According to Rose

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Fraser River Sunset

A Piece of My Mind

A federal election has been called for October 19, 2015. This will be the 42nd federal election in Canadian History. The results of this election will determine what party and what leader governs our country for the next four years. With the election already being called it gives the candidates 11 weeks to campaign.

In 2011 only 61% of eligible voters actually voted. That election resulted in the Conservatives obtaining a majority with 38% of the popular vote and the NDP forming the official opposition with 30% of the popular vote and the Liberals sliding into third with less than 19% of the popular vote. What these numbers show you is that the 39% of eligible voters in Canada that didn't vote could have changed the outcome of the election. I am not saying that is a good or bad thing or that the outcome should have been different. What the numbers show however is that only 2/3 of Canadians historically are determining the future of Canada by showing up and voting. That number was even lower in 2008 at 58%.

The most talked about election issues facing our politicians and our country are the Duffy trial, the economy, oil and pipelines, education and first nations issues. Get educated on the position that the politicians are taking on these issues and make an informed decision on October 19. Take the Quiz on ISideWith.com to find out which political party is most aligned with your values and stance on the political issues. Get out and vote and help determine the future of our country.

The Value of Pain and Suffering

The award that is made in a personal injury case for pain and suffering varies depending on the individual circumstances of each plaintiff. There is some consistency amongst awards though and judges and lawyers look at what has been awarded in similar cases to get a sense of an appropriate award in any individual case. The following provides a summary of recent awards of non pecuniary (pain, suffering and loss of enjoyment of life) awards in British Columbia:

Cross v. Boehlke 2014 BCSC 2225 – the plaintiff was a 21 year old woman at the time that she was injured in the motor vehicle accident which occurred four years prior to trial. Her injuries included initially nausea, pain in her neck, upper back, shoulders and hips as well as headaches. At the time of trial the judge found that she was suffering from chronic pain and that she would never return to her previous level of functioning. Non pecuniary damages were assessed at $70,000.

Mathroo v. Edge-Partington 2015 BCSC 122 - $60,000 for pain and suffering was awarded to an elderly man (81 years old) who had been injured as a pedestrian in a motor vehicle accident. The accident resulted in an open, comminuted fracture to his right elbow which required surgery, as well as headaches and pain in his hips and back. The accident occurred three years prior to trial and at the time of trial the plaintiff continued to experience pain and limitations in his activities.

Hosseinzadeh v. Leung 2014 BCSC 2260 – the plaintiff was 43 years old at the time that she was injured in the motor vehicle accident. At trial six years after the accident the judge found that she had suffered significant pain constantly since the accident. She was permanently disabled from her pre accident work and was permanently partially disabled from her previous activities of daily living. She suffered from chronic debilitating pain which disabled her from most of her former activities and was unlikely to improve. Her once vibrant social life was greatly diminished. Damages for loss of enjoyment of life were assessed at $125,000.

Camilleri v. Bergen 2015 BCSC 124 – the 51 year old female plaintiff was injured in an accident which occurred three and a half years prior to trial. At the time of trial it was found that as a result of the accident she suffered from chronic myofascial pain with symptoms of persistent headaches, neck and upper back pain left arm pain and numbness, difficulties with memory,

processing speed, multitasking, attention and recall. Her symptoms disabled her from work and from participating in her previous recreational activities. Prior to the accident she was very physically active. It was not likely that her symptoms would improve. $90,000 for pain and suffering was awarded.

Hodgson v. Saeed 2015 BCSC 147 – the plaintiff was awarded $80,000 for pain and suffering after a finding that the plaintiff suffered chronic pain that was unlikely to improve. At the time of the accident the plaintiff was 23 years old. The trial occurred five years after the accident. The plaintiff was very physically active prior to the accident. The judge found that the plaintiff was a stoic individual who was working his best to cope with his pain. He had suffered a significant change in his abilities since the accident which affected his family, work and personal life.

