



According to Rose



Inside this issue:

- A PIECE OF MY MIND 1
- MITIGATION AN ON-GOING ISSUE 2
- PROOF OF A FUTURE EVENT 3
- DEFINITE TERM CONTRACT...OR NOT? 4
- HIT AND RUN!! REQUIRED STEPS YOU 5
- VALUING PAIN AND SUFFERING 6
- NOTABLE QUOTES 8
- OUR AREAS OF PRACTICE 8

A PIECE OF MY MIND...

BY ROSE KEITH...

Fall is for many of us the busiest time of the year. Getting kids back to school, returning from summer holidays and starting all the new activities that begin in the fall can make life extremely hectic. Around our office we take fall as an opportunity to really look at the way we are running our files and servicing our clients. It is our little "tune up" time. We are always looking for ways to improve the service that we

are providing to our clients and welcome your feedback at any time. Expect to receive a survey from us in your email and we would really appreciate if you could take a few minutes to complete the survey and help us improve the service that we are providing. Happy Fall!!



MITIGATION AN ONGOING ISSUE

A primary issue in any personal injury case is mitigation. The defense will allege that the injured person has failed to mitigate their damages and that the amounts payable to them should therefore be decreased. What this means is that the defense is saying that the injured person has not done all that they could to get better. They will suggest to the judge that the payments that should be made to the injured person for their injuries should be reduced by a certain percentage because if the injured person had done everything that they could to get better, they would have been better quicker. This is almost always an argument that is made at trial. It is important for clients to understand that this is something that the court considers and to understand the way that the court looks at this issue.

Some recent examples of the court considering this issue are the following:

1. A male plaintiff age 36 was injured in an April 2006 motor vehicle accident. He had suffered a soft tissue type of injury primarily to his low back. The court reduced the damages payable to him by 25% finding that he had been advised from an early date to exercise but failed to do so until 2009. The court also noted that once the plaintiff did follow the advice of his medical practitioners he immediately noticed a benefit.
2. Damages were reduced by 20% for failure to mitigate for a male plain-

tiff that was found to have failed to have sought out professional assistance for his sleep and mood disorders that followed a motor vehicle accident and for his failure to take any active steps to address his alcohol addiction;

3. Damages were reduced by 10% for a failure to mitigate for a male plaintiff who was found to have failed to continue with a physical exercise program for a brief period of time three years after an accident;
4. A failure to mitigate was not found to exist where a plaintiff considered a recommendation made by a doctor hired by the defense, when he did not follow the recommendation after considering it carefully and with the concurrence of his doctor.

These cases illustrate the manner in which courts will consider whether an individual has done all that he or she can to decrease the damages and loss that they suffer after injury. Almost without exception, if it can be shown that steps could have been taken to improve the individuals outcome, the plaintiff will be penalized with an award of damages that reflects the extent of the loss that could have been realized. Although it is always the individuals choice in terms of treatment that they seek out and advice that they follow, avoidable damages will not be compensated.



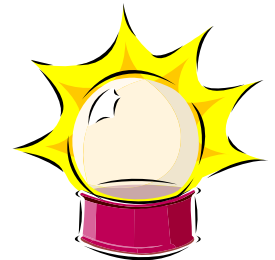


PROOF OF A FUTURE EVENT

Often in a personal injury case much of the time at trial will be spent talking about what will happen in the future. Whether the plaintiffs injuries will continue to bother him or her in the future, whether they will suffer a loss of income in the future, whether they will be unable to pursue a career path that they had intended to prior to the accident and whether they will require certain treatments in the future, incurring costs. When the court considers events that may occur in the future the question they ask is whether there is a real and substantial possibility that the future event may occur. This is different than the test that is applied to events that have already occurred. In those circumstances the court will look at whether it is more likely than not. The real and substantial possibility test is central to claims relating to future events.

