

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *McArthur v. Hudson*,
2013 BCCA 375

Date: 20130823
Docket: CA040278

Between:

Robert McArthur

Appellant
(Plaintiff)

And

Danielle Louise Hudson

Respondent
(Defendant)

Before: The Honourable Madam Justice Prowse
The Honourable Madam Justice D. Smith
The Honourable Madam Justice Neilson

On appeal from: An order of the Supreme Court of British Columbia, dated
August 31, 2012 (*McArthur v. Hudson*, 2012 BCSC 1293,
Vancouver Docket No. M102589)

Counsel for the Appellant: T.J. Delaney

Counsel for the Respondent: C. Godwin

Place and Date of Hearing: Vancouver, British Columbia
April 19, 2013

Place and Date of Judgment: Vancouver, British Columbia
August 23, 2013

Written Reasons by:

The Honourable Madam Justice Neilson

Concurred in by:

The Honourable Madam Justice Prowse
The Honourable Madam Justice D. Smith

Summary:

Appeal from the order of a Supreme Court judge awarding the appellant \$40,000 for non-pecuniary loss and \$4,000 for special damages suffered in a motor vehicle accident. The judge declined to award damages for past or future income loss or future care costs as it was her view the appellant's ongoing right hip disability was related to the outcome of hip surgery, and was not caused by the accident: 2010 BCSC 1293.

The appellant had undergone right hip replacement surgery in September 2007. On June 9, 2008, while he was still recovering from this surgery, he injured his right hip in the accident caused by the respondent's negligence. He continued to suffer pain in his right hip and was unable to return to his work as a truck driver. The appellant maintained the accident was a necessary cause of his ongoing disability, and the trial judge had misapprehended the medical evidence on this point, resulting in reversible error.

Held: appeal allowed and new trial ordered. The trial judge erred in finding the appellant had developed trochanteric bursitis prior to the accident, and in holding his "hip joint issues" were divisible from this condition. These errors were integral to her analysis of causation and damages.

Reasons for Judgment of the Honourable Madam Justice Neilson:

[1] On June 9, 2008, the appellant, Robert McArthur, was injured when the respondent, Danielle Louise Hudson, drove through a stop sign and hit his truck on the driver's side. The appellant brought an action to recover damages for his injuries, chief of which was right hip pain that prevented him from returning to work. The respondent admitted liability for the accident, and the primary issue at trial was whether the appellant's hip pain had been caused by the accident or was attributable to hip replacement surgery he had undergone several months before the accident.

[2] Following a seven-day trial, the trial judge found that while the accident had aggravated the appellant's pre-existing hip pain, this had resolved to its pre-accident status by March 2011, and any ongoing disability was not caused by the accident. She accordingly awarded non-pecuniary damages of \$40,000 and special damages of \$4,000, but denied the appellant's claims for future income loss and cost of future care.

[3] On appeal, the appellant maintains the trial judge erred in finding that the trochanteric bursitis at the root of his hip pain was present prior to the motor vehicle accident, and so was not caused by the respondent's negligence. The appellant initially contended, as well, that the judge erred by applying the wrong standard of proof to future events in assessing damages. At the hearing of the appeal, however, he conceded that if he succeeded on his first ground of appeal the appropriate remedy would be a new trial, and it would be unnecessary to deal with this second ground of appeal.

Background

[4] The appellant was 61 years old at trial. He has a grade 8 education, and has worked as a truck driver since he was 19. His work has characteristically required heavy labour and long hours. He has a significant medical history of orthopaedic injuries and pain. As this appeal is focussed on his right hip disability I do not intend to address this history fully, and limit my account to the aspects relevant to this issue.

[5] In 1992, the appellant fractured his pelvis. He had surgery to repair it, and was warned that he would eventually need a hip replacement. In 2006, he began to have pain in his right hip, and in the spring of 2007 it became sufficiently severe that he had to stop working. On September 10, 2007, he underwent a right hip replacement performed by Dr. Lu, an orthopaedic surgeon.

[6] Dr. Lu told the appellant he could expect to be able to return to work in six to eight months. The appellant used ambulatory aids for several months, and took Endocet, a narcotic analgesic, for his pain. He attended physiotherapy twice a week from October 2007 to March 2008. From March 12 to April 13, 2008, the appellant went to an occupational rehabilitation program ("OR 1") with the Canadian Back Institute, in the expectation he would be ready to return to work on its completion. The OR 1 Discharge Report indicated, however, that as of April 24, 2008 he was still unable to meet the functional requirements of his job, and had tenderness over the right greater trochanter and ongoing limitations in his range of motion and strength. It

recommended he take the intensive full-time OR 2 program with Back in Motion for further rehabilitation.

