



# According to Rose

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*March in Vancouver*

## According to Rose

Welcome to Spring!! We had such a mild and pleasant winter this year that if you are like me, you were not as anxious for spring to finally arrive. Regardless, spring brings with it anticipation of a different set of outdoor activities, specifically bike riding. I am an avid cyclist and love when the days turn longer and the weather turns warmer. Whether it is on the trails or on the roads, I love spending time on my bike. Spring is a great time to remember the safety precautions that

need to be taken when enjoying bike riding. One of the most important precautions is to always wear a helmet. In BC the law requires all cyclists to wear a helmet.

A helmet is important regardless of whether you are a mountain biker, a road rider or a casual cyclist. Even a low speed fall on a bicycle trail can result in a brain injury and a brain injury, regardless of severity, has the potential to have significant consequences. Re-

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search shows that safety approved bike helmets reduce the risk of brain injury by over 85%. Make sure that the helmet fits. A good fit means that the helmet is level on your head, touching all around, and is comfortably snug, but not too tight. The helmet should not move more than about an inch in any direction and must not pull off no matter how hard you try. If you can pull off the helmet chances are good that at least part of your head will not be protected when you crash. Make sure that the edge of the helmet is positioned two fingers above the eyebrows to protect the forehead. You should be able to fit only one finger between the chin and the chinstrap.

A helmet reduced the risk of brain injury by reducing the peak energy of an impact. The helmet has a thin shell on the outside and a thick foam inside. That foam crushes when you crash which then cushions the blow, usually protecting your brain. The shell also makes the helmet skid on the street, providing some protection to your neck. The helmet should be replaced if you crash as the impact will crush some of the foam even if the damage to the helmet is not visible. Most helmet manufacturers recommend replacement of the helmet after five years.

Enjoy the spring weather and if you enjoy it on a bike, enjoy it with a helmet on. Safe cycling!!



## The Value of Pain and Suffering

Pain and suffering or non pecuniary damages are one of the category of damages that are awarded to plaintiff's in damages cases. Pain and suffering is not something that can be calculated, rather judges take into consideration the nature and extent of injury and aim to maintain consistency with previous decisions. For this reason, understanding the nature and basis of awards in personal injury cases for pain and suffering provides a foundation for expected outcomes. The

Supreme Court of Canada established a maximum that can be awarded for pain and suffering which is regularly adjusted for inflation. Currently that maximum is approximately \$350,000. What follows is a summary of recent BC cases and the assessment of non pecuniary damages.

*Nish v. McLaughlin* 2014 BCSC 1366 – the 23 year old plaintiff was injured in two motor vehicle accidents which had occurred four years prior to the trial. The

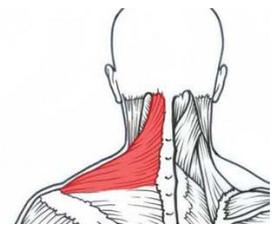
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injuries suffered included a soft tissue injury to his back, knees and ankle in the first accident and a further injury to his neck, mid and lower back in the second accident. By the time of trial his injuries were largely resolved, with some ongoing back pain. The trial judge awarded \$45,000 for pain and suffering noting that he was taking into account the “nature of the plaintiff’s injuries, his continuing symptoms and the significant impact that the accidents had on his lifestyle, at home and at work, his relationships and his extracurricular activities”.

*Yang v. Engen* 2014 BCSC 1332 – the 42 year old female plaintiff was injured in a motor vehicle accident three years prior to trial. Prior to the accident, the plaintiff suffered from a driving anxiety which put her at a heightened risk for development of anxiety disorders. As a result of the accident she suffered moderate soft tissue injuries to her neck and back which although improved continued to cause her symptoms. She also suffered pain to her index finger which may require further medical intervention. She suffered significant psychological and emotional difficulties including generalized anxiety. The trial judge assessed non pecuniary damages at \$100,000, reduced by \$10,000 to reflect her somewhat compromised pre accident position relating to her pre existing driving phobia and emotional susceptibility.

*Field (Litigation guardian of) v. Bains* 2014 BCSC 1371 - \$50,000 in pain and suffering was awarded to a young plaintiff who had suffered from PTSD following a motor vehicle accident. At the time of the accident the plaintiff was 7 years old. The accident was a frightening one, involving a semi truck and the vehicle in which the plaintiff was riding being dragged down the road. Following the accident the plaintiff experienced nightmares, would not get in a car for several months, then was hyper vigilant when she did get into a car. She was afraid of loud noises. The trial judge found that at the time of trial the PTSD and anxiety were in remission but were not completely eradicated.

