



# According to Rose

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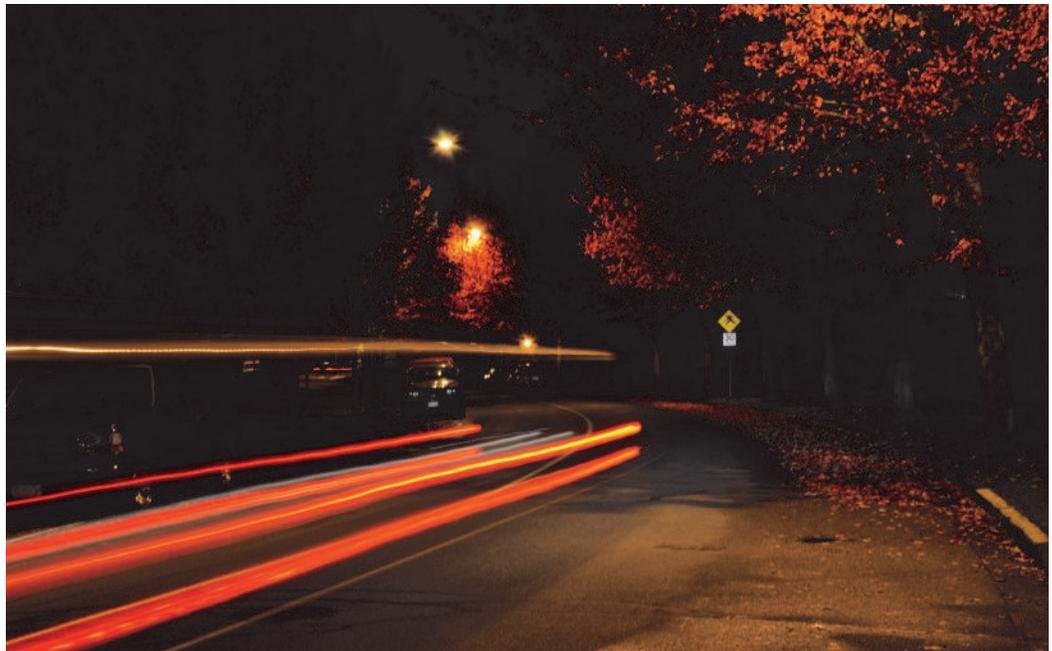
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*School Zone in October*

## According to Rose

The Supreme Court of Canada recently upheld BC's tough new drinking driving laws. Those laws came into place in 2010 and provided police with the power to sanction drivers for impaired driving at the side of the road on the basis of a portable breath device test. Two cases were considered by the Supreme Court of Canada. One related to a group of individuals who received roadside suspensions after their failure to provide a breath sample. They argued

that the law violated their rights of unreasonable search and seizure and their guarantee of innocence until proven guilty. The other case concerned a challenge to the law on the basis that a warning being registered on the roadside device is not evidence that the driver was impaired. The Supreme Court of Canada ruled against both of these cases, upholding the law and its application in British Columbia.

The purpose of the law is to make our

roads safer and to lessen the number of injuries and deaths that occur on our roads every year due to drunk driving. Statistics published by MADD (Mothers Against Drunk Driving) paint an interesting picture. Some of those statistics are as follows:

- Each day people drive drunk almost 300,000 but fewer than 4,000 are arrested
- Almost half of all drivers who were killed in crashes and tested positive for drugs also had alcohol in their system
- About one third of all drivers arrested or convicted of drunk driving are repeat offenders
- Over 1.2 million drivers were arrested in 2011 for driving under the influence of alcohol or narcotics
- In 2013 a total of 1,149 children 14 and younger were killed in motor vehicle traffic crashes. Of those 1,149 fatalities, 200 (17%) occurred in alcohol-impaired driving crashes. Out of those 200 deaths, 121 (61%) were occupants of vehicles with drivers who had blood alcohol concentrations of .08 or higher, and another 29 (15%) were pedestrians or pedal cyclists struck by drivers with blood alcohol concentrations of .08 or higher.
- In 2011, 15 percent of all drivers involved in fatal crashes during the

week were drunk, compared to 31 percent on weekends

- Every day in American, another 28 people die as a result of drunk driving crashes.