Dhaliwal v. Meerdink 2014 BCSC 2418 – the plaintiff was 38 years old when she was injured in a December 2008 motor vehicle accident. At the time of trial the judge found that the plaintiff continued to suffer from chronic pain which impacted all areas of her life. Prior to the accident the plaintiff had been extremely active and very involved in the lives of her children and her husband. In addition to the physical injuries, for the first few years after the accident the plaintiff experienced extreme anxiety about driving in winter conditions. $90,000 was awarded for pain and suffering.

Torchia v. Siegrist 2015 BCSC 57 – the 40 year old male plaintiff was awarded $65,000 for pain and suffering after a finding that he continued to suffer pain and restriction as a result of injuries sustained in a motor vehicle accident which occurred seven years prior to trial. The injuries were soft tissue injuries to his neck, shoulder and lower back. The judge found that there was still a possibility of further improvement in the lower back symptoms.

Larsen v. Moffett 2015 BCSC 222 – the plaintiff was injured in two motor vehicle accidents, the first of which occurred four years prior to the trial and the second two years later. At the time of trial the plaintiff was 44 years old. It was found that as a result of the accidents he suffered two soft tissue injuries to his neck and back as well as headaches, which caused ongoing and severe pain and limited his daily activities. A complete resolution of his injuries was unlikely. $70,000 for pain and suffering was awarded.

Sirak v. Noonward 2015 BCSC 274 – the 56 year old plaintiff was awarded $160,000 for pain and suffering from injuries sustained in a motor vehicle accident which occurred ten years prior to the trial. The judge found that the plaintiff had since the accident suffered from severe, disabling and progressively worsening pain and neurological symptoms. The symptoms were found to have significantly affected all aspects fo the plaintiff's life. He was unlikely to experience any substantial improvement in the future, even if he underwent surgery.

Redmond v. Krider 2015 BCSC 178 - $150,000 for pain and suffering was awarded to a 47 year old woman after a finding that as a result of a motor vehicle accident she suffered soft tissue injuries to her neck, upper back, shoulders and periscapular region, causing soft tissue pain and spasm, mechanical low back pain, left hip and buttock pain, sacraoiliac strain, flare up of fibromyalgia, cervicogenic headaches and adjustment disorder with depressive symptoms and anxiety, including persistent somatic symptom disorder of moderate severity and reduced cognitive ability. The trial judge found that her quality of life had changed drastically. Where she used to be able to enjoy physical fitness and life with her partner, she now came home from work exhausted and preoccupied with measures to try to lessen her pain. Her symptoms had not abated four years after the accident and were now chronic.

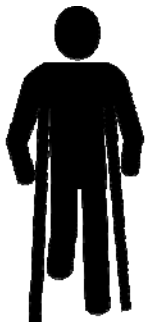
Mastromonaco v. Moraal 2015 BCSC 228 – a 49 year old woman was found to have suffered soft tissue injuries as well as a mild complicated traumatic brain injury in a motor vehicle accident which occurred six years prior to the trial. At the time of trial the judge held that the mild traumatic brain injury continued to cause mild cognitive impairment in processing, and in turn affected the plaintiff's memory, mood, concentration and focus, with the result that she exhibited signs of depression and social isolation as well as irritability, anxiety and fatigue. $160,000 for pain and suffering was awarded.

Mir Tabatabaei v. Kular 2015 BCSC 295 – the 53 year old male plaintiff developed right rotator cuff syndrome and myofascial pain in his cervical spine as a result of a motor vehicle accident which occurred five years prior to trial. At the time of trial the plaintiff continued to be restricted in his physical activities due to the injuries suffered in the accident. He was awarded $75,000

in non pecuniary damages.

