



# According to Rose

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*February in Vancouver*

## A Piece of My Mind

In January I had the opportunity to attend the Trial Lawyers Association of British Columbia's Medical Legal conference. The conference was a great opportunity to further connections with leading medical experts and to learn about advances in the fields of psychiatry, chiropractic and neuropsychology. The conference also had an outstanding faculty of legal professionals and judges who shared great insights in trial preparation and presentation.

In February I was on the faculty of the

"Messages that Matter: Effective Trial Strategies for the Plaintiff's Bar". The conference considered a variety of topics, presented by leading trial lawyers in British Columbia. A major highlight of the conference was the presentations by Ed Lazarus, a jury consultant from the US. I have used Ed in several cases to conduct focus groups to ensure that the message that we are presenting to juries is one that will resonate and obtain the results we are looking for. Ed

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## The Value of Pain and Suffering

Non pecuniary damages are awarded following an injury to compensate the plaintiff for the pain, suffering, inconvenience and loss of enjoyment of life that they experience following an injury. The amount of the award depends on the nature and extent of injury and how that injury impacts the particular plaintiff. Below is a summary of recent non pecuniary damage awards which is presented to assist with understanding how our courts value pain and suffering.



*Javier v. Hooper* 2014 BCSC 1253 – The female plaintiff was 56 years old at the time of trial. She had been injured in three motor vehicle accidents, the first occurring five years prior to trial. The court found that at the time of trial she was continuing to suffer from ongoing neck pain, right shoulder pain, low back pain and intermittent headaches. Non pecuniary damages of \$70,000 were awarded.

*MacDonald v. Kemp* 2014 BCSC 1079 – The female plaintiff was 25 years old at the time of trial. She had been injured in a motor vehicle accident four years prior. The judge found that she suffered persistent, low grade pain in her neck and lower back and shoulder and that she was unable to do many of the things in daily life that she could

previously do, including recreational activities and household chores. The trial judge found that she was compromised in her physical health during the years of her life when she should have enjoyed peak strength and functionality. \$55,000 was awarded for non pecuniary damages.

*Adkin v. Grant* 2014 BCSC 1304 – The female plaintiff was age 69 at the time of trial, four years after a motor vehicle accident which resulted in injury to her neck. The judge described the injury to be of moderate degree and to cause her physical pain for many months, which was partially disabling in the sense that it reduced, for many months, her capacity to engage in the physical activities she had previously. The injury had also caused emotional stress in the form of anxiety and depression, for many months, which reduced her powers of memory and concentration. By the trial date the plaintiff had recovered from her accident related physical injury to a substantial degree but would be left with a permanent, but minimal, residual disability. \$70,000 for pain and suffering was awarded.

*Jiwani v. Borody* 2014 BCSC 1164 – the 52 year old male plaintiff suffered injuries to his neck, back and headaches in

four motor vehicle accidents, the first of which occurred five years prior to trial. The judge found that the neck problems and headache resolved within six months of the first accident but the back pain persisted to some degree, five years after the first accident. The judge concluded that the soft tissue injury to his lower back would improve over time or cause only modest discomfort. \$65,000 for pain and suffering was awarded.

*Kathuria v. Wildgrove* 2014 BCSC 1274 – the 21 year old male plaintiff was injured in a motor vehicle accident five years prior to the trial. The accident resulted in symptoms in his neck, left shoulder and low back that were not fully resolved at the time of trial. The trial judge found that the injuries resulting from the accident caused the plaintiff not insignificant discomfort and pain which continued for a time and awarded \$75,000 for pain and suffering.

*Bruno v. Diamzon* 2014 BCSC 1270 – The male plaintiff was injured in a motor vehicle accident which occurred 8 years prior to the trial. At the time of trial he was age 46. The plaintiff suffered from pain and stiffness in his neck, back and shoulders and also had pain radiating down his right arm together with numbness and tingling in his right hand. He also suffered from

anxiety, panic attacks and depression. The diagnosis accepted by the trial judge was that he had a chronic pain disorder associated with both anxiety and depression. He also suffered from major depressive disorder, post traumatic stress disorder, panic disorder with agoraphobia and generalized anxiety disorder, all of which were primarily due to the accident. As a result of his ongoing symptoms the plaintiff had a marked decrease in the overall quality of his life and his relationships with others had been markedly affected. Non pecuniary damages of \$120,000 were awarded.