These statistics demonstrate that drinking and driving continues to be a significant societal issue. Will tougher laws such as BC's address this issue? Or will it take something more than penal sanctions to change the culture around drinking and driving and its acceptance? Anecdotally, it seems to me that the incidence of drinking and driving has decreased significantly over the years. It is socially acceptable to take a cab home from an event or to make arrangements to get a safe ride home when you plan on drinking and driving. The statistics indicate that much more still needs to be done to eliminate the deaths and injuries that needlessly occur each year due to drinking and driving. The new BC law has been in place for five years. We should soon be in a position to statistically analyse whether the law is making a concrete difference in drinking and driving behaviours.



## The Value of Pain and Suffering

In a personal injury case, plaintiffs are awarded damages to put them in the position that they would have been in if they had not been injured. A component of that award is for the pain, suffering and loss of enjoyment of life that the plaintiff experiences as a result of injury. That portion of the award is referred to as non-pecuniary as it is not calculable. You do not take the number of days of pain and suffering and multiply it by a certain dollar figure. Rather, the courts have been clear that you take into consideration a variety of factors in the assessment of the award of non-pecuniary damages. Those factors include such things as the age of the plaintiff, the nature and extent of suffering, the prognosis for the future and the restrictions and limitations resulting from the injury. Courts also taken guidance in their awards for non-pecuniary damages from decisions that have previously been made in similar cases. Below is a summary of the non-pecuniary damages awarded in recent British Columbia Supreme Court decisions:

*Diep v. Cunha* 2015 BCSC 819 – a 38 year old female plaintiff was injured while crossing the street as a pedestrian. The vehicle struck her leg as it was making a left hand turn. The accident occurred almost five years prior to trial. She was awarded \$75,000 for pain and suffering after a finding that she had suffered soft tissue type injuries to her low back, left hip and thigh and left knee in the accident. Those injuries

had shown slow but substantial improvement over the course of time since the accident. It was expected that she would continue to experience pain and limitation into the future although there was a likelihood of future improvement if she engaged in further treatment.

*Gill v. Bhuller* 2015 BCSC 851 – the 46 year old female plaintiff was injured in a motor vehicle accident which occurred four years prior to trial. At the time of trial the judge found that she was continuing to experience persistent, regularly occurring, disabling pain involving her neck and shoulders. The prognosis for further recovery was poor. The judge found that it was likely that over time the plaintiff's condition would deteriorate and that she would be more vulnerable to injury in the future. Non pecuniary damages of \$75,000 were awarded.

*Haroon v. Basran* 2015 BCSC 794 – the 27 year old female plaintiff was injured in a motor vehicle accident four years prior to trial. At trial the judge found that there was an ongoing chronic injury to the hip area but that symptoms were substantially diminished when adequate medical treatment was provided and the medical recommendations were followed. The judge found that there had been a failure to properly and consistently follow the exercise program suggested. Non pecuniary damages of \$45,000 were awarded.

*Zhang v. Ghebrenenya* 2015 BCSC 938 – the 78 year old plaintiff was awarded



\$65,000 for non-pecuniary damages for injuries suffered in a motor vehicle accident occurring five years prior to trial. He was found to have been left with significant weakness and intermittent pain in his shoulder as a result of the injury. It was found that the weakness would be ongoing.

*Karlsson v. Noormohamed* 2015 BCSC 911 – the 66 year old female plaintiff was awarded \$120,000 in non-pecuniary damages for injuries suffered in a motor vehicle accident which occurred four years prior to trial. The accident was found to have caused significant and life changing injuries including a comminuted fracture dislocation of the right shoulder that required surgical repair. The surgery was not successful. The plaintiff also experienced psychological side effects of anxiety, depression and a driving phobia. She was at the time of trial in nearly constant pain and had severely limited function in her dominant right arm. She had difficulty performing most activities of daily living due to the pain and reduced range of motion.