Valino v. Chu 2015 BCSC 114 – a 22 year old female plaintiff was awarded $125,000 for pain and suffering after a trial judge found that as a result of a motor vehicle accident which had occurred five years prior to trial the plaintiff suffered significant injuries. At trial she was continuing to experience symptoms of pain in her neck, back, shoulder and hand and the symptoms were continuing to impact her ability to perform tasks at home and work and participate in recreational activities. The prognosis for future improvement was guarded. In addition to pain, the plaintiff suffered permanent scarring to her head and hair loss and had ongoing mood disturbance including irritability, mild depression and anxiety. The plaintiff had undergone four surgeries as a result of the injuries she suffered in the accident.

Liu v. Bains 2015 BCS 486 – the plaintiff was 47 years old in 2009 when she was injured in the first of three motor vehicle accidents, all of which she was found to not be at fault for. The plaintiff was a Chinese immigrant who worked in a physically demanding job and who outside of work was very physically active. The trial judge found that since the first motor vehicle accident the plaintiff had had some pain in some part of her body constant, while the severity and location of the pain varied. Overall, her pain had been significant and had had a significant impact on her life. She was no longer able to work, o the many household chores she did before, or cook and socialize as she did before. She had developed a chronic pain syndrome and it was unlikely her pain would resolve completely or even to the point that she could work part time. She suffered from the loss of her sense of well-being, the impairment of her relationships with her husband and children, and the loss of social connections from work and social activities. Her life was changed dramatically. She was awarded $90,000 for pain and suffering.



Karim v. Li 2015 BCSC 498 - $100,000 for pain and suffering was awarded to a 29 year old male plaintiff who had been injured in a motor vehicle accident four years prior to trial. The judge found that he sustained moderate to moderately-severe soft tissue injuries and was essentially incapacitated from a physical perspective for approximately one year after the accident. He now suffered from chronic pain. The judge found that the plaintiff was capable of much more than he currently perceived

and with appropriate treatment he would largely return to his pre accident level of personal and professional functioning, although likely with some intermittent flare-ups. The judge also found that the accident was instrumental in the plaintiff's relationship breaking up and the accompanying stress and decreased quality of life which was associated with that.

Rabiee v. Rendleman 2015 BCS 5595 – the plaintiff at age 44 was injured in a motor vehicle accident which occurred 7 years prior to trial. The trial judge awarded $40,000 for pain and suffering after a finding that the accident caused soft tissue injuries to her neck and lower back which worsened until they became chronic two years later. She also experienced headaches, fatigue, difficulty sleeping and depressed moods. The judge found that her condition was likely to improve with regular exercise and physiotherapy but that even with improvement she was likely to have some minor, lingering pain in her neck and back. The damages were reduced by 5% to reflect the plaintiff's failure to mitigate by not engaging in a consistent regime of exercise and physiotherapy.

Miolla v. Fick 2015 BCSC 616 – The 55 year old female plaintiff was injured in a motor vehicle accident which had occurred over two years prior to the trial. Since the accident the plaintiff's main ongoing complaint had been dizziness. The judge found that the medical evidence established that the accident caused the plaintiff to have a vestibular mismatch which in turn caused nausea dizziness and other symptoms. The balance and nausea had a large impact on her life. She was awarded $90,000 for pain and suffering.

Wagner v. Newbery 2015 BCSC 894 – the female plaintiff was 25 years old at the time of trial. She had been injured in two motor vehicle accidents which had occurred six years prior to trial. The plaintiff was pregnant at the time of the motor vehicle accidents and the second resulted in her going into labour early. The judge found that as a result of the accidents the plaintiff suffered injuries to her lower back, neck and left hip which had become chronic. The accident and injuries also had led to persistent symptoms of anxiety disorder, depression and post traumatic stress disorder. It was unlikely that the symptoms would ever resolve and she had an elevated risk of re injury and symptoms aggravation. Non pecuniary damages of $110,000 were assessed.

