

CANADA / JUDGMENT

7-Eleven Canada Inc. v. Tommy

2025 BCCA 220

COURT

British Columbia Court of Appeal

DECIDED

25 June 2025

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2025 BCCA 220 7-Eleven Canada Inc. v. Tommy

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

7-Eleven Canada Inc. v. Tommy,

2025 BCCA 220

Date: 20250625

Docket: CA50178

Between:

7-Eleven Canada, Inc.

Appellant

(Defendant)

And

Crystal Leanne Tommy

Respondent

(Plaintiff)

Before:

The Honourable Mr. Justice Grauer

The Honourable Justice Donegan

The Honourable Justice Gomery

On appeal from: An order of the Supreme Court of British Columbia, dated September 4, 2024
(Tommy v. 7-Eleven Canada, Inc., 2024 BCSC 1558,

Vancouver Docket S203407).

Counsel for the Appellant:

M. Vesely, K.C.

C. Chisholm

Counsel for the Respondent:

T. Dennis

Place and Date of Hearing:

Vancouver, British Columbia

June 13, 2025

Place and Date of Judgment:

Vancouver, British Columbia

June 25, 2025

Written Reasons by:

The Honourable Justice Gomery

Concurred in by:

The Honourable Mr. Justice Grauer

The Honourable Justice Donegan

Summary:

The respondent was injured as a result of the appellant's negligence and was awarded significant damages. The appellant challenges the award of damages on the basis that the judge erred in failing to address whether the respondent's mental health injuries were the consequence of non-compensable as opposed to compensable causes.

Held: Appeal allowed. The judge's reasons can only be understood as treating the respondent's mental health injuries as indivisible consequences of the appellant's negligence. However, she made no finding capable of supporting this causal connection as a matter of fact or law.

Furthermore, she failed to engage in the necessary analysis of whether the mental health issues the respondent was suffering at the time of trial were the divisible consequence of what were conceded to be divisible injuries. These errors undermine the judge's damage assessment, and the record is insufficient for this Court to perform its own. A new trial is ordered.

Reasons for Judgment of the Honourable Justice Gomery:

Overview

- [1] When a plaintiff is injured due to the negligence of a defendant, but then suffers further unrelated injuries, the assessment of the damages payable by the negligent defendant is sometimes complicated. The law distinguishes "divisible" and "indivisible" injuries: *Athey v. Leonati*, [1996] 3 S.C.R. 458, 1996 CanLII 183 at paras. 24-25; *Neufeldt v. Insurance Corporation of British Columbia*, 2021 BCCA 327 at paras. 66-68 & 79-98. The idea is that the losses associated with divisible injuries can be apportioned among the injuries, while the losses associated with indivisible injuries cannot. If injuries are divisible, then the losses flowing from those injuries must be apportioned among those injuries: *Neufeldt* at para. 80. Losses are divisible where it is possible to tease out independent chains of causation.
- [2] This is a case in which the plaintiff, Ms. Tommy, suffered physical injuries and ailments, some of which were consequences of the defendant's negligence, and some of which were not. Among her difficulties were sadness and depression that the trial judge described as mental health injuries. The primary issue on appeal is whether the judge misapplied the law in attributing these mental health injuries to the defendant's account.
- [3] In 2018, Ms. Tommy was injured when she stepped into an unexpected pothole in the appellant's parking lot. She fractured her ankle in three places. While liability was in issue at trial, the appellant no longer disputes that it was at fault and liable to compensate Ms. Tommy for her injuries. They are significant. Ms. Tommy was off work for eight or nine weeks and has been left with a permanent limp. Her ankle frequently swells or "balloons" when she spends much time on her feet.
- [4] Ms. Tommy suffered the ankle injury in May 2018. In December 2018, she fell while descending a staircase and hurt her back. The judge found that Ms. Tommy's ankle injury played a part in this mishap and that her back injury must be considered as a consequence for which the appellant bears responsibility.
- [5] Prior to suffering the ankle injury and subsequently, Ms. Tommy worked in a tree nursery. This was a physically demanding job that required her to lift, plant, and organize tree seedlings for reforestation projects. After suffering the ankle and back injuries, she continued in this work in 2019 with some accommodations from her employer. It was seasonal work, as the nursery shut down for the winter. Typically, Ms. Tommy worked full-time for 39 weeks in a year.
- [6] In 2020, Ms. Tommy continued working at the nursery except for a period when she was ill with Covid-19.
- [7] In November 2020, Ms. Tommy lost control of her vehicle while driving in icy conditions and suffered shoulder, elbow and abdominal injuries unrelated to her ankle and back injuries. She subsequently developed a hernia in consequence of her abdominal injury. In October 2022, she suffered the development of an ovarian cyst. In March 2023, she underwent surgery to remove the cyst and endured a second hernia as a complication of the surgery. In

