

Divide & Conquer: Strategies for Indivisible Injuries

Russell J. Bailey, Alex D. Kask, Julia S. Lauwers



Guild Yule LLP
BARRISTERS AND SOLICITORS

WHAT IS INDIVISIBILITY?

The analysis is necessary when there are 2 or more tortious acts causing injury.

- **Divisible injuries:** those capable of being separated out and having their damages assessed independently. (i.e. different body parts).
- **Indivisible injuries:** those that cannot be separated or have liability attributed to the constituent causes. (i.e. chronic pain, same body part, same symptoms).

[Bradley v. Groves](#), 2010 BCCA 361 at para. 20



CONSECUTIVE OR CONCURRENT TORTS?

It does not matter whether the torts are consecutive or concurrent:

[41] ... whether the torts are categorized as concurrent or consecutive, the underlying issue would be the same: whether the two causes of action were separate.

[42] The two causes of action are not separate: they are linked by the indivisible injury the trial judge found to have been caused by the separate torts. That link brings into play not only joint and several liability, but also the rule against double recovery.

[Ashcroft v. Dhaliwal](#), 2008 BCCA 352, at paras. 41-42



WORST CASE SCENARIO

1. Liability of defendants to a plaintiff for indivisible injuries is joint and several: *Bradley* at para. 21;
2. A plaintiff can recover from a defendant 100% of the damages attributable to the injury which is caused or contributed to by that defendant, regardless of the contribution to the injury by others: *Bradley* at para. 29;
3. Nonetheless, tortfeasors are entitled to contribution as between themselves on the basis of their respective degrees of fault, per the *Negligence Act*, R.S.B.C. 1996, c. 333: *Bradley* at para. 24;
4. If a co-defendant has no assets, you are on the hook for all damages.



WORST-ER CASE SCENARIO

1. 2 accidents:
 - 1st accident causes significant injury, but the tortfeasor's breach of the standard of care was minimal
 - 2nd accident causes minor exacerbation of same injury, but tortfeasor's breach of the standard of care was egregious
2. The injuries are indivisible;
3. The two defendants have joint and several liability to the plaintiff;
4. As between the two defendants, the court apportions damages on the blameworthy approach;
5. The egregious tortfeasor who only mildly exacerbated an existing injury will be on the hook for greater percentage of award than the one who caused significant injury.



HOW DID WE GET HERE?



BACKGROUND & CONTEXT

- Prior to 2010, the common law had decades of case law addressing the question of loss with multiple contributing causes.
- The Supreme Court of Canada had set out the appropriate tests in a series of decisions with which you are no doubt familiar.
- Given where we are today it is important to revisit those first principles.



BACKGROUND & CONTEXT

After the evidence has established the elements of a tort and a loss, a two part analysis is required:

- 1. Causation:** did the tort cause the plaintiff's harm in fact and in law? This will consider the foreseeability of harm and remoteness of damage and whether there is an indivisible loss. If established, then;
- 2. Compensation:** quantification of various forms of pecuniary and non-pecuniary loss including principles such as thin skull or crumbling skull.

[Blackwater v. Plint](#), [2005] 3 SCR 3 paragraph 78, McLachlin C.J. for a unanimous SCC
[Mustapha v. Culligan of Canada Ltd.](#), [2008] 2 SCR 114 paragraph 11, McLachlin C.J. for a unanimous SCC



BACKGROUND & CONTEXT

“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 CanLII 183 (SCC), [1996] 3 S.C.R. 458, at para. 32.”

[*Blackwater v. Plint*](#), [2005] 3 SCR 3 paragraph 74, McLachlin C.J. for a unanimous SCC



BACKGROUND & CONTEXT

“It is a fundamental principle of tort law that an injured person should be compensated for the full amount of his loss, but no more. This is implicit in the principles governing the recovery of damages for personal injury set forth by this Court in the trilogy of *Andrews v. Grand & Toy Alberta Ltd.*, 1978 CanLII 1 (SCC), [1978] 2 S.C.R. 229, *Thornton v. Prince George School Board*, 1978 CanLII 12 (SCC), [1978] 2 S.C.R. 267, and *Arnold v. Teno*, 1978 CanLII 2 (SCC), [1978] 2 S.C.R. 287.”

[*Ratyck v. Bloomer*](#), [1990] 1 SCR 940 at 962

“Full and fair compensation without double recovery.”

[*Cunningham v. Wheeler*](#), [1994] 1 SCR 359 at 368



THE COURT CHANGES COURSE?

