



According to Rose

Volume 11 Issue 4

April 2015



Porteau Cove Provincial Park

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According to Rose

April is one of my favorite months. Spring is well under way and summer is right around the corner. It is a season where I spend a lot of time either on my road bike or my mountain bike. Being a cyclist in Vancouver there are endless options for riding. The north shore mountains have some of the best mountain biking in the world. For road riding Vancouver has many epic rides including horseshoe bay, riding up Cypress or Seymour Mountains, Fort Langley and the routes in and

around the University of British Columbia. Spring is a great time to remember some of the ways of lessening the chance of injury on a bike. In March's newsletter I talked about the importance of wearing a helmet and how to ensure that it is properly fitted. In this edition of According to Rose I will provide you with some basic cycling safety tips.

Every year approximately 7,500 cyclist are seriously injured in Canada. Most bicycle crashes occur during

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the afternoon rush hour and one out of three cyclist deaths occur at night or at a time when there is artificial lighting. Statistically cyclists are more likely to be killed or injured at an intersection or at a location where there are traffic signals or other traffic control signs. Cyclists have the same rights and responsibilities on the road as a motor vehicle and must obey the same rules. Some of those rules include that a cyclist must yield to a pedestrian, they must stop for stop signs and must travel with the flow of traffic. When you are on a bicycle, you must follow the same rules as a motorist. If you are walking your bike, you have the same rights and obligations as a pedestrian.



The most common vehicle-bike collisions occur when:

- 1) A vehicle is turning right – as a cyclist always be on the lookout for vehicles turning right at intersections and anticipate that they have not observed your presence. Remember that vehicles do not always activate turn signals and that they often make last minute decisions to execute turns. Also be aware of vehicles making wide right hand turns. Do not ride your bike through the cross walk. Although a motorist may be on the lookout for a pedestrian in the crosswalk, if you are riding your bike through the crosswalk you will be travelling at a much faster speed than you would if you were walking and a motorist may not see you;
- 2) A vehicle is turning left – motorists often will not observe a cyclist travelling through an intersection. Always be on the lookout for vehicles making left hand turns. Do not ride your bike through the crosswalk;
- 3) A vehicle passing a cyclist – watch for vehicles passing you on the road and in particular watch to make sure that they do not come into your lane too early. Always be prepared to slow down or stop;
- 4) A motorist opening a car door – always be on the lookout for people sitting in parked vehicles. They often won't observe an approaching cyclist and may open the door as you are riding by.

The Value of Pain and Suffering

When our courts assess non pecuniary damages, or the amount of damages that will be awarded for the pain, suffering and loss of enjoyment of life that results from an injury, a variety of factors are taken into consideration including the age of the plaintiff, the nature and extent of injury, the impact of the injury on the plaintiff, the treatment that has been required, and the prognosis for the future. Our courts also strive for consistency among their awards and for that reason an important factor in assessing the damages awardable for pain and suffering are consideration of what judges have awarded in similar cases. This factor provides for an ability to assess what will likely be awarded to any particular plaintiff in advance of a trial. The following cases are a summary of some of the recent decisions where an assessment of non pecuniary damages was made in British Columbia:

Ahmadi v. West 2014 BCSC 2050 – the 50 year old plaintiff was injured in a motor vehicle accident which had occurred five years prior to the trial. The trial judge found that as a result of the motor vehicle accident the plaintiff suffered soft tissue injuries to her neck, shoulders, arms and back. The judge found that she had substantially im-

proved by one year post accident when she discontinued any therapy and returned to many of her activities. By two years post accident the judge found that the injuries had largely resolved and that they continued to improve until they had fully resolved three years post accident. Non pecuniary damages of \$35,000 were awarded.

Barta v. DaSilva 2014 BCSC 2113 – the male plaintiff was awarded \$75,000 for non pecuniary damages for injuries suffered in a motor vehicle accident which occurred 7 years prior to the trial. The trial judge found that as a result of the motor vehicle accident the plaintiff suffered a mild concussion and experienced headaches and soft tissue injuries to his neck and back. The judge found that the effects of the concussion gradually diminished over a number of weeks. The headaches and soft tissue injuries continued to effect the plaintiff for about four years.