[7] On April 16, 2008, the appellant returned to see Dr. Lu about his continuing right hip pain. Dr. Lu described him as “doing well”, but reported he still had lateral hip pain with subluxation of the fascia lata and iliotibial band, which he described at trial as a dynamic movement of the soft tissue structure that can cause a “clunking” or “clicking”. X-rays of the hip showed no concern with the hip prosthesis. Dr. Lu reassured the appellant, and recommended he continue with physical therapy and start a graduated return to work in six to eight weeks. Although not set out in his written account of this appointment, Dr. Lu testified that the appellant had tenderness in the area of his right greater trochanter before the accident.

[8] On May 1, 2008, the appellant began the OR 2 program. His Intake Assessment Report indicated he had recently increased his narcotic analgesic medication, and described increased depression and anxiety due to growing financial pressure after a year of unemployment. The treatment plan set a goal of returning to work with some limitations after eight to ten weeks with the program, but stated that given the disparity between his current functional level and his job demands, “the prognosis for a successful return to work is guarded”. Unfortunately, the appellant developed bronchitis and a pulled muscle in his chest, and so was only able to attend 8 of the 26 sessions in the OR 2 program before the accident.

[9] On May 7, 2008, the appellant saw Dr. Lai, who had been his family doctor since 1992. She recorded his complaint of continuing right hip pain and a “clunking sound” in the hip joint with movement.

[10] In the June 9, 2008 accident, the respondent’s vehicle hit the appellant’s truck with significant force. The appellant struck his left shoulder on the door of the truck, his head on the window, and his right hip on the console. He also cut his leg on the brake pedal, sprained his wrist, and bruised his ribs. The next day he developed a stiff neck and headaches. While these injuries all presented difficulties for the

appellant over the next months, I again limit these reasons to the chronology relevant to his hip complaints.

[11] The appellant saw Dr. Lai about his injuries on June 13, 2008. With respect to his hip, she found a decrease in his range of motion, and tenderness along the right greater trochanteric and upper leg area. She concluded he had sustained a soft tissue injury to the muscles surrounding the hip.

[12] The appellant continued to see Dr. Lai periodically with respect to his injuries. She recommended conservative treatment, including massage, physiotherapy, and medication. She also ordered diagnostic radiological investigations, and referred him to Dr. Lu, as well as to a neurologist and psychiatrist for assessments.

[13] On September 17, 2008, the appellant saw Dr. Lu, who recorded his complaint of increased hip pain since the accident. It was Dr. Lu's view that the accident had not damaged the hip replacement, and that the appellant's symptoms were originating from trochanteric bursitis and subluxation of the fascia lata. He recommended stretching and physical therapy.

[14] The appellant had to discontinue the OR 2 program due to the accident. As his injuries gradually resolved, he was able to return in November 2008. His treatment plan anticipated attendance for eight weeks in the hope he would then be fit to return to work with limitations, although his prognosis for success in meeting this goal remained "guarded". A progress report on December 18, 2008 indicated slow improvement. He left the program at the end of December, however, apparently due to Dr. Lai's view that he was not yet fit to resume rehabilitation.

[15] On May 13, 2010, the appellant saw Dr. Lu again for a follow up. He told Dr. Lu his hip still ached when he stood for longer than an hour or walked, but he was not taking regular analgesics or pursuing further therapy. X-rays taken that day indicated no concerns with his prosthesis. Dr. Lu's report to Work BC stated the appellant was not medically capable of working full-time, but he could increase his activities as tolerated and was an appropriate candidate for further rehabilitation.

[16] The appellant continued to see Dr. Lai periodically up to the trial date. On March 1, 2010, she provided a letter “To Whom It May Concern” stating that the appellant was not competitively fit for any employment for this reason:

He suffers from chronic right hip and back pain resulting from a past WCB related right hip fracture and subsequent right hip replacement surgery. He is unable to sit, stand or walk for greater than 60 minutes intervals.

