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MEDICAL MALPRACTICE

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WHEN MOTOR VEHICLE ACCIDENTS AND MEDICAL NEGLIGENCE COLLIDE - NOVUS ACTUS INTERVENIENS

INTRODUCTION

Your client was injured in a motor vehicle accident and treated in a hospital for those injuries. In the course of investigating a potential lawsuit against the driver you begin to suspect that your client's injuries were exacerbated by the care received at the hospital. Should you name the treating doctors, nurses and the hospital as defendants?

In the cases of medical negligence subsequent to an original injury, the issues of apportionment and indemnity or contribution may arise. In addition, the original defendant may raise the defence of *novus actus interveniens* and potentially escape liability altogether.

In this article we will discuss the defence of *novus actus interveniens* in the context of a health care provider as the intervening actor, and review a number of cases in which defendants have attempted to avoid liability through its use.

NOVUS ACTUS INTERVENIENS

A successful defence of *novus actus interveniens* has the potential to deprive the plaintiff of compensation for their injuries if the correct defendants have not been named. Compounding the problem, if too much time has passed since the injury, the plaintiff may be barred from pursuing the medical professionals by the limitation period. These problems can be avoided if the plaintiff names the right defendants (including, for example intermediary health care providers if appropriate) at the outset. In this way, the plaintiff has the potential to recover full damages, whether from the initial wrongdoer, from the subsequent wrongdoer, or from a combination of the two. If the plaintiff has not named an intervening actor and the defendant successfully argues *novus actus interveniens*, the plaintiff risks being denied full compensation.

The principles governing the law of *novus actus interveniens* can be simple enough to state but difficult to apply—only a narrow set of circumstances can relieve a defendant of liability. Principles of

fairness are at the foundation of the law of *novus actus interveniens*: a defendant should not be held liable for consequences of their actions that are not foreseeable and are caused by a third party. These principles are also codified in the provisions of the *BC Negligence Act*¹ which states that the apportionment of liability for damages does not make a defendant liable for damage or loss to which their negligence has not contributed.

In order for a defence of *novus actus interveniens* to succeed in the context of subsequent medical negligence, the defendant must prove that the medical care provided was negligent, that it was not reasonably foreseeable that the plaintiff would suffer further loss or damage because of that negligence, and that the act was sufficiently new such that it severed the chain of causation. As the cases illustrate, the impact of intervening medical negligence on the plaintiff's compensation is highly variable and fact driven. The enquiry includes the determination of negligence, the analysis of remoteness and a consideration of the impact of the intervening negligence on the chain of causation.

Negligence – Medical negligence is never easy to prove. Physicians are not held to a standard of excellence, only to the standard of a reasonable physician.² Errors in judgment do not necessarily constitute negligence, provided the physician comes to a decision based on the honest and intelligent exercise of judgment.³ If there is more than one valid school of thought as to a medical procedure, a physician will not be found liable for a negative result from the approach selected.⁴ These examples only serve to illustrate the challenges a defendant faces when trying to advance a *novus actus interveniens* defence. As the cases below illustrate, the difficulty of proving the intervening medical care was negligent is often the cause of a defendant's failure to succeed with a *novus actus interveniens* defence.

Foreseeability or Remoteness – Generally, the courts find that an original wrongdoer must bear the risk inherent in medical care that is required as a result of the injury they caused – in other words, it is reasonably foreseeable that an injured person will seek medical attention and that they may suffer further loss or damage because of error in medical treatment.⁵ Provided the plaintiff takes reasonable care in the selection of the person who provides that

care, presumably by attending an appropriately licensed health care provider, the original wrongdoer cannot avoid liability. The court will consider if the intervening act should be considered to be within the risk set into motion by the defendant and should therefore remain the defendant's responsibility.⁶ If it was not foreseeable, the court may find that the medical negligence was a *novus actus interveniens* that relieves the defendant of liability. The foreseeability analysis highlights the fact that an injured person who seeks medical help may suffer further loss or damage because of errors in medical treatment; however, only *negligent* medical care has the potential to break the chain of causation.

Breaking the chain of causation – Medical negligence in and of itself is not enough to break the chain of causation – it must introduce something sufficiently new so as to sever the chain of causation.⁷ In *Yoshikawa v. Yu*⁸ the BC Court of Appeal stated that in order for an act to be a *novus actus interveniens* it had to:

...give such a pronounced new impetus or deflection to the chain of causation that the original wrongful act of the defendant is no longer regarded as a sufficient cause upon which to rest legal liability.