Suedat v. Kara 2014 BCSC 1837 – the 39 year old plaintiff was injured as a pedestrian in December 2010, four years prior to trial. Her injury was primarily psychological and included post traumatic stress disorder and adjustment disorder with depressed mood. At the time of trial she continued to suffer from PTSD and the prognosis for re-



covery in the near future was guarded. Non pecuniary damages of \$50,000 were awarded.

Farbatuk v. Lagrimas 2014 BCSC 1879 – the 47 year old male plaintiff was injured in a motor vehicle accident which occurred three years prior to the trial. The trial judge found that the plaintiff suffered a moderate to severe whiplash to his neck and back as a result of the motor vehicle accident that resulted in a significant curtailment of his activities for the first six months with some ongoing restrictions at trial. \$60,000 for non pecuniary damages was awarded.

Zhao v. Yu 2014 BCSC 1915 – the 45 year old plaintiff was injured in a motor vehicle accident which had occurred six years prior to trial. The trial judge found that the plaintiff suffered soft tissue injuries to his neck, mid back, left shoulder and lower back as a result of the accident. He also experienced headaches which were sometimes severe. The shoulder and mid back pain had resolved at the time of trial but the plaintiff continued to experience neck and low back pain as well as occasional severe headaches.

\$70,000 was awarded for non pecuniary damages.

Cook v. Symons 2014 BCSC 1781 – the 47 year old male plaintiff was injured as a

pedestrian four years prior to trial. His primary injury was to his knee. He had undergone three surgeries prior to the trial and a total knee replacement would be necessary within five years of trial. The plaintiff also suffered from depression as a result of the injuries suffered in the accident. The plaintiff remained disabled from both work and school and therefore as a result of his injuries had been unable to complete retraining. Non pecuniary damages of \$140,000 were awarded.

Rosso v. Balubal 2014 BCSC 1786 – the 31 year old plaintiff was awarded \$20,000 for pain and suffering following injury in a motor vehicle accident which had occurred three years prior to trial. The injury was a soft tissue injury to his neck and back. At the time of trial he continued to experience neck and back pain which was relatively mild and could be managed with attendance at yoga. Although it was anticipated that he would continue to experience ongoing symptoms into the future the medical experts recommended that he resume his normal activities of life.

Curtis v. MacFarlane 2014 BCSC 1138 – the 26 year old male plaintiff was injured in a roll over motor vehicle accident. The accident had significant con-



sequences for him including a neck, shoulder and lower back injury. He also suffered from depression and post concussion syndrome. The court found that the 2009 accident had changed the plaintiff due to a complex of post concussion symptoms including depression, anxiety, lost memory and other cognitive deficits. The court found that his enjoyment of life and self worth were significantly compromised by the injuries suffered in the motor vehicle accident and awarded \$140,000 for pain and suffering.

Kostecki v. Li 2014 BCSC 1056 – the 32 year old female plaintiff was awarded \$42,000 for pain and suffering for injuries that she sustained in a motor vehicle accident four years prior to trial. The trial judge found that the injuries included neck and upper back pain as well as headaches and that the symptoms persisted at the time of trial although did not significantly interfere with her work and life.

Chahal v. Righele 2014 BCSC 1086 – the 46 year old female plaintiff was awarded \$120,000 for injuries sustained in a motor vehicle accident which occurred four years prior to trial. The injuries were to the plaintiff's neck, shoulder and back, as well as serious headaches, difficulty sleeping and a major depres-

sive disorder. The medical evidence established that the symptoms would likely not improve and the plaintiff was left with chronic pain throughout her back and headaches. The trial judge found that both her social life and work life had been drastically changed as a result of the car accident.

Tchir v. South Coast British Columbia Transportation Authority 2014 BCSC 1119 – the 60 year old plaintiff was injured on a bus five years prior to trial. The trial judge found that the injuries suffered by the plaintiff included soft tissue injuries to her neck and back, a post concussion syndrome and a shoulder injury which included a full thickness tear. The accident also made a pre existing asymptomatic arthritis condition in her knee symptomatic. The plaintiff underwent surgical repair of the shoulder injury and would require knee replacement in the near future. \$110,000 for pain and suffering was awarded with a finding that the effect on the injury were devastating and resulted in anxiety, sleeplessness, depression and other mood issues. The pain that resulted from the physical injuries required the plaintiff to take many different kinds of pain, mood and sleep medications all of which had a profound impact on her ability to function



both at work and in her daily life.