*Bains v. Parks* 2014 BCSC 1818 – the 45 year old plaintiff was awarded \$15,000 for pain and suffering following injury in a motor vehicle accident. The trial judge found that she suffered a six month moderately severe aggravation of strain to her neck and low back leading to chronic mechanical back pain, headaches, tendonitis and chest and thoracic strain. She was off work for a period of one month after which she returned on a part time, modified duties basis.

*Pistruga v. Garcia* 2014 BSC 1795 – the 49 year old male plaintiff was injured in a motor vehicle accident six years prior to trial. His injuries included a torn rotator cuff for which he under-



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went surgery. The surgery unfortunately did nothing to assist the plaintiff in his symptoms and he was left with pain and restriction in his range of motion. He also experienced emotional problems due to the ongoing pain and was diagnosed with an adjustment disorder with mixed depressive/anxiety symptoms. An award of \$110,000 for non pecuniary damages was made.

*Bouvier v. Behrend* 2014 BCSC 1208 – the male plaintiff was 57 years old when he was injured in a motor vehicle accident in 2009. His injury was primarily to his left arm and was diagnosed as a tear in the tendon of the epicondyle and mild cubital tunnel syndrome from compression of the ulnar nerve. The trial judge awarded him \$110,000 for pain and suffering finding that the injuries initially caused him intense pain which gradually diminished over time but left him with occasional pain and weakness and limitations in his ability to use his arm for heavier tasks. The trial judge noted that the injury caused the plaintiff to lose his work life which was his defining feature and in which he had considerable seniority and as well that he lost the social life associated with his work.

*Barnes v. Lima* 2014 BCSC 1282 – the 35 year old male plaintiff was injured in a

motor vehicle accident which occurred four years prior to trial. He was awarded \$45,000 for pain and suffering after the trial judge found that he suffered soft tissue injuries to his hip and chest as well as a compression fracture. Most of the accident related symptoms resolved within three months, with the exception of the back pain which persisted although on an occasional basis only. The medical opinion was that the plaintiff would continue to experience sporadic upper back stiffness and activity-related back pains.

*Lane v. Pedersen* 2014 BCSC 1302 – the 59 year old female plaintiff was injured in a motor vehicle accident which occurred five years prior to trial. The trial judge found that as a result of the accident she sustained a mild traumatic brain injury which resulted in difficulties with memory and attention, a reduced ability to synthesize ideas quickly, cognitive fatigue, a reduced sense of smell and taste and residual pain to her neck, shoulder and back with occasional headaches and occasional sciatic and sacroiliac pain. These symptoms were expected to continue indefinitely. \$110,000 was awarded for pain and suffering.

*Yip v. Saran* 2014 BCSC 1283 – the 59

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year old female plaintiff was awarded \$55,000 for pain and suffering for injuries sustained in a motor vehicle accident occurring three years prior to trial. The trial judge found that she suffered a mild to moderate soft tissue injury to her neck and shoulder area, her low back and her right leg and knee as well as loss of sensation in her hands. She also suffered a concussion and headaches although the symptoms from the concussion eventually resolve. Emotionally the accident left her feeling unusually anxious and she also experi-

enced nightmares and disturbed sleep.