[17] On August 10, 2010, Dr. Lai completed a medical report for the appellant to submit to the Canada Pension Plan for a disability pension, and again stated his pre-existing right hip problem from 1992 and his surgery in 2007 were the cause of his disability. When she was cross-examined, this exchange took place as to why she did not mention the 2008 accident as a cause of his disability:

Q But you’re not mentioning the accident in this report.

A No, because if I mention anything that’s work-related or ICBC related, then there would be a high chance that he would not qualify for the disability pension.

Q Oh, are you suggesting then that perhaps you’re not being candid and forthright with CPP?

A I’m writing the conditions that he has at this point that is disabling for him, but if I start mentioning things such as ICBC and WCB, then they will often decline and wait till those issues are settled.

Q Okay. So you’re writing in here what is disabling for him, which would suggest, and you’ll agree with me, that these pre-accident problems with his right hip are disabling for him in and of themselves.

A Yes.

[18] On January 17, 2011, Dr. Lai responded to a request from the appellant’s disability insurer for medical information. She set out his complaint as “Chronic Right Hip Pain and Bursitis post Right Hip Arthroplasty”, and described the limitations this created, including:

5. Robert suffers daily from chronic pain in his right hip. He requires daily use of the strong pain medication Endocet. His sleep is disturbed at night because he is awakened by pain in his right hip. He is unable to sit, stand or walk for prolonged periods because of his right hip pain. Frequent sitting breaks are required when Robert goes grocery shopping and during meal preparations and dishwashing.

[19] This letter, like the others, did not mention the accident. At trial, Dr. Lai explained this by saying the insurer did not ask what the cause of the appellant's symptoms were. In cross-examination, however, she agreed the symptoms and disabilities she described in the letter were all related to the 2007 surgery.

[20] On January 3, 2012, Dr. Lai prepared a medical-legal report for trial in which she expressed the opinion that the appellant had sustained right hip bursitis in the accident, and the resulting chronic hip pain continued to limit his daily activities and prevent him from returning to work. She stated:

Robert's right hip symptoms are overall more severe since the motor vehicle accident. Prior to the 2008 accident, there were no limitations in Robert's activities of daily living, he was participating in a rehabilitation program at WCB and was able to walk 2.5 to 3 miles on the treadmill each day. Since the 2008 accident, Robert has experienced limitations at home and at work because of his right hip symptoms. He is unable to do activities which require prolonged periods of sitting, standing or walking greater than 30 minutes. Household chores such as vacuuming or mowing the lawn, now take an exorbitantly long time to complete. He is no longer competitively employable as a truck driver because of his symptoms.

[21] On March 3, 2011, the appellant saw Dr. Lu for the last time before trial for a reassessment of his right hip. Dr. Lu reported he was complaining of "mild and intermittent right lateral hip pain", the range of motion of his right hip was well preserved, and he was not using regular analgesics. It was his opinion that the appellant's residual hip pain was secondary to trochanteric bursitis, and was "mild in intensity and intermittent in pattern". He recommended physical therapy and other conservative treatment.

[22] At trial, Dr. Lu agreed that hip surgery can be one of the causes of trochanteric bursitis, and that tenderness in the greater trochanter can be one of the symptoms of this condition.

[23] On December 21, 2011, the appellant saw Dr. Sovio, an orthopaedic surgeon, for an independent medical examination at the respondent's request. Dr. Sovio reported the appellant's condition at that point as follows:

As far as his right hip is concerned, he finds that the hip is still sore. He feels a “clunking sensation” sometimes. He states that walking sometimes causes him discomfort and he walks most of the time with a limp and has done so even prior to the motor vehicle accident. His surgeon has told him that the x-rays look fine and that any proposed surgery might make him worse so he has been told that he has to live with his current discomfort. He was not told what the diagnosis was and why he was having pain. The left hip does not bother him.

[24] Dr. Sovio noted the appellant was not doing any formal exercise. He observed he had a Trendelenburg limp involving his right leg, which is indicative of failure of the hip replacement, and pain in his right trochanteric area. Although he had not seen any x-rays of the appellant’s hip, it was Dr. Sovio’s view that the appellant’s ongoing difficulties were due to a failure of the hip replacement:

He is not able to function with the hip and he is unable to walk, stand or sit for more than thirty minutes at a time because of hip pain. This pain pre-dated the motor vehicle accident in question and does not appear to have worsened his hip problem as a result of the motor vehicle accident.

The patient has a Trendelenburg sign and an antalgic limp and I think the limp and the hip pain are a result of failure of the total hip replacement.