An example of how this is applied can be found in a recent British Columbia Supreme Court in which the court

considered the claim of a plaintiff who had been injured six years prior to trial, when he was 19 years old. The plaintiff sought to prove that if he had not been injured he would have become a police officer and that his injuries now prevented him from doing so. The court rejected this claim, finding that there was not a real and substantial possibility that the plaintiff would have achieved this career objective if the accident had not happened. The court also declined to award loss of future income, finding that there was not a real and substantial possibility of a future event leading to an income loss (the plaintiff had continued to work since the accident occurred). This case clearly illustrates that a court will not award damages for claims that are purely speculative, rather it is imperative that a real and substantial possibility of the future event occurring be established to result in an award of damages.



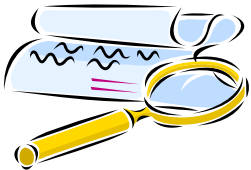
DEFINITE TERM CONTRACT...OR NOT?

In employment, you can be hired for either an indefinite term, or a defined period of time. Different rights and obligations follow depending on which of these types of employment terms you have been hired under. The vast majority of employees are on indefinite term, which means that the employment will continue until it has been terminated by either the employee or the employer.

A recent decision by the British Columbia Court of Appeal has gone a step further in implying a right to terminate into what on its face appears to be a contract of set duration. The employee was hired as a dental hygienist to fill in for a maternity leave. In his offer letter it was specified that he would be filling the position from December 1, 2008 – July 30, 2009. The employer terminated the employment on December 22. The employee took the position that he had a fixed term contract of employment and that he was entitled to be paid his remuneration until July 30, 2009. The Court of Appeal upheld the trial judge's decision finding that the defendant was entitled to terminate the employee's employment upon giving reasonable notice and that the employee was not guaranteed employment until the end of the maternity leave. The Court of Appeal held that there was an implied term in the contract of employment that the employment could be terminated by either party upon reason-

able notice. The Court did however emphasize that each case turns on its facts.

As an aside, the British Columbia Court of Appeal also stated that notice periods in respect of temporary employees, such as those filling maternity leave positions, will be less than notice periods to which permanent employees are entitled. I question whether this is right at law given that the basis for the notice period is to provide the employee with sufficient time to find alternative employment. The Supreme Court of Canada has specified that in determining the appropriate amount of notice you must consider the nature and length of employment, the age of the employee and any other factors that may effect re employment. An argument could be made that the nature of short term assignment employment falls within this but given the theoretical basis for notice I expect that the Supreme Court of Canada may not agree with this statement by our court of appeal. Unfortunately, given the amount at issue in the specific case that this ruling arose in, it is doubtful that the parties would apply to have the Supreme Court of Canada consider the issue. The words of our Court of Appeal will no doubt be repeated many times in court rooms in British Columbia by lawyers making arguments in support of reduced notice periods.



HIT AND RUN!! REQUIRED STEPS YOU MUST TAKE

Unfortunately, many motorists are the victim of what are referred to as hit and run accidents. This is when the other motorist leaves the scene without providing his or her information and as a result you are unable to identify the other driver. In British Columbia an injured party who is unable to identify the other motorist may still be entitled to compensation, as long as they can prove that they made reasonable efforts to ascertain the identity of the other involved motorist.

A recent British Columbia decision describes some of the factors that will be taken into consideration in assessing whether reasonable efforts have been made. Unfortunately for the injured party in this case, the court found that reasonable efforts were not taken, and their case was dismissed. The result to the injured party was that no compensation was available to them for their injuries.

In this case the court found that all that had been done by the plaintiff following the accident was that she contacted 911 to report that the driver had fled the scene, reported the accident to ICBC and attended at ICBC to provide a statement. No further steps were taken. The trial judge held that the requirement to make reasonable efforts is not limited to the immediate aftermath of the accident. Rather to satisfy the requirement to make all reasonable efforts to ascertain the

identity of the other motorist requires that the plaintiff make all reasonable efforts at the scene and also all reasonable efforts to identify the other parties in the days and weeks following the accident. The trial judge suggested such steps a posting signs and advertising in a local newspaper in an effort to seek out potential witnesses.

This approach was confirmed in another decision of the British Columbia Supreme Court where an elderly woman was found to have not taken all reasonable efforts to ascertain the identity of an unidentified driver. The court held that as there was at least one reasonable avenue of investigation open to the plaintiff which was not pursued, the court could not find that she had taken all reasonable steps. Her case against ICBC was dismissed.

