapha saw a dead fly in an unopened bottle of water supplied by the defendant. Neither he nor anyone else consumed the water, and he became obsessed about the fly and was eventually diagnosed as suffering from a major depressive disorder, with associated phobia and anxiety, triggered by seeing the dead fly.
- Trial judge found that it was “clearly foreseeable” that the supply of water with dead flies would cause him and others like him to suffer some degree of nervous shock, and awarded \$80,000 in general damages, \$25,000 in special damages, and \$237,600 for past and future economic loss.

Mustapha v. Culligan of Canada Ltd. (2008) SCC 27

- SCC came to same conclusion as the Court of Appeal, but for a different reason. While Court of Appeal found no duty was owed by Culligan, SCC found that Culligan owed Mr. Mustapha a duty of care in supplying bottled water as the manufacturer of a consumable good, which was an established category following *Donoghue v. Stevenson*.
- Also found that Culligan's actions breached the standard of care, thus satisfying the second element of the test for negligence.
- At the third stage the Court collapsed the distinction between physical and psychological damage, and held that only psychological disturbance that is serious and prolonged constitutes personal injury and is recoverable

Mustapha v. Culligan of Canada Ltd. (2008) SCC 27

- Plaintiff's claim failed at the fourth stage – defendant's breach was too remote to warrant recovery.
- According to Justice McLachlin:
...in order to show that the damage suffered is not too remote to be viewed as legally caused by Culligan's negligence, Mr. Mustapha must show that it was foreseeable that a person of ordinary fortitude would suffer serious injury from seeing the flies in the bottle of water he was about to install. This he failed to do.

Mustapha – What does it mean?

- Difference between unrecoverable “psychological upset” from recoverable “psychological disturbance that rises to the level of personal injury”
- Focusing on the person of ordinary fortitude for the purposes of determining foreseeability “*is a threshold test for establishing compensability of damages at law.*”
- Has the Supreme Court created a threshold for *actionable injuries*?
- How much of the Court’s reasoning vis-à-vis psychological injuries can be transferred into the realm of physical injuries?

Mustapha – What does it mean?

- While speaking of psychological damage the SCC states (arguably) generally, that: personal injury at law connotes serious trauma or illness...a compensable injury must be:

serious and prolonged and rise above the ordinary annoyances, anxieties and fears that people living in society routinely, if sometimes reluctantly, accept.

Mustapha – What does it mean?

- The court has arguably (re)introduced a new threshold for *actionable* (psychological) injuries, which, may be transferrable into the realm of physical injuries.
- If original and expected physical injury falls within the *de minimus* range or falls short of what is an actionable injury, and the plaintiff suffers an extreme and unforeseeable psychiatric injury, the claim may not be compensable

Mustapha – What does it mean?

- Following *Mustapha*, there is a strong argument to be made that a defendant is not responsible for a disproportionate psychiatric injury sustained by a plaintiff as a result of an accident where the physical injury is minor, if it is not reasonably foreseeable that a person of ordinary fortitude would have suffered an actionable or “serious” personal injury.
- *Mustapha* clearly gives rise to the argument that a profound and inexplicable major psychiatric episode may be seen as unforeseeable, and hence unrecoverable, if it flows from a minor motor vehicle accident with minor physical injury.

Mustapha Applied

- Considered and distinguished by Justice Moore in the medical malpractice case of *Frazer and Smith v. Haukioja*, [2008] O.J. No. 3277, which involved a claim for damages by a plaintiff who was injured in a motorcycle accident against his former doctor.
- Plaintiff alleged that the defendant failed to identify a serious ankle fracture, and that this failure resulted in severe pain and the onset of a psychological illness which has prevented him from working and left him in a fragile state.

Frazer and Smith v. Haukioja, [2008] O.J. No. 3277

- According to Justice Moore:

Mustapha is clearly distinguishable from the instant case. There, the plaintiff suffered no physical injury from ingesting contaminated water supplied by the defendant. Here Grant did suffer physical injury by reason of the failure of Dr. Haukioja to diagnose and/or treat or make treatment recommendations relating to the talar fracture. Although the plaintiff has failed to demonstrate that Grant's orthopedic outcome has been adversely affected, the early stages of his orthopedic recovery were clearly set back by reason of the defendant's conduct

- Decision is under appeal...will it provide answers?

Editorial Note

- Justice Moore's decision was upheld by the Court of Appeal (2010 ONCA 249).
- Nevertheless, it appears that a remoteness argument can be advanced when it would not be within the contemplation of a defendant that an objectively robust person in the circumstances of the plaintiff would suffer compensable injury flowing from the defendant's conduct.

Beyond *Mustapha*...

- Look for cases where the initial expected injury is minor (within *de minimus* range) and the plaintiff goes on to develop severe emotional/psychological/psychiatric injuries.
- Despite duty/breach of duty/cause of damage – argue that damage remains too remote to be recoverable.
- No argument in *Mustapha* damages were actually caused by seeing the fly in the bottle – but still too remote to be recoverable – not within defendant's reasonable contemplation that the reaction that did occur, would or could occur.

Ordinary Grind of Life and Remoteness...

- As stated by Ontario Court of Appeal in *Vanek v. Great Atlantic & Pacific*, [1999] O.J. No. 4599:

The law expects reasonable fortitude and robustness of its citizens and will not impose liability for the exceptional frailty of certain individuals.

- On the flipside, if it can be contemplated that compensable injury would be suffered by a person of ordinary fortitude, then the plaintiff is entitled to all of the damages actually suffered (subjectively).
- Therefore, if objectively compensable, then subjectively sustained damages are recoverable.

Summary

Coverage in the Third Party Liability Context

- In the third party liability context (coverage) under s. 239(1), look carefully at the causal chain, which is much more robust requirement after *Vytlingham* and *Herbison*
- Look also for concurrent coverage of both CGL and auto policies, but keep in mind *Derksen* as tempered by *Cumis*

Summary

Don't Speed through the Negligence Analysis:

- Review case carefully for presence of all four elements of a negligence action
- Do not take presence of duty for granted following *Childs* and *Douglas*
- Has a breach of standard occurred – remember *Orillia Power*
- Causation is stricter following *Resurfice*
- Remoteness is a live issue after *Mustapha*