April 2024, she was advised that she would require further surgery to repair the second hernia, and she was awaiting that surgery at the time of trial in July 2024.

- [8] All of the physical injuries and ailments suffered after November 2020 were considered by the trial judge as independent of the consequences of the ankle injury suffered in May 2018. In this Court, Ms. Tommy accepts that they are not attributable to the ankle injury. She was off work in consequence of these independent injuries and ailments from October 2022 and was expected to remain off work at least until the spring of 2026. The judge recognized that the appellant should not have to compensate her for the time off work between October 2022 and the spring of 2026.
- [9] However, the judge held that Ms. Tommy was entitled to compensation for mental distress, depression and unhappiness she experienced since the May 2018 injury. This conclusion factored into the judge's assessment of non-pecuniary damages, and damages for future loss of income earning capacity in respect of the period after April 2026. In so doing, the judge treated the injury to Ms. Tommy's mental health as a consequence of the original ankle injury, not a divisible consequence of various physical injuries and ailments which included both the ankle injury and consequent back injury and the various non-compensable injuries and ailments suffered by Ms. Tommy since November 2020.
- [10] The appellant maintains that the judge erred in law in failing to address whether the mental health injuries were the consequence of non-compensable as opposed to compensable causes, and that this error undermines the judge's assessment of damages. The appellant further submits that the judge erred in other respects: in applying the law governing an award for loss of housekeeping capacity; in another aspect of the assessment of an award for future loss of the income earning capacity; in awarding damages that were inordinately high; and in placing weight on expert evidence tendered by Ms. Tommy that was not sufficiently grounded in the evidence.
- [11] Ms. Tommy submits that the judge did not err. She characterizes the appellant's arguments as an attempt to reargue factual matters in the absence of an overriding and palpable error.
- [12] For the reasons that follow, I agree with the appellant that the judge erred in law in her treatment of the mental health injuries. I view the error as undermining the judge's damage assessment. The evidence and judge's findings are not sufficient to enable this Court to perform its own assessment. With regret, I would order a new trial.

The trial judgment

- [13] Ms. Tommy was born in 1987 and has lived most of her life in Northwestern British Columbia. She is a member of the Wet'suwet'en First Nation. Following high school graduation in 2006, she went to work for the Woodmere Nursery in Smithers. That was her only employment of any significance through 2022.