*Renaerts v. Renaerts* 2015 BCSC 1028 – the female plaintiff was 19 years old when she was injured in a car accident. The trial to assess her damages occurred five years later. The trial judge found that the plaintiff had suffered soft tissue injuries in the motor vehicle accident. Most of the injuries had resolved fairly quickly but the plaintiff was left with chronic mechanical back pain. The medical opinions were that the plaintiff should focus on strengthening, fitness and suitable activities to

be better able to cope with her limitations and reduce them. She was awarded \$75,000 for pain and suffering which also included a component for loss of homemaking capacity.

*Buckle v. Raworth* 2015 BCSC 989 – The plaintiff was 60 years old when she was injured in a car accident which occurred three years prior to trial. At the time of trial she continued to experience neck pain, constant pain in her right upper arm and shoulder and migraine headaches two to three times per week. Because of her injuries she was no longer able to engage in most of the activities that brought enjoyment to her life. Non pecuniary damages were assessed at \$65,000.

*Yannacopoulos v. Cronk* 2015 BCSC 1154 – the male plaintiff was 55 years old at the time of trial. He had been injured in a motor vehicle accident which occurred five years prior to trial. Subsequent to the accident all of his symptoms except for back pain resolved fairly quickly. An MRI identified an annular tear in a disc. He underwent a discectomy which failed to resolve his pain. He continued at trial to suffer from lower back pain which he said prevented him from being able to participate in his usual recreational and social activities. He was awarded \$80,000 for pain and suffering which was reduced by 25% to \$60,000 to reflect his pre accident condition which included lower back pain. The trial judge found that the accident accelerated a pre-existing degenerative condition in his lower back which was well established and progressive.

*Grewal v. Neumann* 2015 BCSC 2015 – the 26 year old male plaintiff was injured in an accident which occurred 8 years prior to trial. As a result of his injuries he was hospitalized for five days. At trial his injuries were found to be fractured ribs, a torn patella requiring surgical repair, soft tissue injuries throughout his neck and back, chronic pain and recurrence of depression. Non pecuniary damages of \$110,000 were awarded.

*Hendry v. Ellis* 2015 BCSC 1186 – the 26 year old female plaintiff was injured in an accident which occurred three years prior to trial. Her injuries were primarily soft tissue type injuries to her neck and back. Her condition improved slowly but at the time of trial her neck and back pain continued. The trial judge found that the injuries had had a “severe and lasting effect” on the lifestyle of the plaintiff and awarded \$75,000 for pain and suffering.

*Hutton v. Breitzkreutz* 2015 BCSC 1164 – the 24 year old female plaintiff was awarded \$100,000 for pain and suffering for injuries suffered in an accident which occurred 7 years prior to the trial. The injuries were extensive and included a fractured collar bone, perforated bowel that required surgery, nine days in hospital and then revision surgery to lessen the scar, soft tissue injuries to her neck and back, and most problematic a complicated right shoulder injury that continued to bother the plaintiff at the time of trial. The plaintiff would be undergoing surgery in an attempt to deal with the ongoing right shoulder symptoms. There was very

little chance that the surgery would eliminate the pain in the shoulder but a good chance that it would lessen the pain. The injuries resulted in the plaintiff having to give up her longstanding dream of becoming a hairstylist.

*Hsu v. Choquette* 2015 BCSC 1123 – The 34 year old female plaintiff was injured in a car accident which occurred four years prior to trial. At the time of trial she continued to experience symptoms from the injuries including fatigue, pain in her upper back, hips and wrist, pain in her neck and symptoms down her arms. The judge held that the accident caused reasonably severe soft tissue issues that went into spasm regularly, causing neck and shoulder pain and headaches. \$87,500 was awarded for pain and suffering.