*Saadati (Litigation guardian of) v. Moorehead* 2014 BCSC 1365 – the plaintiff was injured in an accident which occurred 9 years prior to the trial. The judge found that the injuries included soft tissue injuries to his neck and back and a moderately severe head injury. The judge found that the injury caused psychological injuries, including personality change and cognitive difficulties. The plaintiff was involved in a further serious accident in 2008, which was taken to be the end date for assessment of the damages suffered in the 2005 accident. \$100,000 in non pecuniary damages was awarded.



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*Chouhan v. Allemeersch* 2014 BCSC 1415 – the 34 year old female plaintiff was injured in a motor vehicle accident which had occurred four years prior to the trial. Prior to the accident the plaintiff had suffered from depression and some mild fibromyalgia symptoms. The trial judge found that as a result of the accident the plaintiff suffered from post traumatic stress disorder and an exacerbation of her fibromyalgia symptoms. The consequences of the accident were described by the trial judge as devastating, noting that since the accident the plaintiff had difficulty caring for her children, required constant assistance from her husband, had difficulty getting out of bed, her relationship with her husband had suffered and her social activities were significantly curtailed. An award of \$90,000 was made to compensate for her pain and suffering as well as her loss of homemaking capacity.



*Van v. Howlett* 2014 BCSC 1404 – this decision is an example of where the maximum award is made. Non pecuniary damages of the maximum (\$351,000) were awarded to a female plaintiff who suffered severe and life altering injuries at age 46. The injuries were a result of a motor vehicle accident which had occurred seven years prior to the trial. The plaintiff was thrown from the car that she was riding in, suffering extensive facial and head injuries. The most devastating injury was a severe brain injury which

resulted in a complete personality change. These changes were permanent and resulted in the plaintiff being unable to care for herself, being subject to angry outbursts with behaviour that was often childlike and inappropriate and poor hygiene. The brain injury caused significant cognitive impairment including problems with short term memory, awareness and tangential thinking. She had daily difficulties with irritability, outbursts of temper and control of emotions as well as an underlying depression.

*Tweddle v. Losch* 2014 BCSC 1377 - \$12,000 for pain and suffering was awarded to a plaintiff who suffered a mild whiplash injury. The court found that her pain and suffering was intermittent after a few weeks and occasional by six months after the accident.

*Isbister v. Delong* 2014 BCSC 1395 - \$100,000 for pain and suffering was awarded to a 38 year old plaintiff who had been injured in a motor vehicle accident four years prior to the trial. The primary injury was a compound fracture of her femur and tibia which resulted in surgery to install a metal rod and plate and a hospital stay of nine days. The plaintiff had to undergo a second surgery involving debridement of the surgery site due to necrosis. This resulted in an infection. A third surgery was undertaken to remove the hardware from her leg. At the time of trial the plaintiff continued to

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experience pain and disability as a result of the injury and it was likely that she would experience progressive degenerative changes to the leg.

*Pichugin v. Stoian* 2014 BCSC 928 – the 57 year old male plaintiff was injured in a motor vehicle accident which occurred four years prior to the trial. He was awarded \$48,000 for pain and suffering after a finding that he suffered soft tissue injuries to his neck and back with symptoms present for approximately one and a half years with continuing periodic pain and discomfort at the time of trial. The trial judge also found that the plaintiff suffered from tinnitus as a result of the accident.

*Zhang v. Graham* 2014 BCSC 1578 – The male plaintiff was injured as a pedestrian four years prior to trial at which time he was 70 years old. He was struck in a cross walk with a resulting tibial plateau fracture and strained knee. Prior to the accident the plaintiff had osteoarthritis in his knees with limited symptoms. He was awarded \$90,000 for pain and suffering with a judge finding that the accident caused a significant worsening of the knee symptoms with the likely need for a knee replacement as well as a mild traumatic brain injury with residual symptoms of decreased memory, concentration, energy, headaches and depressed mood.

*Gillespie v. Yellow Cab Company Ltd.* 2014 BCSC 1745 – the 65 year old male plaintiff was injured in two motor vehicle acci-

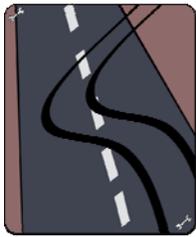
dents which occurred five years prior to trial. The first accident was the most significant with the second accident causing an exacerbation of symptoms for less than two weeks. The plaintiff was awarded \$85,000 for pain and suffering with a finding by the trial judge that he had suffered a mild traumatic brain injury with symptoms of irritability, aggressiveness, agitation and a shortened temper. He also suffered from anxiety, inner ear dysfunction that affected his balance and neck and low back pain.