- [14] The trial judge noted that Ms. Tommy's work was important to her. Despite its physical challenges, she loved her job at the nursery as it involved working with people she considered her friends. The judge accepted the evidence of her mother, sister, and boyfriend that, prior to fracturing her ankle, she was an outgoing person with a funny sense of humour. She enjoyed going for walks outdoors.
- [15] The judge noted that Ms. Tommy "does not claim for injuries resulting from a motor vehicle accident in 2021 which resulted in a hernia, and subsequent difficulties created by the resulting surgery": at para. 70. The judge found that, in late 2022, Ms. Tommy stopped working at the nursery due to these health issues: at paras. 23-24.
- [16] By the time of trial, the judge described Ms. Tommy as "sad and depressed as she is unable to do her previous activities and unable to work at the nursery where she effectively had all her social connections with her friends": at para. 25. She had gained close to 100 lbs in weight; the judge observed that she is "not tall": at para. 26.
- [17] The judge compared Ms. Tommy's state prior to her injury in 2018 with her state at the time of trial and stated:
- [27] All witnesses corroborated Ms. Tommy's change from a happy person to one who is sad and depressed. Her sister says she now seems to just shut herself in her room in her father's house, and references her pain or makes excuses to not go out when she is invited to do so.
- [Emphasis added.]
- [18] Under the heading "What is the legal causation of Ms. Tommy's injuries following the accident?", the judge reviewed her ankle and back injuries and their consequent effects on her mobility. She addressed the circumstances of the fall in which Ms. Tommy incurred the back injury in some detail. She explicitly found that "there is no doubt Ms. Tommy had some mobility impairment as a result of the limp and this in conjunction with the snow conditions of the day, materially contributed to her fall": at para. 77. Accordingly, she concluded:
- [79] As the plaintiff submits, the fall is a non-tortious event for the Athey analysis. It contributed to the accident related injuries of limping and pain avoidance and as such is compensable by the defendant.
- [19] The judge listed Ms. Tommy's difficulties with her mental health as well and concluded that Ms. Tommy suffered "a legally compensable mental injury" without performing the same analysis. She did not identify the ankle or back injuries as material contributors to the mental distress experienced by Ms. Tommy. She stated:

- [81] In view of all the above, while there is some possibility of improvement depending on further medical imaging and possible treatment, as 6 years have gone by, Ms. Tommy's symptoms have remained consistent and her recovery has plateaued. I accept therefore that Ms. Tommy is rendered partially disabled and continues to be limited in her daily activities up until this time. She continues to experience mobility issues, pain as well as difficulties with her mental health as she attested to, and this was corroborated by her family members.
- [83] In this case, I agree as argued by the plaintiff that the evidence establishes Ms. Tommy as happy, funny, outgoing and active before the accident. She is no longer so and is described by her family members as sad, depressed and most recently has been locking herself in her room. She is stressed and unhappy, largely due to her financial situation. This I conclude is serious and prolonged, arising above the ordinary anxieties, fears and annoyances and rises to the level of a legally compensable mental injury and I include it as part of my consideration of the heads of damages claimed.

[Emphasis added.]

- [20] The judge awarded non-pecuniary damages of \$175,000, describing it as "particularly troubling that she is presently very unhappy, such that she is now confining herself to her room": at para. 91.
- [21] The judge awarded Ms. Tommy \$907,363 in total, including \$494,000 for future loss of income earning capacity, \$39,000 for past loss of housekeeping, and \$171,863 for future loss of housekeeping.

Issues

- [22] In my opinion, although other issues were argued, this appeal turns on only two issues:
1. Did the judge err in law in attributing Ms. Tommy's compensable mental health injuries to the injuries caused by the appellant?
 2. If so, is a new trial necessary?

Analysis

1. Did the judge err in law in attributing Ms. Tommy's compensable mental health injuries to the injuries caused by the appellant?

Legal framework: divisibility and causation

- [23] The problem of divisibility of damage arises from the treatment of causation in tort. A tortfeasor is responsible for both the immediate injury and its natural consequences, so long as they are not too remote. Adverse consequences may have more than a single cause. Thus, adverse consequences may be viewed in law as resulting from independently tortious acts, and multiple defendants may be responsible to pay damages.