*Kam v. Van Keith* 2015 BCSC 1519 – the 40 year old female plaintiff was injured in a car accident four years prior to trial. She was awarded \$125,000 for pain and suffering after a finding by the trial judge that her injuries were significant and continued to persist at the time of trial. The judge found that she had suffered emotionally and her life had been impaired. Her condition had adversely affected her family, marital relationships and social relationships. She could no longer participate in the sporting activities that were a vital and vibrant part of her personality and her relationship with her husband, family and friends.

## Loss of Earning Capacity

A frequent consequence of personal injury is that an individual's ability to earn an income in the future is impaired due to the impact of the injury. The impairment may result in a complete inability to work in the future or it may be that only some potential occupations are foreclosed to the plaintiff in the future due to the injury. In assessing whether there is a loss of earning capacity, the courts go through a two stage assessment process. The first stage involves an assessment of whether there has been an impairment of the ability to earn an income in the future due to the injury. The second involves an assessment of whether there is a substantial possibility that that impairment will result in a future loss. Below are recent examples of the court's assessment of loss of earning capacity and its valuation.



*Diep v. Cunha* 2015 BCSC 819 – the 38 year old plaintiff was an unemployed seamstress at the time of the accident. As a result of her injuries she was prevented from returning to work as a seamstress for a period of time however by trial she had returned to work part time as a seamstress. In assessing her future loss of earning capacity, the judge took into consideration the average earnings of a seamstress for the remainder of the plaintiff's working life. He assessed the plaintiff's impairment as being 50% resulting in a loss of earning capacity of \$250,000. He then reduced the award to \$200,000 for increased risks of unemployment and

general negative contingencies.

*Gill v. Bhuller* 2015 BCSC 851 – The 46 year old female plaintiff was awarded \$300,000 for loss of earning capacity after a finding that she suffered from regularly occurring disabling pain in her neck and shoulders which would likely increase over time. Since the accident the plaintiff's ability to work had been significantly compromised, to the point that although she maintained her pre accident employment, the compensation that she received for that work had been decreased from \$10,000 per month to \$4,800. Taking into consideration this decrease as well as the possibility that her continuing pain would lead to a loss of income over the rest of her probable working life, loss of earning capacity was assessed at \$300,000.

*Dickenson v. Passero* 2015 BCSC 908 – a 27 year old accountant was awarded \$100,000 for loss of earning capacity after a finding that her earning capacity was diminished by reason of the effects of chronic pain on her work stamina which in turn gave rise to a real and substantial possibility of a future loss occurring. A potential area of future loss was noted to be not being able to take advantage of promotions requiring longer work hours.

*Raenerts v. Raenerts* 2015 BCSC 1028 – the plaintiff was 24 years old at the time of trial. She had suffered an injury at age 19 which left her with chronic mechanical back pain. She was awarded \$200,000 for loss of earning capacity after a finding that the chronic lower

back pain would permanently render her less capable overall from earning income from all types of employment to which she was suited before the accident. In particular, prior to the accident her goal was to become an LPN. There was a chance that she would improve enough to complete the LPN program but she would remain exposed to a greater real and substantial risk that she would re injury or aggra-

vate her back, preventing further employment in the field, and making her less capable of earning income in other employment. The award also recognized the realistic possibility that she would require further education and training to reduce the gap between her earnings as an LPN and that her injuries delayed in entry into employment in the caregiving field by about 6 months.

### Consequences of Employing for a Set Term

An interesting decision in the BC Supreme Court serves as a warning to employers to be careful in the way in which they draft their employment consequences or they will face unintended consequences. In *Alsip v. Top Rollshutters Inc.* 2015 BCSC 1166 the court applied the legal rule of *contra preferentum* in interpreting an ambiguous clause in the employment agreement drafted by the employer. The legal rule of *contra preferentum* requires that if there is an ambiguous clause in a contract it will be interpreted against the party that drafted it.