*Khosa v. Kalamatikaleki* 2014 BCSC 2060 – the 38 year old plaintiff was injured in a motor vehicle accident which occurred in February 2009, almost 6 years prior to the trial. The motor vehicle accident was extremely traumatic, involving the front of the plaintiff's vehicle being driven over by a semi trailer and dragged some distance down the road. The plaintiff sustained physical injuries including a moderate soft tissue injury but her most significant injury was the resulting psychological injury which included post traumatic stress disorder, depression and anxiety. The plaintiff remained completely disabled from work due to her injuries at the time of trial. There was a small possibility that the plaintiff may with further treatment recover sufficiently to enable her to return to her work. Non pecuniary damages of \$140,000 were awarded.



## Contributory Negligence

Contributory negligence is a legal concept which results in a reduction of the damages an individual otherwise would have been entitled to because some action on their part has contributed the harm or damages that they have suffered. Usual examples of this are when an individual is involved in a motor vehicle accident but not wearing a seatbelt. The case will be defended in part by saying that the injuries were more severe or significant due to the failure to wear a seatbelt and that the defendant is not liable for the increased damages that resulted. This will often result in a reduction of the damages payable by 10 – 25%.



A recent British Columbia Supreme court decision illustrates that contributory negligence may also be a factor when you get into a vehicle driven by someone who is impaired. In *Glanville v. Moberg* 2014 BCSC 1336 the plaintiff was a passenger in a vehicle driven by a very impaired driver. The evidence indicate that the driver was very intoxicated and was driving fact and erratically. The trial judge reduced the plaintiff's damages by 30% finding that he was aware, or ought to have been aware, that the driver's ability to drive was impaired by alcohol. The plaintiff also was not wearing the shoulder portion of the seatbelt at the time of the

accident. The judge declined to further reduce the damages because there was no evidence that the injuries would have been diminished or prevented if he had been wearing the shoulder portion of the seatbelt. This was also the finding in *Van v. Howlett* 2014 BCSC 1404. In *Van* the judge found that although the defendants were able to prove that the plaintiff was not wearing her seatbelt at the time of the accident, they were not able to prove that the plaintiff would not have suffered the extent of injury that she did had she been wearing a seatbelt and accordingly there was no deduction of her damages for contributory negligence. The Court of Appeal also came to a similar conclusion in *Schenker v. Scott* 2014 BCCA 203 where the upheld the trial judges decision to not reduce an award on the basis of contributory negligence for the failure to wear a seatbelt. In *Schenker* the Court of Appeal commented that there was no evidence that the plaintiff's injuries were a result of being ejected from the vehicle and therefore it was not appropriate to reduce the damages due to contributory negligence.

## Breach of the Motor Vehicle Act is not always negligence

Often in motor vehicle accident cases the starting point for determining liability of the parties involved in the accident is consideration of the provisions of the Motor Vehicle Act and in particular, whether one of the parties has acted in contravention to one or more of the provisions of the Act. The argument is often made that a breach of the Act is evidence of negligence on the part of that party.

A recent British Columbia Supreme Court decision, *Nish v. McLaughlin* 2014 BCSC 1366 demonstrates that a breach of the Act will not necessarily result in a finding of negligence. The plaintiff in *Nish* was injured while riding his bicycle in a crosswalk at a controlled intersec-

tion. The defendant motorist executed a right hand turn, striking the plaintiff. S. 183 (2)(b) of the Motor Vehicle Act prohibits riding a bicycle in a crosswalk. The trial judge however found that this breach was not determinative of the question of negligence. The trial judge found that the plaintiff, despite riding his bicycle in the crosswalk, did not demonstrate any lapse of care. He was crossing in accordance with the pedestrian light, he was trying to get the motorist's attention and although he was unsuccessful in doing so, it was reasonable to expect that the motorist would look to her right before executing her right turn. The trial judge found the motorist to be 100% at fault for the accident.



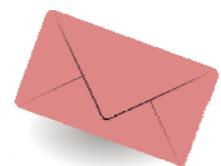
## Reasonable notice in a without cause termination

An employer can terminate an employee's employment at any time. When the terminate without just cause, the employer is obligated at law to provide "reasonable" notice. Most wrongful dismissal cases concern an assessment of what would constitute reasonable notice. Guidance has been given by the Supreme Court of Canada on the factors that are to be taken into consideration in assessing reasonable notice. Those factors include the age of the dismissed employee, the nature and duration of the employment and any other factors that may affect re employment.