[Bradley v. Groves](#), 2010 BCCA 361

- Plaintiff suffered two legal injuries in two motor vehicle accidents.
- Physician reports “complaints of injury from the second accident were essentially in the same pattern as the first accident and that his findings after the second accident were similar to his findings after the first accident but perhaps less traumatic.”
- “The plaintiff generally said that the areas of pain and suffering were the same after the second accident.”
- **Do you agree that it was impossible for the trier of fact to separate out both the causation and the compensation issues for these injuries?**



THE COURTS CHANGE COURSE?

(Bradley continued)

- Court rules that [Athey](#) must be interpreted to mean that “indivisible injuries, whether occasioned by a combination of non-tortious and tortious causes or solely by tortious causes, result in joint liability for tortfeasors.”
- Court does not consider the impact of the revised analysis for the material contribution test set out in [Resurfice Corp. v. Hanke](#), [2007] 1 SCR 333, 2007 SCC 7, yet quotes it in para 37 in a commentary that ends with the problematic comment “it is difficult to see how the worsening of a single injury could be divided up.”
- Court also rules that *Athey* overrules *Long v. Thiessen* (1968), 65 WWR 577, a BCCA ruling that used a formula in which the quantum of each loss is subtracted from the value of the global loss as of the date of trial to determine individual defendant liability.
- An exacerbation of injury therefore creates both joint and several liability and great difficulty in separating out the appropriate amounts for the heads of damage during the compensation stage.



FIVE STEP ANALYTICAL FRAMEWORK

1. Review basic negligence principles;
2. Analyze whether injuries are truly indivisible;
3. If indivisible, assess 2 different theories on apportioning between accidents;
4. Assess damages and, if possible, apportion the heads of damages between accidents;
5. Explore best way to develop defence through investigation.



STEP 1: REVIEW BASIC NEGLIGENCE PRINCIPLES

1. A defendant is liable for any injuries that would not have occurred but for his or her negligence, but not other injuries caused through the negligence of others;
2. Each defendant is separately liable for the divisible injuries that they have caused, and jointly liable for indivisible injuries that they caused together with the other defendants;
3. To establish liability, a defendant's negligence only has to cause or contribute to a plaintiff's injury;
4. A plaintiff cannot seek double recovery; and
5. The defendant need not compensate the plaintiff for any damages he/she would have suffered anyway taking into account her original position or subsequent intervening events.



STEP 2: ARE THE INJURIES TRULY INDIVISIBLE?

- Ways to “divide and conquer”:
 - 1) Establish that the injuries are divisible (see [McKenzie v. Lloyd](#), 2016 BCSC 1745, [Moore v. Kyba](#), 2012 BCCA 361)
 - 2) Establish that the subsequent injuries are mere “blips of exacerbation” (see [Derksen v. Nicholson](#), 2015 BCSC 1268);
 - 3) Establish there is no evidence in respect of one or some of the accidents (see [Schnurr v. ICBC](#), 2015 BCSC 1630);
 - 4) Establish that the plaintiff has a chronic, pre-existing condition that will not improve and the exacerbation can be measured against the plaintiff’s “original position” just before the subject accident(s)



STEP 2: ARE THE INJURIES TRULY INDIVISIBLE?

A light at the end of the tunnel?



STEP 2: ARE THE INJURIES TRULY INDIVISIBLE?

[Khudabux v. McClary](#), 2018 BCCA 234

- Plaintiff suffered injuries in 2 MVAs: the first 2011 accident involved two impacts, one of which was entirely her fault and for the other she was 20% contributorily negligent; the defendant in the latter 2014 MVA admitted liability.
- She had numerous tortious and non-tortious incidents before and after the 2011 accident:
 - 2006 struck by a van when a pedestrian that led to a concussion and multiple injuries that were still symptomatic in 2011;
 - 2009 diagnosed with PTSD, major depressive disorder, and chronic pain disorder;
 - 2010 rear-end MVA aggravated her symptoms from the 2006 MVA;
 - Between the two subject MVAs, the plaintiff's injuries were exacerbated by three non- tortious falls and a 2012 MVA (she also required an involuntary psychiatric hospitalization in 2012 due to conflict with family members).



STEP 2: ARE THE INJURIES TRULY INDIVISIBLE?

(Khudabux continued)

- The BC Court of Appeal noted that the trial judge was live to the distinction between causation and damages set out in *Blackwater* and described the difference between those two stages.
- “[D]espite the tangled nature of Ms. Khudabux’s various injuries, [the trial judge] was able to determine the extent to which the two defendants at trial had caused or aggravated those injuries.”
- In addition the *Negligence Act* precluded a finding of joint liability due to her contributory negligence in the 2011 MVA



STEP 2: ARE THE INJURIES TRULY INDIVISIBLE?