The claim against ICBC was also dismissed in a case where the motorist took no steps beyond reporting to the police, to ascertain the identity of the unknown driver.

If another motorist leaves the scene of the accident the right to be compensated for your injuries is not dependent on identifying the other driver, it is however dependent on being able to establish that you took all reasonable steps to identify the name of the other driver. When our clients are involved in an accident where the other driver

(Continued on page 6)





(Continued from page 5)

leaves the scene, we always advise them to seek out witnesses by advertising at the scene of the accident and in other ways such as craigslist. Tak-

ing these simple steps ensures that you will be found to having taken steps to identify the other motorist and your right to compensation for your injuries preserved.

VALUING PAIN AND SUFFERING

A component of personal injury claims is compensation for the pain, suffering and loss of enjoyment of life that the injured person experiences subsequent to the injury. When courts are asked to assess this element of a claim they look to decisions of other judges in previous cases to provide guidance on the amount that should be awarded. When I advise clients of the potential value of a case I look to previous decisions as well. The summaries that follow are provided to give you an understanding of the factors that are considered by the court and the range of damages that are awarded. The Supreme Court of Canada has ruled that the maximum that can be awarded for pain and suffering is \$100,000. This decision was in 1978 and the \$100,000 is regularly adjusted to take into consideration inflation. The current upper limit given inflation is \$327,000. This upper limit is reserved for cases in which a truly catastrophic injury has been suffered.

1. \$35,000 for pain and suffering was awarded to a female plaintiff injured four years prior to the trial.

Her symptoms subsequent to the accident included trouble sleeping, headaches and back pain. By two years after the accident she was 85 percent recovered. At the time of trial, four years post accident, she continued to experience frequent flare ups in her pain, sometimes once every week or two, or more often if she did strenuous activities.

2. \$144,000 was awarded to a plaintiff after a reduction of 20% for failure to mitigate, after the plaintiff suffered injuries while a pedestrian. The accident occurred seven years prior to the trial. The injuries resulted in the plaintiff being hospitalized for several days with complaints of pain in his elbow, lower back, knee, ribs, shoulder and right wrist. At trial the plaintiff continued to suffer from elbow, lower back and headache pain. The elbow injury required three surgeries and the plaintiff was left with permanent disability. The plaintiff also suffered from sleep disturbance, depression, anxiety and al-





(Continued from page 6)

coholism. The trial judge found that the accident injuries had fundamentally changed the plaintiff's life and precluded him from participating in a number of activities that gave him pleasure and that formed the basis of his social life.

3. Non pecuniary damages of \$100,000 were awarded to a 41 year old male plaintiff at a trial that occurred seven years subsequent to the motor vehicle accident. The trial judge found that the plaintiff at the time of trial continued to experience chronic pain in his neck, shoulders

and back and suffered from chronic myofascial pain syndrome;

4. \$40,000 for pain and suffering were awarded to a 31 year old who had been injured in a motor vehicle accident five years prior to trial. At the time of trial she still had frequent neck pain and stiffness as well as headaches, although she remained physically active and had experienced no significant time off her work. The ongoing injury was relatively minor but was still frequent and significant enough to make her life less comfortable and less enjoyable.





**ROSE KEITH BARRISTER
AND SOLICITOR**

1486 West Hastings Street
Vancouver, British Columbia
V6G 3J6

Phone: 604.669.2126
Fax: 604.669.5668
Toll free: 1.888.651.6638


Email:
Rose: rkeith@rosekeith.bc.ca
Romila: romila@rosekeith.bc.ca
Darlene: darlene@rosekeith.bc.ca

NOTABLE QUOTES

Everyman is a quotation from his ancestors
– *Ralph Waldo Emerson*

**Dare to reach out your hand into the darkness to pull
another hand into the light**
– *Norman B. Rice*

**If I have seen further, it is only by standing on the shoulder
of giants**
– *Isaac Newton*



If you would like to receive this publication via email, please contact Darlene and your name and email address will be added to the distribution list. If you do not wish to receive this publication, please contact Darlene and your name will be removed from the distribution list.

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.