- [24] It may be the case that tortfeasors independently injure a plaintiff who suffers separate consequences. This would arise if, for example, tortfeasor A injures the plaintiff's arm, and tortfeasor B injures the plaintiff's leg in a later incident. These are divisible injuries: *Athey* at para. 24. They do not cease to be divisible if the subsequent adverse consequences for the plaintiff overlap: *Neufeldt* at para. 80. For example, if the plaintiff must take time off work while recovering from the arm injury and suffers the leg injury in that period and remains off work, the court must consider when the plaintiff would have returned to work if it were not for the leg injury, and limit the damages payable by tortfeasor A accordingly. Both tortfeasors A and B will be responsible for the economic loss suffered by the plaintiff for the period when both injuries were keeping the plaintiff from working. Only tortfeasor A will be responsible for the prior period, and only tortfeasor B for the subsequent period: *Neufeldt* at paras. 85-86; *Dingle v. Associated Newspapers Ltd.*, [1961] 2 Q.B. 162 at 189 (C.A.).
- [25] Sometimes injuries are indivisible. If both tortfeasors injure the plaintiff's neck, so that it is impossible to differentiate the injury caused by each tortfeasor, then the injuries are indivisible.
- [26] To this point, I have discussed injuries caused by two tortfeasors. However, where the plaintiff suffers injuries or ailments independent of those caused by tortfeasor A, it makes no difference whether the other injuries or ailments were caused by the tortious conduct of a tortfeasor B, or some other independent, non-tortious event. In either case, tortfeasor A is responsible for the natural consequences of their own wrongful conduct, and only those consequences: *T.W.N.A. v. Canada (Ministry of Indian Affairs)*, 2003 BCCA 670 at paras. 23-24 and 36.

Standard of review

- [27] Whether damage is divisible is a question of fact, while the application of the legal framework used to address the question of divisibility is a question of law: *Neufeldt* at para. 62. Similarly, the legal framework that identifies what is required to establish causation is a matter of law. Thus, while a finding of causation is a finding of fact, overlooking the absence of a legally essential factual underpinning is a legal error: *Isbister v. Delong*, 2017 BCCA 240 at paras. 177-180.
- [28] Questions of fact are reviewed on a deferential standard, so that this Court will only intervene in the case of an overriding and palpable error. But questions of law are reviewed according to a different standard. This Court must ask whether the legal framework was correct, without deferring to the reasoning of the trial judge.

Ms. Tommy's mental health issues

- [29] Ms. Tommy's physical ailments were obviously divisible, and the judge treated them as such. She differentiated the ongoing ankle and back injuries attributable to the 2018 fracture from the shoulder, elbow and abdominal injuries attributable to the 2020 motor vehicle accident as well as the hernia, ovarian cyst, and everything that followed. However, the judge treated Ms. Tommy's compensable mental health issues--depression, and the loss of a happy and outgoing nature--as indivisible consequences of the original ankle injury.
- [30] In my opinion, the judge erred in her treatment of the compensable mental health issues by mistaking the applicable legal framework. The error may be understood in two ways. Most simply, it may be understood as a failure to make a necessary finding of fact, namely a finding that the ankle and back injuries contributed to the mental distress that the judge found was legally compensable. Alternatively, the judge's error may be understood as a failure to address whether mental distress of a compensable nature consequent on divisible physical injuries was itself divisible.
- (1) Failure to make a necessary finding of fact
- [31] It is clear from the judge's findings, and the evidence accepted by the judge, that the mental health difficulties noted by the judge in her assessment of damages were attributable to a large extent to Ms. Tommy's recent physical ailments and her absence from a workplace she loved. She felt isolated from her social contacts through work and experienced financial stress from being off work. The loss of her employment in late 2022 was not a consequence of the ankle injury in 2018. She had carried on working for two years after she suffered the ankle injury. The loss of her employment was a consequence of the non-compensable injuries and ailments she suffered commencing in November 2022.
- [32] Ms. Tommy submits that the evidence of a deterioration in her mental health was not limited to a comparison of her state prior to the 2018 ankle injury and at the time of trial. She points to the evidence that she was off work for eight to nine weeks in 2018 and argues that her mood was impaired by that period of social isolation, by her persisting reduced mobility from the ankle injury, and by persisting chronic pain associated with the ankle injury. She submits that the judge's finding of compensable mental health injuries was accordingly justified.
- [33] Ms. Tommy's submission is not grounded in a fair reading of the evidence and the judge's use of it.
- [34] Most of the evidence bearing on Ms. Tommy's mental health issues flowed from the questions put by Ms. Tommy's counsel. To Ms. Tommy, they were questions such as: "How's your mental health been more recently? How are you spending your time these days?" Ms. Tommy's evidence in chief ended with the following exchange:

Q. Is there anything else you'd like to tell the court about how your life has changed from after May 2nd, 2018?

A. I know a lot's changed. Like social wise I can't do as much as I used to, like hanging around with friends all the time. And by our house there's this nice, like, trail we usually go down to Jello Beach, and I can't do that no more because it's, like, a steep hill - and walking around with my dogs in the field all the time. I have two large dogs.

Q. So what's your social life like these days?

A. None really. Just with my boyfriend or my sister and not being at work also, because that's where I got most of my social interaction with - was with friends at work.

Q. Does that affect your mood at all?

A. Yeah.

Q. How so?

A. I think more like just sad because I miss my friends from work.

[Emphasis added.]

[35] Ms. Tommy's mother's evidence in chief focused on her present state and included the following:

Q. What's her mental health been like since May 2nd, 2018?

A. Deteriorating.

Q. How so?

A. She's not the happy person she used to be. She's sad a lot. She's depressed a lot.

Q. What are you seeing in her that leads you to that conclusion?

A. Just her crying and that she can't do the work she used to do. She's not - she can't be the person she was. Kind of sad.

Q. Are you worried about your daughter at all?

A. All the time.

Q. Why?

A. Her health, her weight, her livelihood because she's in a cocoon right now.

Q. What do you mean "cocoon"?

A. She doesn't go out much, and if she does it hurts too much. And there's so much for her to see.

[Emphasis added.]

- [36] Ms. Tommy's boyfriend was asked about her mental health "more recently". He described her as stressed out about falling behind financially and the loss of her driver's licence. The evidence was that she could not afford to pay an insurance bill required to renew her driver's licence.
- [37] Ms. Tommy's sister also focused on her present difficulties. When she was asked to address Ms. Tommy's state after May 2, 2018, she framed her answers in the present tense. She said: "she just seems more in a depression keeps to herself most of the time". When Ms. Tommy was invited out, she said "there's always an excuse".
- [38] Some of the evidence accepted by the trial judge might have supported an inference that Ms. Tommy was experiencing mental health issues in 2019 and 2020, while she was still at work but experiencing reduced mobility and chronic pain. Her counsel urges this inference on us.
- [39] But it is not at all clear that the judge drew this inference or relied on it to assess damages. Her findings concerning Ms. Tommy's mental health issues reference Ms. Tommy's present sadness and depression, and attribute them to her being off work and her financial and health challenges since 2021: at paras. 25-27 and 81. At para. 82 of her reasons, she refers to *Saadati v. Moorhead*, 2017 SCC 28 at para. 37 and the requirement that a compensable mental injury must be "serious and prolonged and rise above the ordinary annoyances, anxieties and fears that come with living in civil society". The judge applies this test and emphasizes the evidence of Ms. Tommy's present mental state. For ease of reference, I repeat the judge's finding:
- [83] In this case, I agree as argued by the plaintiff that the evidence establishes Ms. Tommy as happy, funny, outgoing and active before the accident. She is no longer so and is described by her family members as sad, depressed and most recently has been locking herself in her room. She is stressed and unhappy, largely due to her financial situation. This I conclude is serious and prolonged, arising above the ordinary anxieties, fears and annoyances and rises to the level of a legally compensable mental injury and I include it as part of my consideration of the heads of damages claimed.
- [Emphasis added.]
- [40] In short, the evidence relied upon by the judge to conclude that Ms. Tommy's sadness and depression rise to the level of a compensable injury was the evidence of her present state, not her state in the period from May 2018 through November 2020, after the ankle injury and before the car accident. The judge did not address the effects of the ankle injury and back injury on Ms. Tommy's mental state.
- (2) Failure to address whether the mental health issues were divisible