*Rogalsky v. Harrett* 2014 BCSC 1255 – the 53 year old plaintiff was injured in a motor vehicle accident which occurred four years prior to trial. She was awarded \$35,000 for pain and suffering after a finding that she had suffered moderate soft tissue injuries to her neck, upper back and right shoulder. She was also found to have sustained a partial thickness right shoulder rotator cuff tear, symptoms of thoracic outlet syndrome and carpal tunnel syndrome which had resolved. She

### Loss of Earning Capacity

In a personal injury case, the damages awarded are meant to return the injured person to the position that they would have been in if they had not been injured. In many cases an individual's ability to work in the future may be compromised by the injuries suffered in the accident. Either the injuries will prevent them from working in the future, or working in the same capacity or to the same extent as they could have prior to the injury. When our courts assess whether an award for loss of earning capacity should be made, they consider a wide variety of factors. The cases below and the factors considered illustrate some of the considerations that affect whether an award for loss of earning capacity will

be made or not.

*MacDonald v. Kemp* 2014 BCSC 1079 – the female plaintiff was 25 years old at the time of trial. After finishing high school the plaintiff worked as a veterinary assistant but since 2009 she had worked as an insurance agent. At trial she alleged that if she had not been injured in the motor vehicle accident she would have taken a veterinary assistant's program. In declining to make an award for loss of earning capacity the trial judge found that the plaintiff was settled in her career path as an insurance agent, which was sedentary, office-based work. There was no evidence of earnings loss or that she would have switched to a veterinary assistant's program or other career direction.



## Are Cyclists Allowed to Pass on the Right?

Under the rules of the road, cyclists are treated the same as motorists and are required to obey the same rules of the road as motorists. They also though are required under the provisions of the *Motor Vehicle Act* to ride as far to the right of the road as possible. Accidents frequently occur between motorists and cyclists when a cyclist “passes” a car on the right. That car then not seeing the cyclist either executes a right hand turn or in some other way impedes the path of travel of the bicycle. As a cyclist myself I often see this situation evolve. As I am riding as far to the right as possible, a motorist for one reason or another comes to a stop. Am I then required to stop as well to avoid passing him on the right?



A recent decision from our Court of Appeal found a cyclist 100% at fault for an accident that occurred when a cyclist passed a stop vehicle on the right. The Court of Appeal decision involved the decision of three judges. Two of them found the cyclist at fault for the accident and the third disagreed, finding that the cyclist was required to ride off the roadway, to the right side of the highway. The facts in that case involved a van that passed a cyclist as they were travelling down a hill. When the van reached the bottom

of the hill it slowed. The cyclist also slowed but then determined that he could accelerate and move past the van. When the cyclist was at approximately the rear passenger door of the van, the van abruptly moved to the right and then drove on. There was no contact with the cyclist but the movement resulted in the cyclist having to take evasive measures and ultimately going off the road and suffering injury. The trial judge found the van driver 70 percent at fault for driving without due care and attention and the cyclist 30 percent at fault for passing on the right. ICBC appealed the decision..

On appeal, the two judges who decided that the cyclist was 100% at fault for the accident found that for the actions of the driver to constitute driving without reasonable consideration for others, the driver would have to have reasonably expected some other person, in particular the plaintiff, to have been put at risk by the action taken. The court commented that the cyclist did a foolish thing in deciding to pass on the right, noting that if he had waited even a few seconds there would have been no accident. They found that the plaintiff was the sole author of his misfortune and held that there was no basis in law to hold the driver of the vehicle liable in negligence.

I disagree with this decision. The van driver had passed the cyclist seconds prior to his moving over to the right and knew that the cyclist was there or should have checked to see where the cyclist was prior to moving to the right. Section 158 of the *Motor Vehicle Act* describes the circumstances where passing on the right is permitted. It includes an allowance for passing on the right when on a "laned roadway" and there is one or more unobstructed lanes on the side of the roadway on which the motorist is permitted to drive. Section 183(2) of the *Motor Vehicle Act* requires a cyclist to ride as far to the right of the highway as possible. "Laned roadway" is defined in the *Motor Vehicle Act* as a part of the road that is divided into two or more lanes for the movement of vehicular traffic in the same direction. An argument can be made that the portion of the highway to the right of the fog line constitutes a laned roadway for the movement of bicycles. The motorist should have been aware of the existence of the cyclist to the right of him. The bicycle should have been able to pass to the right of the motorist given the existence of the laned roadway and should have been able to do so safely.