In this case the employer had prepared an employment agreement that was said to be for a three year contract. At approximately one year into the employment the employer terminated the employment without cause. The issue before the court was whether the parties had entered into a fixed term contract or whether the employer had retained the right to terminate on reasonable notice. The court held that the contract was a fixed term contract, stating:

The plain meaning of “three year employment contract was that it was for a fixed term. Since the defendant drafted the agreement, even if there were an ambiguity, the *contra preferentum* rule applied. Had the defendant intended to include a provision to allow termination on notice, it could have done so. On the evidence both parties intended the contract to have a three year term.

This finding results in a significant consequence for both the employer and the employee. Rather than damages being determined with reference to a period of reasonable notice, which given the length of employment would likely have been six months or less, damages were determined on the basis of the remainder of the contract period, which was 25 months.



## The Cost of Alleging Just Cause

In the recent decision of *Dhatt v. Kal Tire* 2015 BCSC 1177 the Court applied several legal principles that resulted in a costly award to the dismissed employee. The employer had terminated the plaintiff for just cause, citing dishonesty as the reason. The plaintiff had taken a battery charger which the employer had put in the garbage. Initially the employer gave the plaintiff a two day suspension and then later changed their mind and terminated the plaintiff's employment for cause. In assessing whether the employer had satisfied the burden of proving that they had just cause for the termination, the court applied the well-established legal test of whether there had been a breakdown in the employment relationship. The court considered various factors including that the plaintiff did not act dishonestly when he removed the items given his evidence that he believed that the items that he took were considered to be garbage by the employer. The plaintiff had no intention to steal from the defendant and admitted taking the items when asked. As a result, the court found that the employer had failed to establish just cause.

The failure to establish just cause in this case was particularly expensive for the employer. The employer had purchased the business from another business in 2004 and continued operating it as the same type of business. Part of the business purchase included that the previous owner was to terminate all employees. In the case of the plaintiff,

he had been employed by the previous business for 17 years. He commenced his employment with the new owner in the same position on the day of the purchase resulting in no break in his employment. In assessing damages for the termination of his employment, the court found it appropriate to take into consideration the term of employment with the previous owner. This resulted in the period of employment being 28 years rather than the 11 that the current owner had owned the business.

During the period of reasonable notice, the plaintiff became disabled and would have been entitled to receive long term disability benefits if the employer had continued his employment throughout the period of notice. The court awarded further damages to compensate the plaintiff for the loss of entitlement to long term disability benefits.

The plaintiff also was awarded aggravated damages in the amount of \$25,000. Aggravated damages are awarded because of the increased harm or damage caused by the termination and specifically in the case of wrongful dismissal, is awarded because of the manner in which the dismissal occurred. In this case the court found that the employer terminated the plaintiff in a manner that was unfair, insensitive and in bad faith. The court inferred that there were economic factors that drove the decision to terminate with a desire on the part of the employer to terminate a senior high paid employment who was costing too much,

and replace him with a less expensive employee. The court also found that the employer did not act fairly by changing the two day suspension and in not giving the plaintiff any real op-

portunity to respond to the very serious allegation that he had lied and stolen from the employer.



## Our Mission

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

- Responding promptly
- 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

## Does a Slip and Fall mean someone is at fault

Slips and falls happen frequently. They happen in grocery stores, on the streets and in lobbies. It seems that they can occur almost anywhere. But does a slip and fall mean that the occupier of the premises will be liable?

To establish fault in a slip and fall cases a plaintiff has to establish not only the reason for their fall but also that negligence on the part of the occupier or owner of the premises led to that fall. Simply establishing the reason for the fall is not enough. An occupier is not expected or required by law to prevent any sort of item or dampness on the floor. If they can establish that they have in place a reasonable system of maintenance which provides for inspection and cleaning at reasonable intervals as well as a process for dealing with unusual events, that is generally a complete answer to a claim of negligence.

A typical example of the application of this legal principle is found in dealing with an injury in a grocery store. The produce department in grocery stores is often the scene of slips and falls. Many individuals have slipped on produce that has fallen onto the ground. That does not make the grocery store liable. The question becomes whether the grocery store has a reasonable system in place for making sure that the produce department is reasonably safe. If they do, the grocery store will not be liable for any injuries that are suffered.