Huntley v. Daley 2014 BCSC 978 – the 28 year old female plaintiff was injured in a motor vehicle accident which occurred four years prior to trial. She was awarded \$20,000 for pain and suffering after a finding by the trial judge that the accident caused a mild soft tissue injury to her neck and upper back with resulting pain, stiffness and headaches for several months. The trial judge found that the symptoms were largely resolved in six months and that after a year the symptoms no longer limited her functioning.

Gallina v. Honda Canada Finance Inc. 2014 BCSC 974 – the 34 year old female plaintiff was awarded \$75,000 for pain and suffering for injuries sustained in a motor vehicle accident which occurred four years prior to trial. The injuries included a soft tissue injury to her neck and upper back which resolved within about six months as well as significant hip and lower back pain which was constant and unlikely to resolve. The injury significantly impacted the plaintiff's ability to care for her home, her children, attend work and continue with her recreational activities.

Brunelle v. Yoshida 2014 BCSC 1006 – the 26 year old plaintiff was injured in a motor vehicle accident six years prior

to the trial. At trial, the judge found that the evidence showed that the plaintiff suffered soft tissue injury to her neck and back which resulted in persistent headaches and pain since the accident along with difficulty with sleep and occasions of depression and low mood. The pain symptoms had persisted since the accident and were likely to continue into the foreseeable future. The plaintiff was awarded \$60,000 for pain and suffering.

What is Reasonable Notice?

An employer is entitled to terminate any employee at any time. When they do so without just cause, they are obligated to provide “reasonable notice” of the termination or pay in lieu of reasonable notice. When an employer fails to do so, a wrongful dismissal claim will be brought.

A recent British Columbia Supreme Court case, *Sciancamerli v. Comtech (Communications Technologies) Ltd.* 2014 BCSC 2140 demonstrates how reasonable notice will be assessed by our courts. Many years ago, the Supreme Court of Canada provided direction to our courts in the factors that should be taken into consideration in assessing reasonable notice, specifically the age of the dismissed employee, the nature and length of the employment, and any other factors that may impact the ability of the dismissed employee to find replacement employment. *Sciancamerli* demonstrates how those factors are considered. In this case the plaintiff was hired in December 2012 as a senior account executive. He was 57 years old at the time that he was terminated in October 2013. The court found that 5 months was reasonable notice, citing the following factors:

1. The position was primarily a sales position, but required a person

with specific knowledge in the industry;

2. The plaintiff was a “short term” employee;
3. The plaintiff’s job search showed a lack of available positions which favoured a longer notice period.

The plaintiff’s age was not taken into consideration to further increase the notice period because the court held that doing so and also taking into consideration the specialized nature of the plaintiff’s job would result in double counting.

This case demonstrates how age, nature and length of employment as well as factors which make re employment difficult are taken into consideration in the assessment of reasonable notice by our courts. Although it can be difficult to determine exactly how courts will assess reasonable notice, in general for short term employees a period of between four and six months appears to be required, particularly when the dismissed employee demonstrates a difficulty in finding replacement employment despite diligent efforts.



Faulting Pedestrians for Accidents Occurring in Crosswalks



In *Suedat v. Kara* 2014 BCSC 1837 the court took the opportunity to discuss the rights and obligations of pedestrians in crosswalks and the circumstances under which a pedestrian will be found to have contributed to an accident occurring. The accident in *Suedat* occurred on a dark and rainy night. The plaintiff was in a marked crosswalk at the time that she was struck and was wearing dark clothing. The defendant sought to attribute some of the fault for the accident to the plaintiff. In refusing to do so, the court commented as follows with respect to the liability of a pedestrian in a crosswalk:

Once a pedestrian has safely entered a crosswalk, absent any negligence on the pedestrian's part that could mislead a motorist into thinking he or she could proceed safely, the pedestrian may assume that motorists will yield the right of way

to them and will share no responsibility if struck in the crosswalk. Negligence on the part of a pedestrian in a crosswalk must be proven by the defendant on a balance of probabilities. In this regard, a defendant must show more than imply inattention. Pedestrians in a crosswalk are not required to exercise "extreme vigilance" to ensure they won't be struck.

In *Suedat* the defendant argued that the fact that the plaintiff was wearing dark clothing should be a factor taken into consideration in assessing negligence against her. The court rejected that argument finding that this was not evidence in and of itself of contributory negligence. The court noted that the plaintiff was in a marked crosswalk, was there to be seen and that there was no evidence that the failure to wear light clothing would have prevented the accident.