Further investigation needs to be undertaken with regards to loosening of the hip prosthesis, but I do not feel that this loosening is a result of the motor vehicle accident but rather a gradual progression following the hip replacement as it does not appear that the patient had any pain free interval following the surgery.

[25] On February 22, 2012, Dr. Sovio wrote a supplementary report after reviewing further medical records on the appellant, and reiterated his view that the severity of the appellant’s symptoms and disability level were more in keeping with an unsuccessful hip replacement than with trochanteric bursitis. In his opinion, the fact the appellant’s hip problems had increased in severity fit the picture of a gradual loosening of the hip replacement. At trial, Dr. Sovio testified there is a 90 to 95 percent success rate with “virgin” hip replacements, but the rate drops considerably for hip replacements that have been compromised due to earlier surgery, as in the appellant’s case. He also said although there was some bursitis in the trochanteric area, this would not cause the Trendelenburg sign.

[26] On May 24, 2012, Dr. Lu wrote a response to Dr. Sovio's theory that the hip surgery had been unsuccessful, pointing out that this was not supported by the three sets of hip x-rays done since the appellant's surgery, which Dr. Sovio had not viewed. He concluded:

... I would request Dr. Sovio review the x-rays and identify radiographic evidence to support his diagnosis of prosthetic loosening. I do not believe such a diagnosis can be presumed on suspicion. I also do not believe such a diagnosis is one of exclusion when there are various other clinical conditions that can be contributing to Mr. McArthur's hip pain. These include trochanteric bursitis, subluxating fascia lata, tight iliotibial band, abductor weakness, degenerative spinal disease, and soft tissue injuries of the back. Unless failure of the prosthesis concordant with severe disability can be firmly established, I strongly recommend against revision hip arthroplasty for the above reasons.

[27] Dr. Sovio then reviewed the x-rays. In a report of July 13, 2012, he conceded these did not reveal evidence of prosthetic loosening, but said this could nevertheless be microscopic and difficult to detect.

[28] On January 13, 2012, the appellant saw Dr. Purtzki, a specialist in physical medicine and rehabilitation, to obtain a medical-legal opinion regarding his remaining complaints for use at trial. With respect to his right hip, Dr. Purtzki agreed with Dr. Lu that this was likely related to trochanteric bursitis, as she saw no evidence suspicious of hip joint pain. She also found evidence of weakness in the appellant's muscles around the hip joint, partially due to the hip surgery and partially due to deconditioning, which would aggravate the trochanteric bursitis. She gave this opinion as to causation:

The persistent right hip pain is likely a combination of pre-existing anatomical abnormalities, weakness post hip surgery and aggravation by the MVA.

[29] Dr. Purtzki found the probability the appellant would return to work "very low", stating:

The MVA occurred before he returned to work after hip surgery and thus this is uncertain that he could return to his usual work without a work trial which of course he did not have. Currently a combination of MVA related neck pain and headaches as well as, hip pain and deconditioning and advanced age are preventing him from employment in my opinion.

[30] Dr. Purtzki testified to the symptoms and causes of trochanteric bursitis. She said it is an inflammation of the bursa of the greater trochanter, and has several possible causes, including leg length discrepancy and muscle weakness in the area, which may follow hip surgery. She said tenderness to the greater trochanter on palpation, often with radiation down the side of the leg, is the typical symptom. Dr. Purtzki agreed the tenderness in the appellant's hip identified by Dr. Lu before the accident could be related to his surgery. With respect to causation, however, she testified:

Now the question is why is he continuing to have this problem? I say, you know, likely he had pre-existing problems with his gait before you even get to hip replacement. You limp, when you limp, that can give you trochanteric [*sic*] bursitis. Then he had weak gluteal muscles. Weak gluteal muscles are related to surgery and to arthritis. If you're not using them, they're weak. Then you start getting the tensor fascia lata to do the job. You can then get tightness over the tensor fascia lata and the iliotibial band that can then create greater trochanteric beside it.

So it's just like a cascade of things that can occur. So even having persistence of that doesn't mean anything. What does the car accident have to do with that? It's possible that the car accident either directly injured that area additionally, like I said, or probably more likely that he then was generally set back in his rehab process, and it perpetuated the problem. So had –

Q But you can't – oh, sorry.

A Sorry.

Q You can [*sic*] say that for sure, though. Because he has a pre-existing history of greater trochanteric bursitis, we established that in April. Then he has an accident.

