

“CRUMBLING SKULL” VS. “THIN SKULL”

**BOONE V. O’KELLY,
2021 ONSC 2308**

The Reasons for Decision of The Honourable Mr. Justice Robert N. Beaudoin, Ontario Superior Court of Justice, were given on March 26, 2021.

This case requires consideration of the “crumbling skull” versus “thin skull” principles and the application of any general or specific contingencies to that assessment, where the Plaintiff has a complex medical history.

The Plaintiff Paul Boone (“Paul”) was born on March 7, 1963. Shortly after birth he was diagnosed with hydrocephalus and a shunt was inserted into his spine in order to drain the fluid from his brain. That shunt was replaced when Paul was five years old. By the time he was 11 years old he started to develop a curvature of his spine which required major surgery. That surgery was followed by surgeries to the hamstring muscles of his legs and his right foot. Paul went on to develop kyphoscoliosis, an extreme curvature of the spine. He also suffers from a number of medical conditions which include developmental delay, swelling of his lower limbs, an enlarged prostate and restriction of his pulmonary function. Despite his many challenges, and with the excellent care and attention provided by his parents, Paul was able to enjoy a full life. He could walk independently, and he participated in numerous activities including, but not limited to bowling, swimming, skating, dancing and mini-putt golf. Paul resided with his parents. He also travelled with them. He kept his own bank account, managed his own money and paid for his own groceries and clothing. He attended a sheltered workshop daily and could use Para Transpo. He was independent in almost all aspects of his daily life. He only required assistance when putting on his socks and shoes and, sometimes, he needed limited toileting assistance. According to Paul’s parents, Beth and Larry Boone (“Beth” and “Larry”), also Plaintiffs in this action, they could leave Paul alone for short periods of time. Beth testified that Paul’s disability did not vary for 20 years. While he had suffered a number of falls in the past, he was always able to recover quickly and continue his activities as before.



Occasionally Paul's parents would travel on their own and Paul would be placed at Lavonne Respite Care Centre ("Lavonne") for a few days. During a stay there, on October 13, 2010, Paul suffered what proved to be a serious fall. He underwent an emergency craniotomy to control bleeding in his skull. That surgery was successful and was followed, on February 4, 2011, by a procedure to have a filter removed from his interior vena cava. During this later procedure ("the incident") the Defendant radiologists caused a puncture to Paul's heart, requiring immediate repair. The puncture disrupted the flow of blood to Paul's spine resulting in paraparesis of his lower limbs.

Between the time of the fall and emergency craniotomy in October 2010 and the incident of February 4, 2011, Paul attended rehab and was discharged at the end of January 2011. Paul returned to his workshop at the Loeb Centre. Beth thought that Paul was back to normal. He was not using a walker at the house, nor at the Loeb Centre as far as she knew. Testimony of the physiotherapist and occupational therapist at the rehab centre support Beth's contention that he was independent in most areas.

Since the February 4, 2011 incident, Paul can no longer walk. He is confined to a wheelchair. For practical reasons he wears diapers as he can no longer go to the bathroom on his own. He requires two person transfers when he gets up, when he goes to the bathroom, when he has a shower and when he goes to bed at night. Paul is dependent on others for almost all of his activities of daily living. He requires two-person 24 hour care. While he has resumed some of his former activities, witnesses consistently testify that Paul has changed. He has been diagnosed with depressive disorder. Beth testified that Paul is naïve and unable to accept his new limitations.

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The Defendants have admitted liability and causation and the Plaintiffs submit that they must take Paul Boone as they find him, and, so far as money can do, put him in the same position he would have been but for their negligent conduct. The Plaintiffs argue that Paul's claim is governed by the "thin skull" rule and that his pre-existing condition rendered him more vulnerable to the injuries he suffered which have left him functionally paralyzed. The Defendants maintain that the "crumbling skull" doctrine is applicable, and that Paul would have found himself in his current condition within five years of the subject incident, regardless of the negligence of the Defendants.

"[272]" A concise discussion of the thin skull rule and the crumbling skull doctrine is found in *Athey v. Leonati*, 1996 CanLII 183 (SCC), [1996] 3 S.C.R. 458 at paras. 34 and 35:

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: Likewise, if there is a measurable risk that the pre-existing condition would have detrimentally affected the plaintiff in the future, regardless of the defendant’s negligence, then this can be taken into account in reducing the overall award: This is consistent with the general rule that the plaintiff must be returned to the position he would have been in, with all of its attendant risks and shortcomings, and not a better position. (Internal citations omitted)”

The case law supports the Plaintiffs’ position that evidence of a vague possibility is not reasonable evidence of a material risk and that evidence of a material risk, enough to trigger the application of the “crumbling skull” doctrine, must be “cogent, tangible and credible”

Defendants sought to rely on the evidence of Dr. Anthony Burns to establish that Paul would have found himself in the same condition that he is today within five to ten years of the date of the incident. Mr. Justice Beaudoin dismissed the entirety of Dr. Burns’ evidence. Notwithstanding the exclusion of that opinion, the Defendants continued to advance a “crumbling skull” argument to limit Paul Boone’s damages.

Paul Boone was 47 years old at the time of the incident. Mr. Justice Beaudoin noted that, “apart from evidence with respect to several falls, there was no evidence of any decline, prior to this incident, in Paul’s ability to function independently.” While he agreed that the history of falls is problematic, he found that “the evidence reveals that Paul recovered after each fall, including the nearly fatal fall in October 2021 that left him hospitalized for two months...[and] After two months of therapy... He had returned to his pre-accident condition.”

Mr. Justice Beaudoin found that the Defendants “failed to meet the evidentiary burden to apply the “crumbling skull” doctrine. There is no cogent, tangible and credible evidence that Paul would have become functionally paralyzed at 52 years of age, or even at age 57...” which was the age Paul had reached at the time of trial.



Based on Paul's complicated pre-incident history and mobility issues, Mr. Justice Beaudoin found it reasonable to apply an over all negative contingency of 15% to all of the costs associated with Paul's future care.

SUMMARY OF DAMAGES AWARDED

PAUL BOONE

General non-pecuniary damages	\$250,000.00
Out-of-pocket expenses	\$177,317.54
Future care costs	\$5,702,527.53
SUB-TOTAL (PAUL)	\$6,129,845.07

BETH AND LARRY BOONE

Beth Boone (loss of care, guidance, & companionship)	\$90,000.00
Larry Boone (loss of care, guidance, & companionship)	\$90,000.00
Past attendant care services	\$1,566,752.00
SUB-TOTAL (BETH AND LARRY)	\$ 1,746,752.00
TOTAL (PAUL, BETH, AND LARRY)	\$7,876,597.07

The full Reasons for Decision of The Honourable Mr. Justice Robert N. Beaudoin [CAN BE FOUND HERE](#)

WRITTEN BY STELLA GOWANS, PARALEGAL

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