A recent British Columbia Supreme court decision, *Ostrow v. Abacus Management Corp.* 2014 BCSC 938, illustrates the factors that may be taken into consideration and how they impact the assessment of reasonable notice.

The dismissed employee was 42 years old. He had been employed with the employer for nine months as a senior manager in a group which provided tax advice for high-level financial transactions. He did not have any supervisory responsibilities. The trial judge

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determined that he was entitled to six months notice. The factors taken into consideration in addition to his age and the length and nature of his employment included:

- That he had a reasonable expectation of job security as a result of assurances given by the employer both at the initial contract negotiation stage as well as during his employment
- The existence of a non competition clause
- That the plaintiff was terminated just before the holiday season

The employee's compensation for his employment was an annual salary of \$135,000 plus a bonus in the range of 15% of income plus benefits. In assessing damages as a result of the failure to provide reasonable notice, the judge awarded damages for the loss of the bonus. In doing so the judge noted that the bonus was an express term of a thoroughly negotiated contract and constituted a significant sum. The judge found that the bonus formed an integral part of his expected compensation and that he should accordingly be compensated for the loss of the bonus.

## Duties and Liabilities of Departing Employees

A recent British Columbia Supreme Court decision considered a situation that often arises when an employee leaves their employment. What happens if they do not provide reasonable notice of their intention to leave? Are they able to compete with the employer for business after they have left? In *Consbec Inc. v. Walker* 2014 BCSC 2070 the defendant employee left without providing any notice and set up a company that operated in direct competition with his previous employer, the

plaintiff. The plaintiff sued, saying that the defendant was using confidential information obtained during his employment to enable him to unfairly compete and also that the defendant's abrupt departure caused them harm and damages.

The court did not agree that the defendant was unfairly competing and took the opportunity to describe the circumstances where such a claim would be successful. The court said that as long as the employee is not a

fiduciary, is not subject to a restrictive covenant and does not use confidential information, they are free to compete. In coming to the conclusion that the defendant in this case was not unfairly competing, the court said as follows:

All employees are free to take away with them the skill and knowledge acquired on the job. They cannot use the employer's confidential business information obtained either before or after the employment has ended.

In finding that the defendant was not a fiduciary, the court referenced the following factors:

- The defendant was not a party to corporate decisions
- The defendant did not make policy for the plaintiff
- The defendant did not hire and fire employees or determine compensation
- The defendant did not receive company financial records or statements and he was not entitled to do so

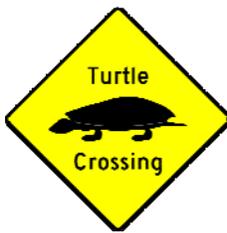
The employer was however successful in their claim of damages for the defendant's failure to provide notice of his resignation. When the defendant

resigned abruptly, the employer sent another employee to the region to deal with customers. In doing so, they incurred significant costs associated with housing and transportation. They were awarded those costs. The court noted that the purpose of the requirement to provide reasonable notice of resignation is to provide time for the employer to make arrangements to cover the work of the departing employee. The length of required notice is dependent upon the employee's responsibilities, length of service, salary and that time it would reasonably take the employer to replace the employee or to adapt to the loss as a result of the departure. The court awarded the employer the costs associated with having to deal with the abrupt departure of the defendant.



## Wildlife and the Duty of Motorists

It is a reality of vehicular travel in British Columbia that there are certain portions of highway on which there is a distinct possibility that wildlife may be on the road. Under certain circumstances, a motorist will be found liable for injuries that result to his passengers when he collides with wildlife. There are a number of cases across Canada that have considered the duty of motorists and responsibility when collisions with wildlife occur. Those cases have established that a variety of factors will be taken into consideration in assessing liability, including:



1. Time of day;
2. Visibility of the animal, including type and colour of fur, contrast with its surrounding environment and direction of approach;
3. Road, weather and traffic conditions;
4. Whether the accident occurred inside a moose or deer “warning zone”;
5. Speed limit and actual speeds of the drivers;
6. Lighting of the area where the collision took place, including the use of any headlights, warning flashers or other lighting equipment; and
7. Condition of the drivers’ vehicles.