A recent similar example is found in the case of *Zary v. Canada Mortgage and*

*Housing Corp.* 2015 BCSC 1145. In this case, the plaintiff slipped and fell as a result of some water on the floor of the bathroom at Granville Island. The trial judge accepted that the water on the floor was the cause of her falling but did not hold the occupier liable because they had in place a reasonable system of maintenance which provided for inspection and cleaning at reasonable intervals as well as a process for dealing with unusual events such as a water leak.

If you slip and fall in a public space, make sure that you identify if possible the cause of your slip and fall. Was it water or another substance on the floor? Are there signs warning of potential danger? If possible, take photos of the substance that led to your fall. It is always worthwhile to seek legal advice about the potential of a claim,, particularly if the injuries that you suffer are significant. But be warned, this type of case is very difficult to prove and often the likelihood of success cannot be adequately assessed until evidence from the occupier has been obtained.



## Keeping Dismissed Employees whole on Termination and the Duty to Mitigate

When an employee is terminated without cause, they are entitled to notice of the termination. That notice is determined with reference to a variety of factors including their age, nature and length of their employment, and any other factors that can affect re-employment. Once the length of appropriate notice is determined a judge will award damages for the failure to provide that notice. Those damages are meant to put the employee in the same position that they would have been in if they had been given the appropriate amount of notice. That often means that in addition to the salary or wages the employee would have earned during the period of notice, they also must be provided with other benefits such as pension benefits.

A recent British Columbia Supreme Court decision considered what damages a dismissed employee was entitled to over and above his wages. The employee through his job had been entitled to pension benefits. The court said that generally, an employee whose employment has been terminated without reasonable notice is entitled to the increased value that would have accrued to his pension entitlement if reasonable notice had been provided.

The Court in *Liboiron v. IBM Canada Ltd.* 2015 BCSC 1523 also explained how a claim for vacation pay during the period of notice is dealt with. The claim for vacation pay during the period of notice was denied. The Court explained that an employee who is paid throughout the notice period during which he was not required to work does not suffer a loss of vacation and thus is not entitled to vacation pay accrued during that time.

The Court in *Liboiron* also considered the employee's duty to mitigate and what the employer must establish to prove a failure to mitigate. The Court described the evidentiary burden on the employer as being a "heavy onus to show that the plaintiff failed to mitigate". The Court found that the onus included a duty to identify any positions that likely would have been available to someone in the plaintiff's position. The Court also noted that the perfunctory letter that had been provided by the employer when they dismissed the employee, confirming only the employee's position and length of service, would have made it more difficult for him to find new employment. Given these factors the Court declined to find that the dismissed employee had failed to mitigate his damages.

**DISMISSED**

### 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

If you are interested, you never have to look for new interests. They come to you. When you are genuinely interested in one thing, it will always lead to other things. *Eleanor Roosevelt*

You make the world a better place by making yourself a better person. *Scott Sorrell*

A lot of people are afraid to tell the truth, to say no. That's where toughness comes into play. Toughness is not being a bully. Its having a backbone. *Robert Kiyosaki*

Energy is the essence of life. Every day you decide how you're going to use it by knowing what you want and what it takes to reach that goal, and by maintaining focus. *Oprah Winfrey*

Ninety-nine percent of failures come from people who have the habit of making excuses. *George Washington Carver.*

Every mistake that I made – and we all make mistakes – came because I didn't take the time to get the facts. I didn't drive hard enough. *Charles Knight.*

Don't worry when you are not recognized, but strive to be worthy of recognition. *Abraham Lincoln*

Successful people recognize crisis as a time for change – from lesser to greater, smaller to bigger. *Edwin Louis Cole*

"The shifts of fortune test the reliability of friends" *Marcus Tullius Cicero*

"Doing what you love is the cornerstone of having abundance in your life." *Wayne Dyer*

"Dig the well before you are thirsty" *Chinese Proverb*

### 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