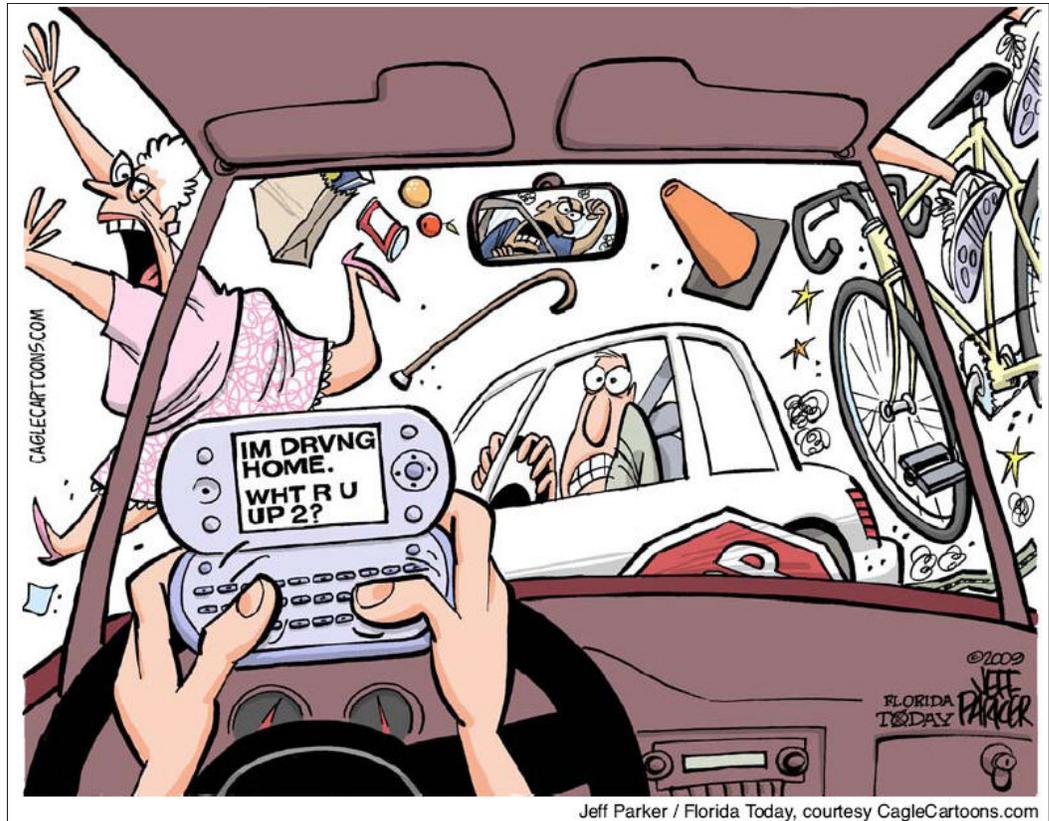




# According to Rose

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Jeff Parker / Florida Today, courtesy CagleCartoons.com

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July 16 will mark the end of the consultation process by the government to help determine what would change people's driving behaviour. The fine in BC for distracted driving is currently \$167, the second lowest in Canada. The only province with a lower fine is Quebec. Fines across the country range from a low of \$154 to a high of \$1,000 in Ontario.

Among the options being considered are higher fines, impounding vehicles and suspending licenses.

Distracted driving is a significant issue. In this day of smart phones, the temptation to check email and texts leads to dangerous behaviour on the part of motorists. Distracted driving is dangerous driving and results in death and serious injury.

Distracted driving is the second leading contributing factor in vehicle fatalities in BC with 88 deaths per year. Motorists using a hand held device fail to see 50% of the things around them.