Duty of Bus Drivers



A recent British Columbia Supreme Court decision highlighted the duty that bus drivers have in ensuring that their passenger's are safe. In *Tchir v. South Coast British Columbia Transportation Authority* 2014 BCSC 1119 the plaintiff was injured when a bus driver was forced to brake hard after a car came to an abrupt

stop in front of him. Due to the hard braking, the plaintiff was thrown from her seat and suffered significant injuries. In finding that the bus driver was negligent the court said as follows:

A public carrier owes a high standard of care to passengers. One it is

proven that a passenger is injured while riding on a public transit vehicle, a prima facie case of negligence is made out and the onus shifts to the carrier to establish that the injuries suffered by the plaintiff occurred without fault on the carrier's part.

This underscores the significant onus on bus drivers. In a typical motor vehicle accident case, it falls to the plaintiff to establish not only that they suffered injuries but also that the injuries were due to negligent actions on the part of the

defendant. This case in effect says that once an injury has occurred on public transit, negligence on the part of the driver of the vehicle will be assumed and it will fall to the defendant to show that the injury occurred without fault on the part of the driver. That is a significant advantage to the plaintiff. The judgment in *Tchir* was significant so we will be watching to see whether the judgment is appealed and the Court of Appeal is given an opportunity to comment on the reverse onus on bus drivers.

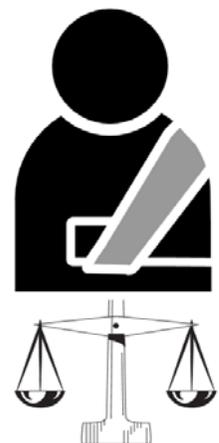
Failure to take Contextual Approach in determining whether just cause exists resulting in award of aggravated damages

A recent British Columbia Supreme Court decision, *George v. Cowichan Tribes* 2015 BCSC 513 demonstrates the application by our courts of the principles dictated by the Supreme Court of Canada in *McKinley*. The Supreme Court of Canada instructed trial judges to take a contextual and proportional approach in determining whether just cause exists. That approach required in *George* that the trial judge take into consideration the plaintiff's years of employment and her exemplary work history during those years.

The background in *George* was that the plaintiff employee who was 55 years old at the time of termination had been working for the defendant for over 30 years. One

night, while not working, the plaintiff attended a pub. She became inebriated and had an altercation with another woman at a pub. The day after the altercation the plaintiff advised her supervisor about the incident. The supervisor conducted an investigation and instituted the first step in the employer's progressive discipline plan.

The woman who had been involved in the altercation registered a complaint with the employer, which triggered an external investigation. The recommendations resulting from that investigation were summary dismissal. The employer in compliance with that recommendation summarily dismissed the plaintiff. The plaintiff then brought the claim against the employer for



wrongful dismissal.

The trial judge found that in applying the need for proportionality and a contextual approach, the plaintiff's conduct was not such to justify summary dismissal, rather a verbal warning, the first step in the employer's progressive discipline, should have been given.

With respect to damages, the court took into account the fact that the allegations against the plaintiff in support of the decision to terminate her were a significant factor in limiting her employment options. The court also awarded \$35,000 in aggravated damages, finding that the employer's manner of termination was in breach of its obligation of good faith. The court noted

specifically that the employer failed to provide the plaintiff with an opportunity to respond to the allegations of dishonesty and that they failed to give any serious consideration to the plaintiff's lengthy service, or her exemplary work record or whether there were measures short of dismissal which could have been imposed. This case demonstrates that in circumstances where an employer fails to take the contextual and proportional approach dictated by the Supreme Court of Canada in determining whether an employee should be dismissed or not, they are exposing themselves to awards of aggravated damages.

Turning Left and Fault



Many collisions occur at intersections where vehicles are executing a left hand turn. Many of these cases go to trial as the issue of who is at fault can be very contentious. I have personally taken many of these cases to trial and the only thing certain about the outcome is that it will depend entirely on the facts. The starting point for an understanding of who will be at fault in a left turning vehicle accident is the *Motor Vehicle Act*, the statute which governs the rights and obligations of motorists. Section 174 of the *Motor Vehicle Act* provides as follows:

When a vehicle is in an intersection and its driver intends to turn left, the driver must yield the right of

way to traffic approaching from the opposite direction that is in the intersection or so close as to constitute an immediate hazard, but having yielded and given a signal as required by sections 171 and 172, the driver may turn the vehicle to the left, and traffic approaching the intersection from the opposite direction must yield the right of way to the vehicle making the left turn.