A You see, in that April document that you showed in the additional – it just says he had tender – I mean, it doesn't actually say he has trochanteric bursitis. He says he has tenderness over the greater trochanter. The two are not necessarily the same, and again, there is the variation between having some pain over the area versus, you know, being – having severe pain that can keep you awake at night. So there are gradations as well. So it's hard to interpret that short segment.

I mean, it's possible it was the same, but it's possible it isn't. I don't know.

[31] When asked if it was possible the appellant might have had the same problems in his hip without the accident, Dr. Purtzki replied:

A You know, it is certainly possible that he could. But being faced with the way his particular story went, that he also had this additional injury after which he reports worse hip pain – he calls it hip pain – that’s what he presents with.

So, you know, the other is obviously speculation. Yes, it’s possible, but it could also be not possible. So it could have been either way. Generally, you are expecting – I’m telling you the general expectation is that when you strengthen and when you rehabilitate after a hip surgery, that those things will resolve as time – that would be the expectation. Doesn’t mean it will be 100 percent, but that would be the expectation.

So there is always an uncertainty.

...

Q In any event, in terms of the accident and its relationship to the greater trepan (sic) – bursitis, it’s very complicated, the causation issue in Mr. McArthur’s case, right?

A It’s because he had a pre-existing condition that was in flux. It was in a state of supposed recovery and then he had another event happen, and that seemed to then – at least for what the evidence or what the history is, that it seemed to stall that expected recovery. And, yeah, everything else is speculation because it’s difficult to know what he would have done without the accident.

The Reasons for Judgment of the Trial Judge

[32] The trial judge reviewed the facts surrounding the accident and the appellant’s medical history. In dealing with the legal principles related to causation, she recognized the doctrines of “thin skull” and “crumbling skull” had particular significance given the appellant’s pre-existing hip pain, and described them as follows:

[10] It is during the damages assessment that the doctrines of thin skull and crumbling skull apply. If the damages are unexpectedly severe owing to a pre-existing condition that was latent and symptomatic and would not have affected the plaintiff in the future, then the thin skull would entitle the plaintiff to the full amount of his or her damages (*Athey v. Leonati*, [1996] 3 S.C.R. 458).

[11] Conversely, if the pre-existing condition was manifest and disabling, or would have become so in any event in the future, then the crumbling skull rule entitles the plaintiff only to additional damages suffered by the plaintiff as a result of the accident (*Smyth v. Gill*, 2001 BCCA 650).

[33] She observed that if the appellant's hip pain was shown to be of a crumbling skull nature, the respondent would only be liable for damages to the extent that the accident had aggravated his pre-existing condition. She acknowledged it was therefore important to distinguish as much as possible between the extent and duration of the appellant's injuries before and after the accident.

[34] In her assessment of the evidence, the trial judge found that while the appellant was a seemingly honest and earnest witness, he was not always reliable in his recollections or observations. As a result, where his evidence conflicted with the documentary evidence, she gave more weight to the latter. She found that although the appellant blamed the accident for the hip disability that prevented him from returning to work, the documentary evidence strongly supported the respondent's theory that his disability was the same before and after the accident.

[35] The trial judge found that at the appellant's appointment on April 16, 2008, Dr. Lu observed signs of trochanteric bursitis in his right hip, and that the OR 1 records from April 24, 2008 also indicated tenderness over his right greater trochanter. Having reviewed the medical evidence of the appellant's right hip complaints before and after the accident, she found he had developed trochanteric bursitis prior to the accident. She concluded:

[40] I find that the plaintiff's pre-existing condition of trochanteric bursitis was aggravated by the Accident. No one denied it increased in magnitude after the Accident, but on Dr. Lu's evidence it seemed to have settled down to a minor complaint by March 2011.

[41] I do not find that the condition of the plaintiff's hip joint is connected to the Accident in any way. It is not necessary to decide whether there has been a loosening of the hip prosthesis, as opined by Dr. Sovio, or not. It is not the non-tortious pre-existing injury that is on trial here; it is the tort-induced injury that must be proved on a balance of probabilities. The hip joint issues suffered by the plaintiff are clearly divisible from the trochanteric bursitis, and are clearly the result of the plaintiff's prior injury in 1992 and the surgery in 2007. The defendant cannot be held responsible for any loss suffered by the plaintiff that was not caused by the Accident.