The question is whether a change to the penalties will decrease the incidence of distracted driving. The fines were increased in the fall of 2014 and yet the police issued more tickets than they did in 2013. But was the increased number of tickets written a result of increased incidence of distracted driving or a result of increased enforcement? Either way, we can all work together to end distracted driving. Some ways to do so suggested by the Ontario Provincial Police include the following:

- Be mindful that distracted driving poses a significant threat to the well being of your family and friends
- Start conversations about distracted driving with your family, your friends, your colleagues and shed the negative light on it that it deserves

- If you are in a vehicle being driven by someone who is driving while distracted, always speak up. Be firm and say, “Enough! Too many people are dying because of distracted driving. It needs to stop and you need to stop.” Make this your new attitude every day.
- If you see someone driving in a dangerous manner while driving distracted, call 911 to report them
- Be self disciplined every time you get behind the wheel. Do not allow yourself to be distracted in any way while you are driving.

Together we can stop distracted driving and save lives.



## The Value of Pain and Suffering

In the May edition of *According to Rose* we explained the basis and rationale for an award of non pecuniary damages in a personal injury case. We referred to the British Columbia Court of Appeal decision in *Stapley v. Hejslet* 2006 BCCA 34 where the court clearly explained that the award is made after an appreciation of the individual's loss is obtained. The Court clearly stated that the award will vary in each case to meet the specific circumstances of the individual case. The Court also went on to provide a lists of factors that may influence an award of non-pecuniary damages. That list included:

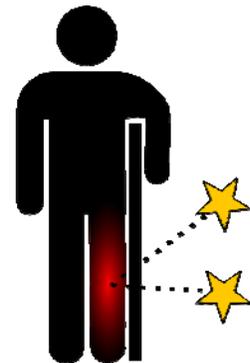
- a) Age of the plaintiff;
- b) Nature of the injury;
- c) Severity and duration of pain;
- d) Disability;
- e) Emotional suffering;
- f) Loss or impairment of life;
- g) Impairment of family, marital and social relationships;
- h) Impairment of physical and mental abilities;
- i) Loss of lifestyle; and
- j) The plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff).

The following summary of recent British Columbia Supreme Court decisions is provided to illustrate how the court

applies these principles and assesses these factors.

*Fadai v. Cully* 2014 BCSC 290 – The male plaintiff was 22 years old when he was injured in a significant rear end collision. The trial judge awarded \$100,000 for pain and suffering at trial six years later after concluding that as a result of the accident the plaintiff suffered soft tissue injuries to his head, neck, shoulder and wrist as well as severe headaches which resolved in one year. He also was found to have suffered a mild traumatic brain injury which led to difficulties with short term memory which resolved within two years. The traumatic brain injury also resulted in impairment of control over impulses and anger. These difficulties persisted at the time of trial and were found by the trial judge to be permanent.

*Glesby v. MacMillan* 2014 BCSC 334 – the 24 year old plaintiff was injured in a motor vehicle accident which occurred five years prior to trial. Prior to injury the plaintiff was in very good physical health and was very active although she suffered from anxiety and irritable bowel syndrome. Those conditions did not affect her daily life prior to the accident. The trial judge found that as a result of the motor vehicle ac-



cident the plaintiff suffered from accident related deficits and pain for three years. The judge also found that the period of recovery was prolonged because of the pre existing conditions and that the defendant was responsible for the extended pain and suffering. \$60,000 for pain and suffering was awarded.

*Liu v. Bourget* 2014 BCSC 291 – this claim concerned the claims of a husband and wife for damages following an accident which occurred six years prior to trial. At the time of the accident the husband was 55 and the wife was 49. The trial judge awarded \$60,000 for pain and suffering to the wife after finding that as a result of the accident she suffered relatively short-lived pain in her face and chest, mild to moderate soft tissue injuries to her neck and back, jaw pain and psychological injury that manifested in the form of a driving phobia. \$85,000 for pain and suffering was awarded to the husband following a finding that as a result of the accident he suffered facial bruising and pain that resolved within a few months, a mild to moderate soft tissue injury to his neck which had resolved, aggravation of a pre existing degenerative back condition that resulted in occasional minor ongoing

symptoms and a major depression with some psychological symptoms continuing.