In a recent British Columbia Supreme

Court case, *Ziemer v. Wheeler* 2014 BCSC 2049, the duty of a motorist following a collision with wildlife was considered. In that case, the defendant had struck a moose on the highway. After striking the moose, the defendant continued on his travel for a period of time, ultimately returning to the scene where he struck the moose after 21 minutes. Approximately 9 minutes after he struck the moose, the plaintiff struck the moose carcass, causing him to lose control and come into contact with another vehicle. The court found the defendant liable for the injuries suffered by the plaintiff, stating that a driver who has collided with an animal must take reasonable steps to preclude the possibility of another motorist colliding with that wildlife. The court said that the actions that will constitute reasonable steps will vary depending on the circumstances but in this case the defendant’s failure to take any steps to warn other motorists of the hazard posed by the moose carcass fell below the standard of care.

## Failure to Follow Treatment Recommendations Resulting in a Reduction of Award

An injured plaintiff has a duty to mitigate their damages, or to take all reasonable steps to facilitate their recovery. A typical defense in a personal injury case is that a plaintiff has failed to mitigate their damages and that accordingly the amount awarded to them should be reduced to reflect that failure. The burden is on the defense to show both that the plaintiff failed to follow a recommended course of treatment and that if he or she had done so they would have experienced greater recovery. If they are able to establish these two things, damages would be reduced.

These principles were recently applied in the case of *Rasmussen v. Blower* 2014 BCSC 1697. In that case, the plaintiff was 41 years old at the time that he was injured in a motor vehicle accident. The trial occurred six years later. The plaintiff had suffered primarily whiplash type of injuries in the accident, which had resulted in neck and back pain, knee pain, left leg numbness and headaches. Due to the injuries, the plaintiff was unable to work for a period of three months. After the accident the plaintiff did not follow the advice of his doctors, specifically, he did not attend regular physiotherapy or massage therapy treatment. He attended only one session of each, stating that the sessions were painful, that he was constantly travelling and that he could not afford the treatments. The court rejected these reasons for failing to attend treatment, stating that realistically, perseverance is the key to allowing medical treat-

ments to work. The non pecuniary damages award was reduced by 20 percent to reflect the plaintiff's failure to mitigate.

In contrast, in *Chahl v. Righela* 2014 BCSC 1086 no reduction for failure to mitigate was made. In that case the trial judge held that the defendant had failed to prove that the plaintiff had failed to mitigate her injuries. The trial judge held that while the plaintiff could have exercised more and done more to facilitate her recovery, she could not be faulted in that regard as her focus since the accident had been on preserving her employment. The trial judge held that the plaintiff could not be criticized for continuing to work and keeping her reputation at work by intense concentration on her work to the exclusion of all else, which left her with little energy to spare for exercise.

Likewise in *Gallina v. Honda Canada Finance Inc.* 2014 BCSC 974 the plaintiff was found not to have failed to mitigate her damages despite not undergoing recommended physiotherapy treatment. The plaintiff said that she did not take all of the recommended physiotherapy treatments due to the associated expense. The judge found that it was reasonable both that she declined to pay the cost for the physiotherapy treatment and also that she did not know that the physiotherapy benefits could have been available through her employer.



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### NOTABLE QUOTES

That's what makes death so hard – unsatisfied curiosity

– *Beryl Markham*

You can accomplish anything in life, provided that you do not mind who gets the credit

– *Harry Truman*

If you don't design your own life plan, chances are you'll fall into someone else's plan.

And guess what they may have planned for you? Not much.

– *Jim Rohn*

You're pretending this isn't your life. You think it's going to happen some other time.

When you're dead you'll realise you were alive now.

– *Caryl Churchill*

Adversity is a soul sister to success. And on the journey to greatness, our willingness to befriend these twin sisters, and know them as one, will have much to do with our greatness.

– *Noah Benshea*

Adversity has made many a man great who, had he remained prosperous, would only have been rich.

– *Maurice Switzer*

The highest form of success...comes, not to the man who desires mere easy peace, but to the man who does not shrink from danger, from hardship or bitter toil, and who out of these wins the splendid ultimate triumph.

– *Theodore Roosevelt.*

### OUR AREAS OF PRACTICE

Depending on your experience with our office you may or may not be aware of the types of problems that we routinely assist clients with. We have experience assisting clients with the following types of problems:

- injuries resulting from motor vehicle accidents
- injuries resulting from slips and falls
- injuries resulting from sexual abuse
- loss of employment
- discrimination and harassment
- damages resulting from breach of contract

Referrals in any of the above areas are welcome. If you have friends or family that require legal assistance, please refer them to our office. If we are unable to help them we usually know someone who is able.



# ROSE KEITH

## TRIAL LAWYER