[36] The trial judge then dealt with the other injuries the appellant suffered in the accident. She expressed her conclusions on causation as follows:

[74] The plaintiff must be compensated for losses due to an aggravation of bursitis in the lateral aspect of the trochanter which was substantially resolved by March 2011. The plaintiff must be compensated for losses incurred by him for a soft tissue injury to his shoulder that substantially resolved after about one month, and a soft tissue neck injury that substantially resolved by May 2011. Finally, the plaintiff is entitled to compensation for headaches experienced until May 2011 and an aggravation of his depression due to the setback (perceived or otherwise) in his rehabilitation until November 2008.

[75] The plaintiff is not entitled to compensation from the defendant resulting from post-surgical complications in his hip, such as subluxating fascia lata, tight iliotibial band or weak abductor muscles. The plaintiff is not entitled to compensation from the defendant for his lower back issues which resulted from a previous injury and arthritis in the spine. The plaintiff is not entitled to compensation from the defendant for any neck injuries or headaches after May 2011.

[37] She concluded that the hip surgery was the reason the appellant could not return to work, and that he had not established a claim for loss of income:

[87] The evidence was overwhelming that the plaintiff's inability to return to work was related to the outcome of his hip surgery. Besides the opinions of Dr. Lu and Dr. Sovio that the plaintiff's bursitis was of a mild and intermittent nature, there were medical reports written by Dr. Lai to Canada Pension Plan (CPP) Disability Benefits, Co-Operator's Insurance Company, and To Whom it May Concern, respectively, all of which described the plaintiff's pre-Accident hip pain and surgery as the reason for his inability to work.

...

[92] The overwhelming conclusion is that the plaintiff has not proved that he suffered any loss of income as a result of the Accident. Furthermore, the plaintiff has not shown any real possibility of income loss in the future because of the Accident. Unfortunately, by the time of the Accident, the plaintiff's skull had already "crumbled" in that he was suffering from a manifest disability that would have prevented him from working in any event.

[38] The trial judge similarly found the appellant was not entitled to future care costs as any future needs arose from his pre-existing chronic injuries.

[39] She ultimately awarded non-pecuniary damages of \$40,000 for all of the injuries the appellant suffered in the accident, and \$4,000 for his special damages.

Issues on Appeal

[40] The appellant alleges the trial judge misapprehended the evidence and erred in fact when she found he was suffering from trochanteric bursitis prior to the motor vehicle accident, and seeks an order for a new trial.

[41] If he is unsuccessful on his first ground of appeal, the appellant alleges the trial judge erred by applying the wrong standard of proof to future events in her assessment of damages.

Discussion

[42] The parties agree that the trial judge correctly stated the law with respect to causation. She acknowledged the general test for is the “but for” test developed in *Athey v. Leonati*, [1996] 3 S.C.R. 458, 140 D.L.R. (4th) 235, and affirmed in *Clements v. Clements*, 2012 SCC 32, [2012] 2 S.C.R. 181. This required the appellant to establish on a balance of probabilities that the respondent’s negligence was a necessary cause of his right hip disability. He did not have to show it was the only cause, but did have to prove that his disability would not have occurred without the motor vehicle accident.

[43] The trial judge also recognized that this was a case in which the doctrines of “crumbling skull” and “thin skull” had application, since the appellant was still experiencing hip pain from his hip replacement surgery when the accident occurred. The Supreme Court described these concepts in *Athey* as follows:

[34] ... The “crumbling skull” doctrine is an awkward label for a fairly simple idea. It is named after the well-known “thin skull” rule, which makes the tortfeasor liable for the plaintiff’s injuries even if the injuries are unexpectedly severe owing to a pre-existing condition. The tortfeasor must take his or her victim as the tortfeasor finds the victim, and is therefore liable even though the plaintiff’s losses are more dramatic than they would be for the average person.

[35] 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. The defendant is liable for the additional damage but not the pre-existing damage: ...

[Emphasis in original.]

[44] Applying these principles here, the key issue was whether the appellant's post-surgical state made his hip more susceptible to injury in the accident, creating a thin skull scenario, or whether it represented a disability he would have suffered in any event, attracting a crumbling skull analysis in which the respondent would not be liable for damages related to the ongoing hip disability.

[45] These are factual issues, and this Court must approach the trial judge's findings and inferences of fact with a high degree of deference, and may not interfere merely because we take a different view of the evidence. Instead, the appellant must establish that the trial judge made a palpable and overriding error in her factual conclusions, or in the inferences she drew from those conclusions: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 at paras. 21, 23-25.