(Khudabux continued 2)

- The BCCA makes extensive reference to the method for balancing complete compensation and avoiding double-recovery set out in *Blackwater*
- The court rules that deference should be provided to the trial judge's global assessment of injuries at \$75,000 (after considering her baseline pre-existing conditions) and reduction of the award to reflect the degree to which the defendants were not entirely liable for that loss.



STEP 2: ARE THE INJURIES TRULY INDIVISIBLE?

(Khudabux continued 3)

- As such, for divisible injuries, *Long v. Thiessen* is still good law.
- Contributory negligence will preclude joint liability for indivisible injuries
- Even injuries requiring mind-numbing causation complexity analysis can be divisible



STEP 3: APPORTIONMENT

Two lines of authority:

1. Physical causation analysis – i.e. whichever accident was more significant apportioned with higher percentage of damages (see [Le v. Point](#), 2014 BCSC 1205; [Demidas v. Poinen](#), 2012 BCSC 416; [Blenkarn v. Mills](#), 2016 BCSC 1976)
2. Blameworthy approach – whichever tortfeasor was more culpable gets higher apportionment despite difference in physical causation (see [Bilanik v. Ferman](#), 2014 BCSC 732; [Lakatos v. Lakatos](#), 2017 BCSC 1990)



STEP 3: APPORTIONMENT

“The *Negligence Act* requires that the apportionment must be made on the basis of 'the degree to which each person was at fault.' It does not say that the apportionment should be on the basis of the degree to which each person's fault caused the damage. So we are not assessing degrees of causation, we are assessing degrees of fault. In this context, "fault" means blameworthiness. So it is a gauge of the amount by which each proximate and effective causative agent fell short of the standard of care that was required of that person in all the circumstances.”

[*Alberta Wheat Pool v. Northwest Pile*](#), 2000 BCCA 505 at paras. 40-42, citing [*Cempel v. Harrison Hot Springs Hotel Ltd.*](#) (1997), 42 BCLR (3d) 219 (C.A):



STEP 4: APPORTION HEADS OF DAMAGES

- Some courts have assessed damages globally and then apportioned;
- Correct approach is to separate out, if possible, the past income loss claims and some special damages claims;
- Return to basic principle that a defendant cannot be held liable for losses they played no part in causing
- Key is to establish on the evidence that although the injuries are indivisible, particular heads of damages are divisible



STEP 4: APPORTION HEADS OF DAMAGES

Scoates v. Dermott, 2012 BCSC 485

Facts:

- Plaintiff involved in four accidents.
- First accident was major cause of plaintiff's disability.
- Plaintiff had not worked for 18 months prior to the third accident.
- Third and fourth accidents caused no new injuries and did not play any role in the plaintiff's inability to work or need for future care.
- Rather, they caused a "temporary aggravation in the plaintiff's generalized pain": para. 163.



STEP 4: APPORTION HEADS OF DAMAGES

Court held:

- NOT possible to identify precise date when aggravation from each of the third and fourth accidents ended and plaintiff's pain returned to baseline.
- Even though *physical injuries* were indivisible, there was “no reason in principle” that a physically indivisible injury may not be divisible for the purpose of specific heads of damages.
- Given third and fourth accidents only “temporarily increased the plaintiff's pain and suffering” but “played no part in the plaintiff's loss of income, inability to return to his former occupation or his loss of earning capacity”, defendants in those accidents were not jointly and severally liable for those losses.
- **“[B]asic rule remains that defendants cannot be held liable for losses they played no part in causing”: para. 164.**



STEP 5: EXPLORE BEST DEFENCE STRATEGY

- Obtain an order that the actions to be heard together;
- Get best evidence possible between plaintiff's accidents – clinical records, witness interviews, disability benefits records, social media;
- Choose correct expert who can extrapolate from that evidence;
- Consider surveillance;
- Explore “blameworthiness” of other tortfeasor to build argument for apportionment;
- Consider ramifications of admitting liability;
- Consider third partying other potential tortfeasors for previous injuries;
- Attempt to explore settlement of previous accident (see [Dholliwar v. Yu](#), 2015 BCSC 670).



SCENARIO 1

John is hit by a car that has run a red light and he hits his head and loses consciousness. He is rushed to the hospital. The emergency physician orders an urgent CT. While being transported to the imaging room, John falls off the stretcher. The orderly could not figure out how to put the side rails up, but had decided to “risk it”. John has a seizure later that date, and the CT shows a subdural hematoma. John’s injuries include ongoing memory loss and speech issues.