At Fault Driving Fleeing the Scene of the Accident

When you are involved in an accident, at the scene of the accident you exchange information with the other motorist. The reason that you do this is in part so that if any damages are paid out, they are paid out under that motorists insurance policy. If you bring a claim for personal injury damages following an accident, your claim is against the at fault motorist themselves, not against ICBC. Because all of us in BC are insured by ICBC, ICBC will handle the defense of the claim and will ultimately pay out any damages relating to the claim. However your claim is against that other motorist, not against ICBC.

So what do you do if you are involved in an accident and the other driver leaves the scene without exchanging information with you? Do you still have a claim? Are you still entitled to compensation for your injuries? The answer is "it depends". The statutory regime which governs ICBC cases is the Insurance (Motor Vehicle) Act. That Act and the insurance coverage that we have as a result of the Act provides for circumstances where you will be entitled to compensation despite the fact that you were unable to identify the person responsible for your injuries. The section of the Act which does this is s. 24(5). That section of the Act provides as follows:

Employer's Actions at time of Dismissal leading to Aggravated Damages

In a wrongful dismissal claim, generally the dismissed employees claim will be limited to a claim for damages for the failure to provide reasonable notice of the termination. On occasion, the claim will be more than that. An employer has a duty to treat their employees fairly. Sometimes when they fail to do that their actions can lead to an award of aggravated damages. Aggravated damages are an award over and above the assessed damages.

A recent British Columbia Supreme Court decision provides an example of the circumstances where an award of aggravated damages was claimed and awarded. In Johnson v. Marine Roofing Repair & Maintenance Service (2003) Ltd. 2015 BCSC 472 the plaintiff was a long term employee, having worked for the employer for 24 years. He held a management position. He was dismissed for cause. At trial the judge found that the employer did not have cause for the dismissal and awarded damages for the failure to provide reasonable notice of the termination. The judge also awarded $10,000 for aggravated damages, finding that the employer had acted unfairly and in bad faith. The particular actions of the employer that the judge criticized were that they did not give the employee advance warning of their concerns with his time sheets, nor did they give the employee an opportunity to review the data that they had compiled. Another factor considered in the award of aggravated damages was the threat that the employer had used of loss of employment insurance as a means to get the employee to settle with them.

Failure to Mitigate in Employment Law

Mitigation is a requirement not just in personal injury cases, but also in employment law. In employment cases the duty to mitigate requires the dismissed employee to take reasonable steps to obtain re employment. The reasonableness of the steps taken is judged on an "objective person" standard. If there is found to be a failure to have taken reasonable steps to obtain re employment, damages payable for the failure to provide reasonable notice will be reduced.

A recent BC Supreme Court decision provides an example of circumstances where there was a finding that the plaintiff had failed to take reasonable steps to find re employment and damages were reduced by three months due to this failure to mitigate. The following factors led to that finding:

- His criteria for a new position was too narrow
- He reasonably should have made greater efforts to find new employment and if he had done more he would have achieved greater success in finding employment
- He failed to pursue available opportunities that feel within his skill and experience
- He conducted too limited a job search
- He placed a greater emphasis on his personal preferences and career objectives than was reasonable in the circumstances.

This case demonstrates the way in which a dismissed employees efforts to find re employment will be critically evaluated. The assessment is based on what a reasonable person in the dismissed employees shoes would do. Efforts which are entirely personally driven may be seen to be less than what is reasonable in the circumstances.

Mitigation – can a plaintiff be blamed when it's the defendant's fault

The legal concept of mitigation requires a plaintiff to take reasonable steps to lessen the harm or damages that results from an injury. The usual form this takes is a requirement that the plaintiff follow reasonable treatment recommendations and return to work as advised. A failure to do these things results in a claim by the defendant that the plaintiff has failed to mitigate. The defendant has the burden to show both that there was a failure to follow reasonable steps and secondly that if the plaintiff had done so his or her harm or damages would have been less. If the defendant is successful in this, the amount awarded to the plaintiff will be reduced to reflect this failure to mitigate.