[46] Turning to the parties' positions, the appellant says the respondent advanced two alternative theories of causation at trial to demonstrate that her negligence was not the cause of his ongoing disability. First, she alleged his hip pain was due to failed hip surgery, based on Dr. Sovio's opinion. The trial judge made no finding on this theory. Second, the respondent claimed the appellant had developed trochanteric bursitis prior to the accident, and this was the cause of his ongoing disability. The appellant says the trial judge erred in accepting this theory because no physician diagnosed trochanteric bursitis before the accident. Instead, the evidence indicated that he was continuing to improve and was expected to be able to return to work within a few weeks. The appellant says since there was no finding his disability arose from failed surgery, and a proper review of the evidence shows he did not develop trochanteric bursitis until after the accident, he should have continued his recovery. Instead, following the accident his hip pain worsened and Dr. Lu diagnosed trochanteric bursitis. The appellant maintains the only conclusion is that the accident caused further injury to his hip and was a necessary cause of the disability that prevented him from recovering sufficiently to return to work.

[47] The respondent concedes there was no formal diagnosis of trochanteric bursitis prior to the accident, but says there was nevertheless evidentiary support for the trial judge's finding that it was present before June 9, 2008. She maintains it is typically diagnosed by tenderness in the region of the bursa, which the appellant clearly exhibited prior to the accident. Alternatively, the respondent submits that the issue of trochanteric bursitis is a red herring. She says the appellant's post-surgical hip pain was uncharacteristically prolonged and sufficiently severe to prevent him from returning to work before the accident. While the accident aggravated his pain, there is no evidence that it altered his long-term prognosis. The respondent maintains the trial judge properly found the increased hip pain caused by the accident had settled by March 2011, and played no role in the disability that prevented the appellant from returning to work.

[48] These arguments require a re-examination of two of the trial judge's findings of fact. First, it is common ground that the trial judge erred in her finding at para. 40 of her reasons that the appellant had trochanteric bursitis before the accident. This condition was not medically diagnosed until September, 2008.

[49] Second, the judge's finding at para. 41 of her reasons that the appellant's hip joint issues "are clearly divisible from the trochanteric bursitis, and are clearly the result of [his] prior injury in 1992 and the surgery in 2007" is difficult to reconcile with the rest of her findings and the evidentiary record. Her comments at paras. 35 and 37 of her reasons demonstrate that she was aware Dr. Lu and Dr. Purtzki had testified that trochanteric bursitis can be causally related to hip surgery. Further, while her finding that it was diagnosed before the accident was incorrect, the fact she held this view makes it difficult to understand why she found the trochanteric bursitis was divisible from the rest of the appellant's hip joint issues. Finally, the trial judge made no finding as to the cause of the appellant's ongoing hip pain. She declined to accept Dr. Sovio's theory that the prosthesis had loosened, and reached no other conclusion about the source of the appellant's disability, referring to it in nebulous terms such as his "hip joint issues", "the condition of [his] hip joint", and "the outcome of his hip surgery". It is therefore difficult to discern how she was able

to find the trochanteric bursitis was divisible from these other problems. In my view, on the record before her this finding was anomalous and erroneous.

[50] The question for this Court is whether these errors are fatal to the trial judge's ultimate conclusion on causation, at paras. 41 and 87 of her reasons, that the appellant's hip condition and his inability to return to work were related to the outcome of his hip surgery, and were not caused by the respondent's negligence. In my view, it is clear from the trial judge's reasons that her findings that the trochanteric bursitis existed prior to the accident, and that the hip joint issues were divisible from the trochanteric bursitis, substantially influenced the manner in which she analyzed the evidence on the critical questions of causation and damages. These findings were material to her ultimate conclusion that, as of March 2011, the appellant was in the same position as he had been in before the accident, and the respondent therefore was not responsible for his inability to return to work, and could not be held accountable for damages for his ongoing disability.

[51] In my view, the only just result is to order a new trial, which is the relief sought by the appellant. It is therefore unnecessary to consider the appellant's second ground of appeal.

[52] I would allow the appeal and direct a new trial.

"The Honourable Madam Justice Neilson"

I AGREE:

"The Honourable Madam Justice Prowse"

I AGREE:

"The Honourable Madam Justice D. Smith"