SCENARIO 1

1. Consider basic negligence principles

- **Who are the tortfeasors?**
 - Driver
 - Orderly
- **Obtain expert evidence on the cause of the subdural hematoma (car accident vs. fall off stretcher)**
 - Timing, location, the fact that he had lost consciousness at the scene
 - Was the plaintiff already injured before the fall off the stretcher?

2. Are injuries truly indivisible?

- Obtain expert evidence that memory loss and speech issues are likely caused by the car accident



SCENARIO 1

3. Apportionment

- Marshall argument on degree to which orderly's actions fell below the standard of care
- Marshall best evidence of orderly as to his actions to support that argument
- Compare this to the driver who ran the red light
- Marshall evidence on driver as much as possible to shift blameworthiness

4. Apportion heads of damage

- Probably not too relevant on these facts since the incidents happened close in time



SCENARIO 2

Max is hit by a car driven by a drunk driver and he loses consciousness. He is diagnosed with a mild traumatic brain injury and he has symptoms that include **frequent headaches, sleep disturbances, and fatigue.**

These injuries are ongoing at the time he attends at his daughter's school for parent-teacher interviews six months later. **He has struggled at work, but has not missed any time yet.** As he's sitting in the classroom, a light falls from the ceiling onto his head. Max loses consciousness again. The school had pushed back the date for inspection of the ceiling lights by one week. In the months after this incident, Max continues to have frequent headaches, sleep disturbances and fatigue, but **in addition he finds he has difficulty with memory and attention and he is forced to stop working.**



SCENARIO 2

1. Basic negligence principles

- **Who are the tortfeasors?**
 - The drunk driver
 - The school
- **What injury has each tortfeasor caused?**
 - Each tortfeasor caused loss of consciousness

2. Are injuries truly indivisible?

- After the first: frequent headaches, sleep disturbances, and fatigue
- After the second: additional memory and attention issues
- Drunk driver will want to argue that the memory and attention issues are divisible
- Court may assign an “amount” for the memory and attention injuries that the drunk driver will not be responsible for



SCENARIO 2

3. Apportionment

- Driver who ran red light more morally culpable than light fixture falling
- All of the injuries that are indivisible are likely be apportioned more to him than to the school

4. Apportion heads of damage

- Drunk driver may argue that they are not responsible loss of future of income earning capacity since the plaintiff was able to work up to the second accident
- School will want to argue that the inability to work was the cumulative result of the two injuries



SCENARIO 3

Jane breaks her right leg while skiing, and is taken to the hospital. She develops compartment syndrome and requires several fasciotomies. She later receives home nursing care for wound management. The nurses use the wrong kind of dressing, and her wound becomes severely infected, requiring several more irrigation and debridement surgeries. She does physiotherapy and regains much of her mobility, although she still has pain every so often. A year later, she is walking in Costco when she slips and falls on a noodle. She breaks her right leg again, as well as both thumbs, and she twists her back. She becomes very depressed and is eventually diagnosed with chronic pain in her leg.



SCENARIO 3

1. Basic negligence principles

- Who are the tortfeasors and was the breach?
 - Hospital staff - failure to detect compartment syndrome
 - Physician - failure to detect compartment syndrome
 - Home care nurse – using wrong kind of dressing causing infection, need for surgery
 - Costco - occupier's liability claim
- Consider whether and where chain of causation is broken by later/intervening events



SCENARIO 3

2. Are injuries truly indivisible?

- Injuries
 - Broken leg
 - Compartment syndrome
 - Infection
 - Surgery
 - Ongoing leg pain
 - Broken thumbs
 - Twisted back/soft tissue
 - Depression
 - Chronic pain



SCENARIO 3

3. Apportionment

- Consider effect of Jane's contributory negligence on severing joint and several liability for indivisible injuries
- Consider blameworthy approach versus causation approach

4. Apportion heads of damages

- Could apportion past income loss and special damages over the two events



TAKEAWAY POINTS

Where there are potential indivisible injuries:

1. Consider the evidence you need to marshal to avoid that finding (if you want to avoid it);
2. Consider third partying all potential joint tortfeasors for contribution;
3. Be aware of potentially larger award even though your accident only “exacerbated” or “aggravated” pre-existing injuries;
4. Consider applying for production of settlement documents if the other action settled: [*Dholliwar v. Yu*](#), 2015 BCSC 670;
5. If there is no claim for contribution, due to a limitation period or some other statutory bar, consider arguments/options;
6. Explore the other tortfeasor’s liability.