But what if the plaintiff is unable to pursue reasonable treatment because of something that the defendant has caused? A recent British Columbia Supreme Court decision, *Wagner v. Newbery* 2015 BCSC 894 explains that in those circumstances the plaintiff's damages will not be reduced. The plaintiff in *Wagner* as a result of her injuries suffered from anxiety disorder, depres-

(Continued on page 9)

sion and PTSD. She had an inability to follow through with counselling which contributed to a poor prognosis. The defendant argued that the inability to follow through with counselling was a failure to mitigate. In rejecting this claim the judge pointed out that the plaintiff's lack of diligence in following through with counselling might well be a part of her depressive symptoms. The defendant's had not shown that it was not a consequence of her depression and the burden was on them to prove this. The judge concluded that a plaintiff cannot be found to have failed to mitigate damages where that failure stems from a condition that the defendants themselves have caused, at least in part.

Liability for Slip and Fall

Our Court of Appeal recently commented on what must be proven to hold an occupier liable for injuries suffered when someone slips and falls on their premises. An "occupier" is someone who occupies the premises, such as the company running the operation where the slip and fall has occurred, or the owner of a premises who has responsibility for ensuring that the premises are reasonably safe. Occupier's are subject to the *Occupier's Liability Act* which the Court of Appeal said only modifies the common law of negligence with respect to occupied premises. It does not replace it. The common law of negligence requires an occupier to ensure that premises are reasonably safe for their intended use. It does not require them to safeguard against every potential injury, rather it requires only that the occupier ensure the premises are reasonably safe.

In the appeal decision of *Simmons v. Yeager Properties Inc.* 2014 BCCA 201 the Court of Appeal commented on what must be established before an occupier will be held liable for injuries which occur on their premises. This case involved an injury which occurred when the plaintiff fell at the front entrance to the defendant's bakery. At the front entrance there was a patio that was raised two to four inches from the landing leading up to the entrance. The raised area was marked with a white stripe and an warning sign to watch your step. At trial, the occupier was found to be 25% at fault for the injuries suffered by the plaintiff because the words of the warning sign were faded. The occupier appealed that finding of liability.

In finding that no liability should be attributed to the occupier and overturning the judge's decision, the Court of Appeal held that the fact that the sign was not properly maintained could not have caused the plaintiff to fall because she did not see the sign. The readability of the sign therefore made no difference. The Court of Appeal held that because the plaintiff failed to prove that but for the defendant's negligent act in failing

to properly maintain the sign her fall would not have occurred, the case against the occupier must be dismissed. This decision serves as a reminder that not only must it be established that there was some negligent act on the part of the occupier but also that but for the negligent act the injury would not have occurred.

Assessing Loss of Income Earning Capacity

A significant component of any personal injury case where a plaintiff has not fully recovered from their injuries is the assessment of how the ongoing symptoms will impact their ability to work and earn an income in the future. To be entitled to an award for potential loss of future income earning capacity, the plaintiff must establish that as a result of their injuries there is a substantial possibility of a future loss. Once that is established, it falls to a judge to assess the value of that future loss. There is an endless list of factors that are taken into consideration in assessing the value of that loss and the cases demonstrate that the amount awarded varies significantly from case to case. Some of the recent British Columbia Supreme Court decisions demonstrate this:

- $100,000 for loss of income earning capacity was awarded to a 21 year old woman who worked on her family's farm after a finding that she would never return to her former level of functioning given the injuries that she had suffered in the accident. Her earnings from her work on the family farm prior to the accident were modest and the size of the award likely reflects the number of working years remaining in her life. (*Cross v. Boehlke* 2014 BCSC 2225)
- An "earnings approach" was found to be appropriate where the plaintiff was totally disabled from her pre accident occupation and there was a 20% chance that she could earn a small amount of income through some form of sedentary employment. The plaintiff's pre accident earnings were approximately $20,000 per year and at the time of trial she was 49 years old. The earnings approach resulted in an award of $175,000 for future loss of opportunity to earn income. (*Hosseinzadeh v. Leung* 2014 BCSC 2260)
- $75,000 was awarded to a 28 year old man who was found to be suffering from chronic pain which resulted in a significant change in his abilities. The trial judge found that the plaintiff after the accident was disabled from doing all the things he would normally have been able to do and he would become less and less able to earn income in labouring and the construction industry as a consequence of his injuries. (*Hodgson v. Saeed* 2015 BCSC 147)
- A capital asset approach was used to assess the loss of income earning capacity of a 44 year old woman.

The judge found that the injuries suffered in the accident prevented her from being able to complete a master's degree which in turn would have opened up further potential work opportunities for her. Loss of future earning capacity was assessed at $200,000. (*Dhaliwal v. Meerdink* 2014 BCSC 2418)

- An asset approach was taken to assess damages for a 40 year old who suffered soft tissue injuries to his back in a motor vehicle accident. That approach resulted in an assessment of loss of future income earning capacity of $50,000 which was equivalent to one year's salary. (*Torchia v. Siegrist* 2015 BCSC 57)
- The loss of capital asset approach was used in the case of a 47 year old who was found by the trial judge to have always worked hard prior to the accident and more likely than not would have continued to do so but because of her motor vehicle accident injuries no longer had the same ability. The judge awarded $250,000 in loss of future earning capacity after finding that the plaintiff now had to take breaks, had difficulty concentrating and was unable to earn the same level of commissions as prior to the accident, resulting in her opting to earn more by salary than commission. (*Redmond v. Krider* 2015 BCSC 178)
- A mathematical approach was taken to determine the future loss of earning capacity of a 49 year old. The trial judge determined that the maximum the plaintiff would have earned on an annual basis absent the motor vehicle accident was $45,000. He would have worked until age 65. The plaintiff was still able to work and from that work could earn $25,000 per year which was deducted from the calculation of future earnings. In addition, there was a further deduction for the measurable risk that pre existing degenerative disc disease may have become symptomatic prior to age 65, resulting in the requirement that the plaintiff would have to quit all work. $175,000 for loss of future income earning capacity was awarded. (*White v. Wiens* 201 BCSC 188)
- A capital asset approach was used to determine the loss of future income earning capacity for a 53 year old carpet cleaner. Prior to the accident the plaintiff had annual earnings of between $40,000 - $60,000. The injuries negatively interfered with his ability to do his work as a carpet cleaner. Due to the injuries he worked more slowly than before the accident, could not complete as many jobs, could not work more than four hours a day and no more than four days per week. He lost a number of customers due to his inability to work at his usual pace. Using the loss of capital asset approach the trial judge assessed the loss of future income earning capacity at $125,000. (*Mir Tabatabaei v. Kular* 2015 BCSC 295)
- $500,000 was awarded to a 22 year old mining engineer who suffered serious and permanent injuries in a

motor vehicle accident five years prior to trial. The trial judge found that she was limited as a result of the accident in the types of work that she could perform and in particular work that involved heavier physical work or long hours. The judge found that there was a real and substantial possibility that the plaintiff would be unable to gain the experience needed to move into the more lucrative managerial positions because she would be limited from gaining experience in all of the different areas of mining engineering. (*Valino v. Chu* 2015 BCSC 114)