- [41] Moreover, the mental health issues were not of themselves caused by the appellant but were rather a consequence of the physical ailments suffered by Ms. Tommy, and those ailments are divisible. Accepting the divisibility of the physical ailments, it was incumbent on the judge to address whether their mental health consequences were divisible.
- [42] Neufeldt featured an equivalent error on the part of a trial judge who was assessing damages. The plaintiff was a police officer who was injured in two separate motor vehicle accidents, one in 2012 and the other in 2016. He suffered soft tissue injuries in the neck and back in the 2012 accident and some of the resulting symptoms were persisting when he was injured in 2016, but the 2016 accident both exacerbated the persisting neck and back injuries and also caused a mild traumatic brain injury that was new. The trial judge mistakenly treated all the injuries as indivisible. The neck and back injuries were indivisible, but the brain injury was divisible. It was only a consequence of the 2016 accident and could not be attributed to the 2012 accident. Speaking for the Court at para. 76, Willcock J.A. held that the trial judge erred in law in failing to engage in the assessment of causation required by law. He stated:
- [77] in cases where there are sequential injuries, and in particular in cases such as this, where there is a body of evidence supporting the view there were divisible injuries, that evidence must be addressed to ensure the most basic principles of tort law are given effect.
- [Emphasis added.]
- [43] The judge's analytical error undermined his assessment of the plaintiff's damages for loss of earning capacity. Justice Willcock explained:
- [80] It is clear on the record that both the respondent's continuing symptoms of a back and neck injury, and the constellation of symptoms associated with his mild traumatic brain injury, contributed to his loss of income earning capacity. Where divisible injuries combine to cause damages, even damages that overlap, the court must engage in the difficult task of assessing the damages associated with each injury. For that reason, in the case at bar, the trial judge ought to have assessed the damages occasioned by the traumatic brain injury, if it was divisible.
- [Emphasis by underlining in original, italics are added.]
- [44] I should note that Neufeldt and the question of the divisibility of the mental health injuries were not addressed in argument before the trial judge.

Conclusion as to the judge's error

- [45] To summarize, in my opinion, faced with Ms. Tommy's claim to be compensated for the consequences of divisible injuries, the trial judge erred in law in failing to engage in the assessment of causation required by law. Absent a finding that the ankle and back injury materially contributed to the compensable mental health issues, it was not open to the judge to incorporate the mental health issues into her assessment of damages payable by the

appellant. Applying the correct legal framework, it was incumbent on the judge to consider whether Ms. Tommy's mental distress was divisible because it flowed from divisible physical injuries and ailments. She did not do so. At the end of the day, it does not matter whether these are viewed as separate errors or as different aspects of a single analytical error.

2. Is a new trial necessary?

[46] The judge's conclusion that the appellant is liable for mental health injuries suffered by Ms. Tommy was important to her assessment of damages. She referred to it expressly in assessing non-pecuniary damages of \$175,000 and an award for future loss of income-earning capacity of \$494,000. We are not in a position to reassess damages in the absence of findings of fact that could ground a just apportionment. They are the province of the trial court.

[47] In my opinion, a new trial of the damages payable by the appellant is necessary. It is not possible, in the circumstances of this case, to isolate particular heads of damages for fresh determination. All must be considered afresh.

Disposition

[48] For these reasons, I would allow the appeal, set aside the order of the Supreme Court and substitute an order declaring the appellant liable for damages to be assessed.

[49] I would order that costs of the proceedings to date in the Supreme Court be determined in that Court at the conclusion of the damages assessment.

"The Honourable Justice Gomery"

I AGREE:

"The Honourable Mr. Justice Grauer"

I AGREE:

"The Honourable Justice Donegan"

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/ca/25/02/2025BCCA0220.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/7-eleven-canada-inc-v-tommy-2025>

Prepared on 28 October 2026 · Esheria