This decision underscores two main things. Litigation involving cycling accidents is fraught with difficulties. If you are a cyclist that has been injured in a motor vehicle accident it is essential that you retain experienced trial counsel, counsel that is experienced in accidents involving bicycles and that is experienced as a cyclist and therefore understands how the rules of the road will apply in practice to cyclists. Cyclists are often found at fault for accidents which clearly involve negligence on the part of the motorist and this is often in my view due to counsel not understanding what it is like to be a cyclist on the roads. More importantly though, this case illustrates one of the many ways that cyclists can be injured on our roads. As a cyclist, if you are involved in a collision with a vehicle, the outcome for you is not going to be good. You are completely unprotected. The consequences of the collision will be devastating. Regardless of whether you have the right of way, always ride cautiously and ensure that you have been seen prior to executing any movement on your bike. Stay safe out there by riding defensively.



## Social Media and Employment

The use of social media has on more than one occasion resulted in negative consequences for an employee. A recent BC Supreme Court decision considered whether derogatory social media posts by an employee could provide the basis for a with cause termination. When considering whether just cause exists it must be remembered that each situation is factually unique and it is those unique facts that drive the finding of the judge. In *Kim v. International Triathlon Union* 2014 BCSC 2151 the trial judge found that the employer did not have just cause, however there have been other cases where the use of social media in a derogatory manner has resulted in a finding of just cause.



In *Kim* the plaintiff was a 34 year old woman employed in a communications specialist role. She posted comments on her personal Facebook page and Twitter accounts which negatively referred to her boss and made other derogatory comments about her employment. When she returned to work following a vacation she was terminated, purportedly with cause. The trial judge found that the employer failed to meet its onus of proof to establish cause, pointing to several factors including that the employee was never

reprimanded, disciplined or criticized specifically in regard to the content of the social media posts. The trial judge said that in the absence of a “clear and express” warning about her performance relating to the social media posts and without providing the plaintiff with a reasonable opportunity to improve her performance after the warning, the employer could not terminate for cause. This is a different outcome than in previous cases and appears to be on the basis of the nature of the posts. In previous decisions the posts on social media were more egregious than in the *Kim* case which likely drove the outcome.

The *Kim* decision is also of interest with respect to the damages awarded for the termination. *Kim* was a relatively short term employee at 22 months. Although she had previously worked for the employer, it was many years prior and she had voluntarily left their employ to pursue other opportunities. The plaintiff was 34 years old at the time of termination. A reasonable period of notice was assessed at five months. In addition to salary the plaintiff was awarded lost MSP benefits during the period of notice.

## Constructive Dismissal and the Duty to Mitigate

A recent British Columbia Supreme court case considered two issues that often arise in employment law cases, whether a demotion constitutes a constructive dismissal and if it does, whether an employee must continue to work with the demoting employer until they find a new job to satisfy their duty to mitigate.

The plaintiff employee in *Younger v. Canadian National Railway Co.* 2014 BCSC 1258 was 58 years old at the time of trial. He had been employed in the railway industry his entire life. In September 2004 the plaintiff was promoted to a superintendent position which resulted in him relocating from Squamish to Prince George. The plaintiff had difficulties with the position and ultimately the employer reassigned him to a supervisory position one year later. The supervisory position had a lower pay grade attached to it but the employer would maintain his current salary and benefits for up to one year. The plaintiff did not accept the demotion and did not return to work. He ultimately obtained another job five months later.

The trial judge found that the plaintiff had been constructively dismissed, finding that a reasonable bystander would consider this to be a significant

reduction in job responsibility, prestige and status. The trial judge highlighted the following factors:

- i) The plaintiff's move from a managerial position to a first line supervisory position;
- ii) The smaller number of employees reporting to him;
- iii) The reduction in pay grade after the one year protection period;
- iv) The reduction in entitlement to stock options, restricted share units and other long-term incentive vehicles; and
- v) The diminished level of responsibility.