The medical negligence supporting a *novus actus interveniens* defence does not have to be "gross negligence". The issue is "what is the strength of the alleged intervening cause, not the degree of negligence by which it was created."⁹

NO MEDICAL NEGLIGENCE – NO NOVUS ACTUS INTERVENIENS

The following cases illustrate that a physician's error in judgement is not enough to constitute negligence, even in the context of a *novus actus interveniens* analysis. In *Watson v. Grant*¹⁰ the defendant's attempt to avoid liability by taking aim at a surgeon who provided subsequent care failed because the court did not find negligence. Here, the plaintiff was involved in a motor vehicle accident in which liability was admitted. The plaintiff suffered soft tissue whiplash injuries, and underwent three surgeries related to these injuries. The court found that two of these surgeries were unnecessary, but were the result of the surgeon's error in judgement rather than negligence. Although the defendant argued that he should not have to pay damages for pain and suffering or the loss of wages related to these two unnecessary surgeries, because the surgeon was not found to be negligent, the original defendant could not escape liability.

INTERVENING MEDICAL NEGLIGENCE – STILL NO NOVUS ACTUS INTERVENIENS

Even when negligence on the part of intervening medical providers is found, it may not be enough to constitute a *novus actus interveniens* that will relieve the defendant of liability.

*Thompson v. Toorenburgh*¹¹ was an action under the former *Families' Compensation Act*¹². The deceased had a known pre-existing heart condition. Following a motor vehicle accident she attended at the emergency room of a hospital and received care that was harmful, may have been grossly negligent and may have hastened her death. The attending physicians failed to diagnose

pulmonary edema which was caused by the accident - had they properly diagnosed and treated her, she would not have died. Nonetheless, the court found that this negligent care was not the cause of her death. The court distinguished between negligence that is *nonfeasance* and negligence that is *malfeasance* and determined that the negligence here was *nonfeasance*, so the defence of *novus actus interveniens* could not succeed. The court noted that the physicians "failed to provide an actus interveniens that would have saved her life, but that is not the same as committing an actus interveniens that caused her death". This case suggests that where the medical negligence is reduced to a failure to act or intervene to avoid further injury to the plaintiff, it will not be considered an act that breaks the chain of causation.

Similarly, in *Scarff v. Wilson*¹³ a young girl was rendered a paraplegic after being struck by a car. The defendant drivers initiated third party proceedings against the treating physicians for delaying the diagnosis of the plaintiff's condition and failing to prevent extensive internal bleeding. The defendants invoked the defence of *novus actus interveniens* and alleged that the physicians' negligence severed the chain of causation. The court found that the allegations against the physicians amounted to a failure to act, and, relying on *Thompson v. Toorenburgh*, held that the defendant failed to prove that some new negligent act had broken the chain of causation. The court noted that even if the physicians' conduct was found to constitute negligence contributing to the plaintiff's overall loss, it was not enough to form a basis for the defence of *novus actus interveniens*.

Although these two cases suggest that the categorization of medical negligence as nonfeasance may cause a *novus actus interveniens* defence to fail, as illustrated below, the courts have not consistently applied this analysis.

MEDICAL NEGLIGENCE RESULTING IN FINDING OF NOVUS ACTUS INTERVENIENS

Even in the face of medical negligence that is found to have been foreseeable and to be sufficient to break the chain of causation, the courts rarely find the defendant can escape liability entirely. The most common result is apportionment of damages between the multiple tortfeasors. The challenge for the plaintiff is to ensure that all potential wrongdoers have been named as defendants in order to maintain the potential for full compensation, regardless of the results of a defendant's plea of *novus actus interveniens*.

In *Lee v. O'Farrell*¹⁴, the plaintiff was injured in a motor vehicle accident which required surgical intervention. The surgeon, who had been named as a defendant in the action, argued that his actions did not constitute a *novus actus interveniens*, in the hopes that the plaintiff could continue to obtain certain future care through s. 24(5) of the *Insurance Motor Vehicle Act*, rather than being funded by the defendant surgeon.

Here, the surgeon performed a surgery that included open femoral rodding. During the surgery the defendant took an x-ray to check the placement of the rods, but did not x-ray the entire operative field, missing a fracture that occurred during the surgery. Had the fracture been identified by the x-ray, it could have been

easily repaired at the time. The fracture was not discovered until 6 weeks later, when avascular necrosis developed and caused severe degenerative changes in the hip.

The court found the defendant surgeon liable for “failing to properly complete the operation he had undertaken by neglecting to x-ray the entire operative field. Unlike the situation in *Toorenburgh*, where the negligence of the medical men, although it failed to save the life of the patient, did not cause her death, here the negligence of the defendant was a new and the effective cause of the injury complained of in this action”. The court found the plaintiff was entitled to the entire award from the defendant surgeon without deduction.

