

tingency fee arrangement. Therefore, more discovery does not mean more expense to the plaintiff litigant. Contingency fees promote access to justice more effectively than capping discovery time. Contingency fees for

other favourable fee arrangements. Insurers require information to assess personal injury claims. Without an opportunity for a full discovery of the plaintiff, insurers are less likely to resolve actions, since

dled by lawyers with a commensurate level of experience. Those generally young lawyers are still learning examination for discovery skills — the same skills required for trial advocacy.

the two-hour limit a challenge. It is not uncommon for litigants to become emotional during discovery given the subject matter. Litigants may also require an interpreter

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Defence bears burden of proof of plaintiff's crumbling skull

A number of appellate decisions have examined the interplay of the thin skull and crumbling skull doctrines. The most recent of these decisions, by the New Brunswick Court of Appeal, places the burden of proof on the defendant seeking to invoke the crumbling skull doctrine. The court also com-



**DAVID
BRANNEN**

ments on a third category of cases that represent a middle ground between the thin and

crumbling skull doctrines.

In *Wallace v. Thibodeau*, [2008] N.B.J. No. 417, the plaintiff was a 43-year-old lobster fisherman who suffered injuries in a motor vehicle collision on July 25, 2002. He went on to develop chronic myofascial pain and acute temporo-mandibular joint (TMJ) dysfunction.

The trial judge found that Peter Wallace had a pre-existing misalignment of his TMJ. He had some symptoms, but did not suffer pain or discomfort before the collision. At trial, Wallace's dentist testified that the motor vehicle accident triggered Wallace's TMJ symptoms. While the TMJ was misaligned before the collision, the dentist stated that it was not in a degenerative state.

Wallace's dentist treated his TMJ dysfunction with a bite plane. The dentist advised that to achieve further pain relief, Wallace would need dental treatment costing approximately \$24,000.

See *Skull* Page 14



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There is no simple 'thin skull versus crumbling skull' dichotomy

Skull

Continued From Page 10

During cross-examination, the dentist agreed that, given the extent of the pre-existing TMJ misalignment, Wallace's TMJ dysfunction could have been triggered in the future by some other cause. Citing this concession, the trial judge held that Wallace's pre-existing TMJ misalignment was a "crumbling skull" situation, and on that basis made no award for future dental care.

The New Brunswick Court of Appeal reversed the trial decision and awarded \$24,000 for the recommended dental care. Writing for a unanimous panel, Chief Justice Drapeau noted that the trial judge had misapplied the crumbling skull doctrine. He then reviewed the law on the thin and crumbling skull doctrines, and held that Wallace's situation fell into the thin skull category.

There are two points that counsel can take away from Justice Drapeau's analysis.

First, there is no simple thin skull vs. crumbling skull dichotomy. Rather, there is a third category of cases that creates a middle ground between the thin and crumbling skull cases. Chief Justice Drapeau describes a spectrum of cases, in which the first category is the

“**The third category is the crumbling skull situation, where the plaintiff's pre-existing condition was 'degenerative' ...**

classic thin skull situation: the plaintiff's pre-existing condition is latent or inactive and becomes triggered by the accident. In this situation, the plaintiff is entitled to full compensation.

The second category involves cases where the accident "aggravates" a pre-existing condition that was already active. In this situation, the plaintiff is entitled to compensation for the extent of the aggravation. The third category is the crumbling skull situation, where the plaintiff's pre-existing condition was "degenerative," and would have emerged and worsened on its own absent the accident. In this situation, the plaintiff is entitled

to damages corresponding to the effect the accident had on the degenerative process.

The second, and perhaps the most significant point arising from *Wallace*, was the Court of Appeal's finding that the defendant bears the burden of proving the plaintiff suffered from a crumbling skull. In reaching this conclusion the appeal court followed *Lynn v. McClarty*, [2003] M.J. No. 29.

In *Wallace*, the appeal court held that the defendant failed to meet its burden of proving Wallace's pre-existing TMJ misalignment was a "degenerative" condition, which would have worsened on its own without the intervention of an external cause, such as the motor vehicle accident.

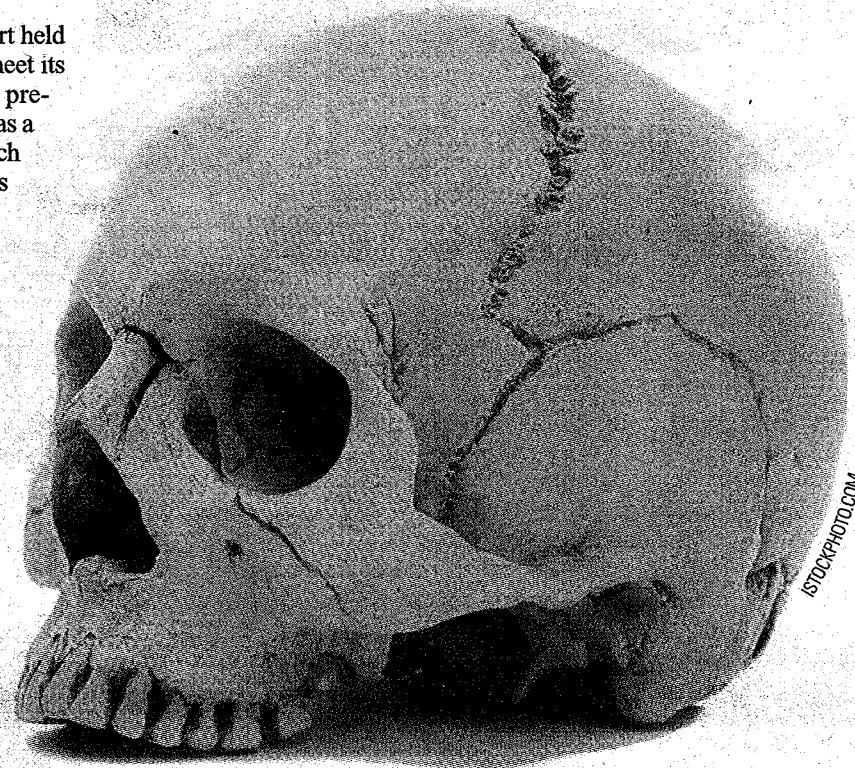
Wallace is an important decision for those involved in personal injury litigation. It is the most recent appellate decision to place the burden of proof on the defendant seeking to invoke the crumbling skull doctrine. To succeed, defence counsel will need to present evidence that the pre-existing condition was "degenerative."

The Court of Appeal's discussion

of a third category of cases is interesting, but represents nothing new. It does illustrate, however, that most cases will fall in the middle ground — aggravation of a pre-existing condition. Counsel should focus on obtaining evidence on the extent of the aggravation of the pre-existing condition, rather

than slipping into the false dichotomy of thin skull vs. crumbling skull. ■

David Brannen is a personal injury lawyer and practises with the Halifax office of Cantini Law Group. His partner, Joseph Cantini, represented Wallace at both trial and the appeal.



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