- An earnings approach was used to assess loss of future earning capacity in a case where the trial judge found that the plaintiff had suffered a complete loss of future earnings. The assessment was based on her pre injury earnings of $29,000 per year calculated to age 65, considering both positive and negative contingencies, resulting in an award of $300,000 for the 11 year period until retirement. (*Liu v. Bains* 2015 BCSC 486)
- $100,000, or roughly two years of income was awarded to a plaintiff who was 29 years old at the time of trial. The judge found that with the recommended rehabilitation the plaintiff would largely return to his pre accident level of functioning, but would from time to time in the future have some sporadic ongoing modest symptoms. In assessing the future loss of income the judge took into account the time it would take for that treatment including a residential pain clinic and the substantial possibility of infrequent absences during his working life due to the injuries suffered in the accident. (*Karim v. Li 2015 BCSC 498)*
- $135,000 was awarded to a 25 year old female plaintiff after a finding that the plaintiff was not capable of full time work and that likely would continue for some time, perhaps even a long time. It was also recognized that the plaintiff was at an elevated risk of re injury and symptom aggravation, either of which may result in time lost from work. The judge found that the earnings approach was not an appropriate method of valuation of the loss of earning capacity as the plaintiff's employment path was not sufficient clear and the contingencies were too numerous. (*Wagner v. Newbery* 2015 BCSC 894)
- $400,000 was awarded to a 25 year old male who was left with permanent restrictions in his dominant hand and restrictions including prolonged standing due to a leg fracture. The judge used the capital asset approach in valuing the loss of earning capacity, noting that certain occupations which he had planned to pursue prior to the accident were now foreclosed to him due to his injuries. (*Ishii v. Wong* 2015 BCSC 922)

Consequences of a Failure to Mitigate

A consistent theme in personal injury cases is that the injured plaintiff has failed to do all that he or she can to recover from their injuries or to lessen the harm or loss that is caused by the injuries. If the defense is successful in proving both that the plaintiff failed to take reasonable steps and that those steps would have made any difference to the harms or losses suffered by the plaintiff a judge will decrease the amount of damages payable to the plaintiff. Typically this will be done by decreasing the amount payable by a percentage amount.

A recent British Columbia Supreme Court decision demonstrates how this principle is applied. The plaintiff was 57 years old at trial and had been injured in a motor vehicle accident which occurred five years prior to trial. At the time of trial he continued to have daily symptoms which continued to restrict his activities. The trial judge assessed his loss and the awards for non pecuniary damages, past wage loss and loss of future earnings and then reduced those awards by 15% for the failure to mitigate. In doing so the trial judge said as follows:

> He failed to pursue or follow up on consistent recommendations for physiotherapy and for cognitive behavioural therapy. He took virtually no personal responsibility for his own medical treatment with the result that, at the time of trial some five years after the accident, his injuries remained largely unabated.

Thomasson v. Moeller 2014 BCSC 2465 is an example of a case where a judge found that there was no failure to mitigate. In *Thomasson* the defense argued that the plaintiff had failed to mitigate her damages because she failed to follow medical advice to take cognitive behavioural therapy. The defense argued that if she had done so the depression she experienced and resulting chronic pain would be much less or possibly eliminated. The trial judge rejected this argument finding that the plaintiff had been very proactive in trying to find a treatment that worked for her. He found that she had at all times tried her best to recover from the injuries so that she could return to work. He held that she did not fail to mitigate by choosing not to take cognitive behavioural therapy because she was taking other therapy and showing some improvement. The judge also found that the evidence did not satisfy the court that there was even a likely improvement possible as a result of cognitive behavioral therapy.

Another recent case in which the defense argument that the plaintiff had failed to mitigate her damages was rejected is *Cross v. Boehlke* 2014 BCSC 2225. In this case the defense argued that the plaintiff had failed to mitigate her damages by not returning to see her general practitioner for follow up. The judge found that there was no reason for the plaintiff to return to see her doctor because she already knew what

his recommendations were and there was no change in her condition.

The judge reduced the damages payable to the plaintiff by 15% in the case of *Torchia v. Siegrist* 2015 BCSC 57 for failure to mitigate when a plaintiff did not participate in a recommended rehabilitation program. The plaintiff's reasons for not participating related to the cost of the program and to him not having time to participate. In rejecting those reasons the court noted that many of the items in the recommended rehabilitation program were covered by his medical and extended medical benefits from is employer and also that the plaintiff had a flexible work schedule which would have allowed him to participate in the rehabilitation program.