*Kabani v. Lee* 2014 BCSC 2336 – The plaintiff was injured in a motor vehicle accident which had occurred four years prior to trial. At trial the judge found that the plaintiff had proven that she had suffered soft tissue injuries to her neck and back that resolved within six months, rejecting the plaintiff's claim that she developed rheumatoid arthritis as a result of the accident. \$32,500 was awarded for pain and suffering.

*Miller v. Marsden* 2014 BCSC 2331 – The plaintiff was awarded \$105,000 for pain and suffering at a trial which occurred nine years after the motor vehicle accident which caused his injury. At the time of the accident the plaintiff was 16 years old. As a result of the injuries the plaintiff suffered neck and back pain, temporomandibular disorder, headaches, driving phobia, adjustment disorder with anxiety and tinnitus. The likelihood of the plaintiff ever becoming pain free was poor and he was found to be likely to experience ongoing intermittent pain into the future.

*Shinzay v. McKee* 2014 BCSC 2317 – The plaintiff was injured in two motor vehicle accidents occurring five and four years prior to the trial. In each accident



he suffered soft tissue injuries, primarily to the neck and low back. The accident resulted in a pre existing spinal degeneration becoming symptomatic. He continued to experience pain at the time of trial and the judge found that he would continue to require physiotherapy, massage therapy and pain medication in the future to manage his flare-ups of pain. \$75,000 for pain and suffering was awarded.

*Davidge v. Fairholm* 2014 BCSC 1948 – A man in his early 20s was injured 5 years prior to trial in a motor vehicle accident. At trial he was found to have chronic neck and back pain with little chance of improvement. \$90,000 for pain and suffering was awarded.

*Campf v. Barbuta* 2014 BCS 1898 – The 50 year old woman was injured in a motor vehicle accident which occurred six years prior to trial. At trial she was found to be continuing to suffer from a chronic pain condition which significantly affected her in her daily activities. She remained disabled from performing many of her activities, other than light activities, which she performed at work and around the home. The trial judge found that her medical condition significantly affected her emotionally and affected her family, marital and social relationships. Her improvement

had plateaued and would not likely improve further without significant further treatment. An award of \$150,000 for pain and suffering was made.

*Lawrence v. Parr* 2014 BCSC 2004 – the 37 year old female plaintiff was injured in a motor vehicle accident which occurred four years prior to trial. At trial she was found to have suffered from myofascial pain symptoms as a result of the accident which lasted for approximately one year with occasional flare ups since then. \$30,000 for pain and suffering was awarded.

*Kaboly-Zadeh v. Murchison* 2014 BCSC 1968 – the 25 year old female plaintiff was injured in a November 2011 motor vehicle accident. The accident caused soft tissue injuries to the plaintiff's neck, upper and mid-back and shoulder area as well as numbness to her right arm extending initially to her fingers and headaches. Most of the symptoms resolved within six to nine months but she continued to experience pain and tightness in her mid-back and trapezius area and when she had a long difficult day some headaches. \$60,000 for pain and suffering was awarded.

*Beggs v. Stone* 2014 BCSC 2120 – the 52 year old plaintiff was injured in a mo-



tor vehicle accident which occurred six years prior to trial. The injuries included soft tissue injuries to her neck, back and right knee as well as post traumatic symptoms, anxiety and depression. Her physical symptoms improved considerably within three years of the accident but she continued to have nightmares and sleep disturbances. The combination of the physical and psychological injuries resulted in a severe and permanent impact on her life, including her quality of life in retirement. The doctors agreed that the plaintiff's combination of physical and psychological conditions was disabling and was likely to remain so and that the plaintiff was not capable of returning to her former work. \$80,000 for pain and suffering was awarded.