In *David v. Toronto Transit Commission*¹⁵ the plaintiff suffered injuries when a bus he was riding in was involved in a motor vehicle accident. The plaintiff required surgery to fuse together two cervical vertebrae, but the surgery was carried out on the wrong vertebrae. The defendant drivers submitted that the negligence of the surgeon amounted to a *novus actus interveniens* and they should not be liable for that portion of the claim. The court assessed the plaintiff’s total damages at \$26,709 finding that \$6,000 of that total was attributable to the negligence of the surgeon in operating on the wrong vertebrae. The plaintiff, having not named the surgeon as a defendant, argued that he should be able to recover in full against the defendant drivers because he had used reasonable care to employ a competent physician. The court found that the plaintiff could not recover from the defendant drivers the damages which were caused by the negligence of the surgeon, depriving the plaintiff of full compensation.

*Phillip v. Bablitz*¹⁶ is a case with a complex judicial history in which the defence of *novus actus interveniens* was successfully invoked, at least in principle. In this case, a 3-day-old girl suffered a hypoglycemic event which was caused by the negligence of Dr. Bablitz. For over two years it was assumed that the girl’s severe developmental delays were related to the hypoglycemic event, when in fact they were caused by a congenital condition which, if treated, would have had minimal effects on her development. When the plaintiff reached the age of 25 months, certain signs became significant enough that they ought not to have been ignored by her pediatrician, Dr. Andrews.

The court found that Dr. Andrews’ negligence was an intervening act that severed the causal link between Dr. Bablitz’ negligence and the plaintiff’s ongoing injury. This finding resulted in the apportionment of the plaintiff’s damages. Dr. Bablitz was found liable for the injury suffered by the plaintiff from the time of her hypoglycemic crisis to the time when Dr. Andrews ought to have recognized that plaintiff’s developmental delays must have been caused by something other than hypoglycemia at birth.

IMPACT ON YOUR CLIENT

The cases illustrate the risk of failing to investigate potential negligence on the part of intervening health care providers. *Novus actus interveniens* is a defence a defendant may invoke to try to avoid liability. If the plaintiff has named the right defendants (including intermediary health care providers if appropriate),

the plaintiff has the potential to recover full damages, whether from the initial tortfeasor or from the *novus actus interveniens* tortfeasor, or from a combination of the two. If the plaintiff has not named a physician whose actions the defendant successfully argues constituted a *novus actus interveniens*, the plaintiff risks being denied full compensation.

Investigate carefully and consider the acts of negligence and the degree the causal harm contributed to the resultant injury. In some circumstances, it might be appropriate to sue both the driver and the medical doctor, or to sue the doctor only. Consider the factual cause of the client’s injury – was it the MVA that brought him for treatment, or was it the treatment received at the hospital? For example if negligent medical care following a minor car accident causes a severe injury, for example an artery severed during a medical procedure causing hemorrhagic shock and permanent neurological deficits – it might be better to sue a physician/nurses only.

The addition of a medical malpractice action to a personal injury or MVA claim requires careful consideration. It will add significantly to the complexity and cost of advancing the case, and for more claims it will not be worth it, since the plaintiff can collect the damages from the initial tortfeasor in most circumstances. V

- 1 *Negligence Act*, RSBC 1996 C. 333, section 1 (1)(3).
- 2 *Crits et al. v. Sylvester et al.* (1956), 5 DLR (2d) 601, [1956] OR 132, aff’d [1956] SCR 991.
- 3 *Wilson v. Swanson*, [1956] S.C.R. 804.
- 4 *Fairley v. Waterman et al.*, 2002 BCSC 10.
- 5 *Watson v. Grant*, [1970] BCJ No. 41 at para. 18.
- 6 *Jack v. Tekavec*, 2011 BCCA 464.
- 7 *Lee v. O’Farrell*, [1988] BCJ No. 3071.
- 8 *Yoshikawa v. Yu*, [1996] BCJ No. 623 at para. 21.
- 9 *Phillip v. Bablitz*, 2010 ABQB 566 at paras. 336, 339.
- 10 *Supra* note 5.
- 11 *Thompson et al. v. Toorenburgh et al.*, [1973] BCJ No. 821.
- 12 *Families’ Compensation Act*, RSBC 1960, c. 138.
- 13 *Scarff v. Wilson*, [1986] BCJ No. 1327.
- 14 *Supra* note 7.
- 15 *David v. Toronto Transit Commission* (1977) 77 DLR (3d) 717.
- 16 *Phillip v. Bablitz*, 2010 ABQB 566.