The above highlights that an argument that there has been a failure to mitigate is frequently seen in personal injury cases. Whether or not that argument is successful depends entirely on the facts. It falls to the defense to prove that there was some failure on the part of the plaintiff to follow a recommended course of treatment or to do all that they could to lessen their damages. They also must establish that if the plaintiff had followed a different course their loss and damages would be lessened. If a plaintiff has not done all that they could to get better or lessen their damages, there is a risk that a judge will find that they have failed to mitigate and will decrease the damages that are payable to them to reflect this.

Insurance and the Consequences of Misrepresentation

We all rely on insurance and rely on our insurance being honored when a situation arises where we have to utilize it. It is important to understand that for your insurance to be valid, you must have been honest and correct in the answers that you have given in the insurance application. If something in the application is dishonest or incorrect, it can form a basis for the insurance company to deny the provision of insurance. If the wrong answer is a misrepresentation, the insurance will be null and void.

A recent British Columbia Supreme court, Schaffner v. Insurance Corp. of British Columbia, 2015 BCSC 314 outlined some of the factors taken into consideration when ICBC denies insurance coverage on the basis of misrepresentation and is illustrative of the process a court goes through in determining whether there has been a misrepresentation or not. In this case the female plaintiff represented that she was the principal operator of a vehicle. When the vehicle was stolen, her husband reported its loss to ICBC, referring to

the vehicle as "his truck". The operating costs of the truck were paid for through the husband's. When the plaintiff attempted to obtain reimbursement from ICBC for the cost of the vehicle due to its loss through theft, ICBC denied her claim, saying that she had misrepresented who the principal operator was. The plaintiff sought indemnification from ICBC for damage to the truck and loss of its contents.

The issue at trial was who was the principal operator of the vehicle. The court found that the plaintiff used the truck for daily driving, using it to go for errands, go shopping and to take children to and from school and other activities. Her husband used the truck for hunting trips and once a week to go to his work. The court therefore found that the plaintiff had not misrepresented when she said that she was the principal operator and indemnification for the loss and damage to the truck was awarded.

This case highlights the importance of considering and assessing what the proper answer to the question of who the principal operator is. In general, the principal operator is the person who uses the vehicle the most. If the principal operator changes at some point after obtaining insurance, it is important to change the insurance documents to accurately reflect who the principal operator is. A failure to do so could result in ICBC refusing to indemnify for any loss or expense.

Our Mission

At Rose Keith Law Corporation our mission is to exceed the expectations of our clients by:

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- Managing all matters in an efficient, caring and proactive manner
- Communicating clearly and regularly
- Doing all things with an aim to achieving the end result desired by our clients

Our Core Values

We will seek for all clients the highest protection of the law possible and will do so with respect, integrity, compassion and transparency.

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NOTABLE QUOTES

"Wisdom doesn't automatically come with old age. Nothing does – except wrinkles. It's true some wines improve with age. But only if the grapes were good in the first place." *Abigail Van Buren.*

"Gardens are not made by sitting in the shade." *Rudyard Kipling.*

"Defeat is not the worst of failures. Not to have tried is the true failure." George Woodbury

"Indecision may or may not be my problem." *Jimmy Buffett*

"Before you begin a thing, remind yourself that difficulties and delays quite impossible to foresee are ahead…You can only see one thing clearly, and that is your goal. Form a mental vision of that and cling to it through thick and thin." *Kathleen Norris*

"Try not to become a man of success but rather a man of value." *Albert Einstein*

"You can't have a better tomorrow if you're thinking about yesterday" *Charles Kettering*

"The man who can drive himself further once the effort gets painful is the man who will win." *Roger Bannister*

"There is no such thing as a minor lapse of integrity." *Tom Peters*

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