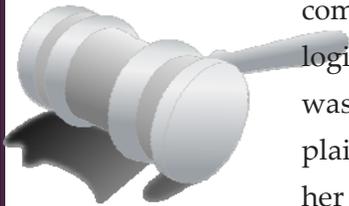
*Chong v. Lee* 2014 BCSC 2258 – the 48 year old female plaintiff was injured in a car accident that occurred seven years prior to trial. The trial judge found that the accident caused mild to moderate soft tissue injuries to the neck, shoulders and back. He found that the plaintiff suffered significant pain and restriction in her activities for at least four to six months following the accident and that by three and one half years post accident she was capable of performing almost all of her house-

keeping activities and any limitations after that point were self-imposed rather than warranted by any physical restriction. \$70,000 for pain and suffering was awarded.

*Carroll v. Hunter* 2014 BCSC 2193 – the 54 year old female plaintiff was injured in a car accident which occurred seven years prior to trial. At the time of trial the judge found that she continued to suffer persistent and significant neck pain and intermittent chronic occipital headaches. As a result of her neck pain she also continued to suffer intermittently from pain related insomnia. The prognosis for further recovery was guarded. Non pecuniary damages were assessed at \$100,000 less 10% for the risk that her pre accident degenerative disc disease would have become symptomatic

*Faa v. Hardy* 2014 BCSC 2302 – the 23 year old male plaintiff was injured in a motor vehicle accident in December 2009. He was awarded \$37,500 for pain and suffering after the trial judge found that his neck pain and headaches which resulted from the motor vehicle accident had largely dissipated by January 2011.

*Mandra v. Lussier* 2014 BCSC 2199 – the 33 year old male plaintiff was awarded \$75,000 for pain and suffering after a



finding by the trial judge that he had suffered significant injuries in the motor vehicle accident which had occurred seven years prior to trial. The judge found that the motor vehicle accident injuries transformed the plaintiff from a happy, healthy and hardworking man to one who lived in constant chronic pain. His lower, mid and upper back hurt on an ongoing basis. He had neck pain, headaches and pain in his legs. He was nervous, forgetful, miserable and depressed. Treatment and medication had not helped and there was no prognosis for improvement except as perhaps in relation to his lumbar pain. His pain was severe and chronic and disabled him from the type of work he used to do. The injuries had affected his social life and his relationship with his wife. He was not as active as he once was and he suffered psychologically.

*Corke v. Andrews* 2015 BCSC 118 – the female plaintiff was injured in a car accident in September 2011. At trial in January 2015 she was awarded \$75,000 for pain and suffering after a finding that by approximately two and a half years post accident her symptoms were mainly in her mid back and chest. She was coping better with her ongoing symptoms, both psychologically and functionally. By the time of trial she

had recovered significantly, but was not asymptomatic and would likely continue to suffer some ongoing discomfort. Her symptoms affected her ability to enjoy her social life with her friends and her daughter.

*White v. Wang* 2014 BCSC 2416 – the 28 year old female plaintiff was injured in an October 2009 motor vehicle accident. She was awarded \$65,000 for pain and suffering after a finding by the trial judge that she had suffered soft tissue injuries to her left shoulder area, neck and jaw. The judge found that the injuries had resolved to some degree by the time that she returned to work in December 2009. The level of pain and discomfort was significant enough that she could do virtually no housework for three months after the accident and then far less than she did before the accident for a significant period of time. The evidence proved that she suffered from a chronic pain condition that was caused by the accident.

*Thomasson v. Moeller* 2014 BCSC 2465 – the plaintiff was injured in a motor vehicle accident in January 2011. At the time of trial the judge found that she continued to have ongoing pain and emotional difficulties associated with her injuries. Her physicians expected that her symptoms would likely be pre-

sent for the rest of her life. The judge found that her injuries could be described as serious soft tissue injuries that had developed into chronic pain syndrome. There was a strong likelihood that she would continue to be affected by her injuries of the rest of her life. Her ability to work and maintain the level of activity she enjoyed prior to the accident would continue to be negatively affected. She was awarded \$95,000 for pain and suffering.

*Mothe v. Silva* 2015 BCSC 140 – the 45 year old man was injured in a motor vehicle accident which occurred four years prior to trial. At the time of trial the judge found that he had suffered neck and shoulder pain as well as headaches as a result of the motor vehicle accident and that his condition was now chronic. Although the injuries did not prevent him from working, he did so with pain and the injuries contributed to fatigue and a discouraged, pessimistic outlook. His injuries also reduced his recreational activities and his family life. \$40,000 for pain and suffering was awarded.