In practice what this section means is that the driver making the left hand turn is the "servient" driver. The servient driver does not have the right of way, but rather must yield to other motorists. The first question for the court is often whether the oncoming

vehicle is an “immediate hazard” or not. This is when questions such as the distance to the point of impact, the color of the traffic light, the location of the vehicles on impact and the speed of the oncoming vehicle are relevant. If the oncoming vehicle is not an “immediate hazard” then the left turning vehicle becomes the “dominant vehicle” with the right of way and the oncoming vehicle must yield the right of way.

The above demonstrates how all of the facts in any particular collision can effect the outcome of who is at fault. Two recent British Columbia decisions demonstrate how the law is applied to those facts:

Strul v. Mondares 2015 BCSC 284 – In this collision the plaintiff was travelling through the intersection on a green light in the middle lane. To the plaintiff’s left vehicles were backed up waiting to make a left hand turn. The defendant was making a left hand turn from the oncoming lane. The vehicles that were facing the defendant and waiting to make a left hand turn blocked the defendants view of vehicles travelling in the middle lane such as the plaintiff. The accident occurred when the defendant made a left hand turn in front of the plaintiff, resulting in a T-bone collision. The defendant admitted fault but alleged that the plaintiff shared liability. The court held that in the circumstances, where the plaintiff faced a solid green light, the plaintiff did not have a duty to slow down and take extra care so that he could stop in time should someone suddenly turn left in front of him. The factors that were highlighted by the court in finding the defendant wholly at fault for the accident included that she

did not see any vehicles approaching, that her vision of oncoming traffic was blocked and that she did not see the plaintiff vehicle at all until the moment of impact.

Vahman v. Cutts 2015 BCSC 198 – this accident occurred in a common way. Traffic was busy and backed up. The plaintiff was stopped, waiting to make a left hand turn. Vehicles in opposing lanes waved the plaintiff through. As the plaintiff was turning left, the defendant was travelling in the right hand lane towards the plaintiff. A collision occurred. The court found the plaintiff to be solely at fault for the accident, finding that the plaintiff failed to determine whether he could continue his left turn safely and that the defendant who was the dominant driver, had no opportunity to avoid the collision.

The above cases illustrate that in any left turning situation there are a variety of factors that are taken into consideration in assessing fault. Although both of the above cases found the left turning driver to be 100% at fault for the accident this is not always the case. In terms of safety on the roads the lessons to be learned from left turning collisions are many. One of the biggest ones is that regardless of whether other motorists have waved you through an intersection or not, make sure each lane that you are crossing can be crossed safely. Make sure that you have a clear view of a lane of travel prior to travelling across it. And always obey traffic signals. A yellow light means stop if safe to do so. A red light means stop.



Rose Keith Trial Lawyer

1486 West Hastings Street
Vancouver BC V6G 3J6

Phone: (604) 669-2126

Fax: (604) 669-5668

Email:

Rose:

rkeith@rosekeith.bc.ca

Romila:

romila@rosekeith.bc.ca



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NOTABLE QUOTES

If you can't stand the heat, get out of the kitchen.

Harry S. Truman

By trying we can easily learn to endure adversity. Another man's, I mean.

Mark Twain

That which does not kill me makes me stronger.

Friedrich Nietzsche

A little bit of pain is good for you. I feel alive. Everybody needs struggle. Once you overcome an obstacle, you springboard into the future. Life is interesting and short and its not supposed to be easy, and if it is, you're probably just in denial and you're existing here like a zombie.

Pamela Anderson

The trials and pressures of life – and how we face them – often define us. Confronted by adversity, many people give up while others rise up. How do those who succeed do it? They persevere. They find the benefit to them personally that comes from any trial. And they recognize that the best thing about adversity is coming out on the other side of it. There is a sweetness to overcoming your troubles and finding something good in the process, however small it may be. Giving up when adversity threatens can make a person bitter. Persevering through adversity makes one better.

John C. Maxwell.

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