However, the trial judge also held that the plaintiff had failed to mitigate his damages by not accepting the position until he found work elsewhere. The trial judge held that the plaintiff's evidence that he was extremely upset, embarrassed and humiliated by the demotion was not sufficient to dislodge the duty to mitigate. Apart from the evidence of his subjective belief, there was no evidence of an atmosphere of hostility or oppression within which the plaintiff would have to work and without this, the plaintiff had failed to mitigate.



**Dismissed**

## Assessment of Notice for Short Term Employee

The recent decision of *Nicholson v. Masonite International Corp.* 2014 BCSC 1247 provides an analysis of the assessment of notice in the without cause termination of short term employees. The plaintiff was a chartered accountant who had been employed as the regional controller of the defendant for a period of two and a half years. He was dismissed without cause as a result of restructuring of the defendant's operations. The plaintiff was 45 years old at the time of the termination and he did not find alternate employment until ten months later.

The trial judge found that an appropriate period of notice was six months in

the circumstances, noting that the plaintiff was a professional employee in a mid level management position with significant financial responsibility. The defendant had suggested that there was a "ceiling" on the amount of notice for short term employees. The trial judge rejected this argument holding instead that the assessment of an appropriate period of notice requires flexibility and sensitivity to the particular features of each case. The trial judge also held that the ranges applicable operate only as a guide, designed to achieve consistency and predictability, and to instill in the litigants a sense that they have been treated fairly in a relative sense.

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focuses on understanding what motivates a jury or judge in their decision making and in tailoring communications and messages in a way that will get the results that you want.

In February I also attended two other educational events that were very beneficial. The first was the CBA Employment Law Section meeting on *Miller v. Convergys*, a case which I have discussed in previous editions of *According to Rose*. The case concerned the principles used to determine whether a

contract of employment is valid when it has terms which are contrary to the Employment Standards Act. The second educational event was a conference by MEA Forensic Engineers. The conference considered a variety of issues in accident reconstruction.

It has been a great start to the year with many outstanding educational events. I look forward to applying many of the things that were learned at these conferences to the cases that I handle and look forward to working with the experts that I connected with.

## Staff Changes

We are very pleased to welcome a new paralegal to our office, Artak Verdumyan. Artak is a graduate of the Capilano College paralegal program. He brings a variety of skills, experiences and knowledge to his role which will greatly benefit all of our clients. In his role as paralegal Artak is responsible for coordinating communication with clients, adjusters, legal counsel and experts. He is responsible for moving files forward in a timely manner, collection of documents, preparation of pleadings and scheduling of court dates and expert assessments. He is a welcome addition to our office.



We are also sad to say good bye to Katherine McKey. Becoming a lawyer is a long process with three years of law school after completing an undergraduate degree, then a year of articling. Finding the special niche or area that you want to practice in can be an even longer process and requires exposure to different practice areas and office environments. Kate split her articles between our firm and a criminal defense firm. Over the last year and a half since her call to the bar she has been involved in a variety of types of files and has gained good experience and exposure to the law. She is going

to further broaden her experience by moving from our plaintiff's practice to a civil litigation defense firm. We wish her the best of luck in all of her future endeavours.



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### NOTABLE QUOTES

This is your life, are you who you want to be? - *Switchfoot*

A reputation one broken may possibly be repaired, but the world will always keep their eyes on the spot where the crack was - *Joseph Hall*

Failure is, in a sense, the highway to success - *John Keats*

Every day, each of us makes a multitude of choices that will impact our lives... the quality of our choices will dictate whether we will struggle in frustration or live an extraordinary life – the life of our dreams. - *Debbie Ford*

Our greatest glory is not in never failing, but in rising every time we fall - *Confucius*

Every day, think as you wake up, today I am fortunate to be alive, I have a precious human life, I am not going to waste it. I am going to use all my energies to develop myself, to expand my heart out to others, to achieve enlightenment for the benefit of all beings.... - *The Dalai Lama*

### 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