*Worobetz v. Fooks* 2015 BCSC 150 – The 45 year old woman was injured in a motor vehicle accident four and a half years prior to trial. The judge found that at the time of trial she continued to

experience pain in her neck, low back and shoulders as well as fatigue, irritability and depressed mood and difficulty sleeping. The injuries affected most of her activities of daily life, including socializing and household chores. She was left with debilitating chronic pain and was partially disabled from work. It was unlikely that she would recover completely and become symptom-free and fully functioning. She was awarded \$90,000 for pain and suffering.

*Gulati v. Chan* 2015 BCSC 431 – a 53 year old female plaintiff was awarded \$150,000 for pain and suffering following a finding by the trial judge that she had suffered serious injuries as a result of a November 2009 motor vehicle accident. The judge found that the injuries included a fracture to the left arm with continuing pain and stiffness in the arm and shoulder, an aggravation of pre existing osteoarthritis in her left shoulder and knee, soft tissue injuries to her neck, hips and lower back as well as depression and post traumatic headaches. The judge found that the plaintiff suffered from chronic pain and that she would continue to do so for the remainder of her life. In addition to the pain symptoms the plaintiff suffered a mild hearing loss in her left ear, and had minor balance and dizzi-

ness issues as a result of the accident. She suffered from post traumatic stress for a period of time and her family and friends testified that she went from being vibrant and active prior to the accident to being withdrawn and easily irritated after.

*Roth v. Hes* 2015 BCSC 161 – the 37 year old female plaintiff was injured in a motor vehicle accident which occurred four years prior to trial. As a result of her injuries she was off work for 11 months after the accident. The trial judge found that as a result of the accident she suffered soft tissue injuries primarily in her back and shoulder area. She continued to suffer from chronic pain disorder and experienced sleeping difficulties. Her lifestyle suffered as a result of the accident. She was not totally disabled but had lost the enjoyment of working on her family hobby farm and the lifestyle that provided to her. The award for loss of enjoyment of life was assessed at \$90,000.

*Sediqui v. Simpson* 2015 BCSC 214 – the 51 year old male plaintiff was awarded \$80,000 for loss of enjoyment of life after being injured in seven motor vehicle accidents between 2010 and 2013. The trial judge held that the evidence established that the plaintiff suffered soft tissue injuries to his neck, right up-

per back and shoulder and lower back as a result of the accident. He also suffered from headaches and the pain resulting from the injuries affected his mood and contributed to his feelings of sadness. He continued to experience pain more than a year following the last accident.

*Snidal v. Spires* 2015 BCSC 446 – the plaintiff was 20 years old when she was injured in a motor vehicle accident which occurred five years prior to the trial. At the time of trial the judge found that she continued to experience fairly constant pain and occasionally debilitating headaches. Her symptoms had likely plateaued, and had become chronic. She was no longer able to enjoy her favorite recreational activities and active lifestyle. She was more withdrawn. Her self-esteem and sense of self-worth were seriously compromised after the accident. She experienced a major depressive disorder attributable to the accident and would likely experience some residual, but manageable, symptoms of that disorder in the future. Damages for loss of enjoyment of life were assessed at \$85,000.

## Entitlement to Total Temporary Disability Benefits

When a person is injured in a motor vehicle accident in British Columbia they are entitled to Part 7 or No Fault benefits. One of the benefits that this provides is for total temporary disability benefits (“TTD’s) to help offset some of the wage loss experienced during a period of disability following injury. There are a number of limitations to TTD’s including that the maximum payable is the lesser of \$300 per week or 75% of the usual weekly earnings pre accident. As well, there is a requirement that the total disability must occur within 20 days of the accident for entitlement to result. What happens if after an initial period of disability there is a relapse and a further period of time when the individual is totally disabled?

A recent British Columbia Supreme Court decision held that in certain circumstances the individual will be entitled to TTDs following a relapse. In *Symons v. Insurance Corp. of British Columbia* 2014 BCSC 1883 the plaintiff had been injured in a motor vehicle accident in April 2008. She was totally disabled until May 2008 after which time she returned to work. In March 2013 the plaintiff required a second surgery which resulted in a period of total disability. ICBC denied the plaintiff’s application for TTD benefits saying that

they cannot be reinstated outside the 104 week period. The trial judge disagreed with them, finding that the plaintiff was entitled to a revival of her TTD’s. The judge held that the following factors made the plaintiff entitled to the revival:

1. The plaintiff had previously established eligibility and received TTDs;
2. The plaintiff could demonstrate that she was totally disabled; and
3. The plaintiff could show that the total disability was due to the injury sustained in the accident.

This decision is an important victory for plaintiff’s injured in motor vehicle accidents. If a plaintiff is at fault for an accident, the only financial assistance that they will be entitled to relating to the accident is through the No Fault benefits scheme. A finding that the entitlement to TTD’s can be revived opens up an important source of potential funding.



## Assessment of Credibility

A recent British Columbia Supreme Court decision provides a great illustration of the process that a trial judge undertakes in assessing credibility and in particular in assessing evidence in a soft tissue injury case. In a soft tissue injury case, there is no “objective” evidence of injury, rather the evidence of injury is based almost exclusively on what the injured individual says that they are experiencing. It is these complaints that drive the medical care that they receive and ultimately the medical opinions with respect to nature and extent of injury. In any type of case the trial judge does not simply take what the experts say at face value, rather they assess the basis of the opinion and whether that is supported on the evidence.

In assessing credibility of testimony a judge considers not just a plaintiff’s demeanor but also third party sources of information. In a personal injury case this is such things as treating practitioner’s records that are made at the time of treatment. Those records will contain the plaintiff’s portrayal of how she is feeling on that date and the recovery that she has experienced. Assessment of credibility also involves consideration of any inconsistencies, either in the evidence given at trial or inconsistencies with sworn testimony given prior to trial such as at an examination for discovery.

The case of *Chong v. Lee* 2014 BCSC 2258 involved a female plaintiff’s complaint of soft tissue injuries following a motor vehicle accident which had occurred seven years prior to trial. At the time of trial the plaintiff complained that she

continued to experience significant pain, suffering and restrictions in her activities. The assessment that the trial judge undertook in rejecting much of the plaintiff’s evidence demonstrates clearly how judges assess credibility. The trial judge said the following:

When a plaintiff’s account of changes in physical, mental, or emotional state as a result of an accident is not convincing, then the hypothesis upon which expert opinions rest will be undermined. Here, in cross examination, the plaintiff’s testimony was repeatedly impeached when prior inconsistent statements from her examination for discovery were put to her. The plaintiff had a tendency in her testimony to downplay her progress and to overstate the extent of her restrictions. Where there were discrepancies between the plaintiff’s evidence at trial of her symptoms and the progress of her recovery and the plaintiff’s contemporaneous reports of her progress as noted in the clinical records of her care providers, the court preferred the evidence of her care providers.

Assessment of credibility always involves a subjective element and always involves a wide variety of factors. As a trial lawyer my job is ultimately to provide advice to client’s on what I think a likely outcome at trial will be. That outcome is driven in large part by a perception of how evidence will be perceived and is driven in large part by my views of whether the opinions of our experts will be accepted.



## 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

Artak:

artak@rosekeith.bc.ca



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### NOTABLE QUOTES

The most important thing about goals is...having one.

*Geoffrey Abert*

The two most powerful warriors are patience and time.

*Leo Tolstoy*

Don't let yesterday take up too much of today.

*Will Rogers*

Do what you can with all you have, wherever you are.

*Theodore Roosevelt*

Nothing can dim the light that shines from within.

*Maya Angelou*

Your best teacher is your last mistake.

*Unknown*

### 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