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A PIECE OF MY MIND...

BY ROSE KEITH...

January always brings with it new beginnings, goal setting and reflection on the past year. It is a time to think back on the successes and failures of the prior year and to plan for the year ahead. The new year provides a new slate where all things are possible. In our office, our focus is always on providing the best possible service to our clients. We recognize that it is a privilege to represent the people that we represent and we recognize as well that generally when client's come to us, they come to us in need. Something has gone very wrong in their lives which has brought them to us. We know that our clients have enlisted our help to make right that which

has gone wrong. We do our best to assist with compassion and respect, collaborating with our client's to get the best possible result.

At this time of year, our office spends time reflecting on the way that we are providing services to our clients, the ways that we can improve the services that we are providing and ways of improving efficiencies in our office so that results are obtained quicker and in a more cost effective manner. We welcome your feedback at anytime but particularly at this time of year we ask that you provide us with your views. What are we doing right? What should we be doing more of?

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Less of? What would improve the service that we are providing to you? How can we be better at what we do? If you can take a moment to provide us with your feedback, you are welcome

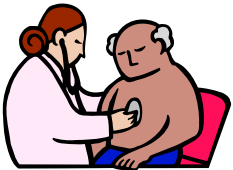
to do so on an anonymous basis by dropping us a line in the mail. Alternatively, please forward any comments to Darlene at **Darlene@rosekeith.bc.ca**. Thanks in advance for helping us to be the best we can be at serving our clients!!

INDEPENDENT MEDICAL EXAMINATIONS

If you are involved in a personal injury case, whether from an injury suffered in a motor vehicle accident, slip and fall accident or other form of injury, at some point you are likely to undergo an “independent medical examination”. Our office will often arrange these to assist us with understanding the nature and extent of injury suffered by our clients, to understand the extent of restriction on employability due to the injury and to understand the future care requirements of our clients. These doctors that are retained by our office are not retained to provide treatment, rather to assist with understanding the type of compensation that will be necessary to return our client’s as closely as possible to their pre injury status. Before you attend that examination our office will provide the examining doctor with a letter of instruction in which we summarize how you were injured and the treatment that you have had since injury. We will also ask the doctor to provide their opinion on a variety of matters including the diagnosis of the injury, prognosis for recovery, extent of restriction on your ability to work and your care requirements. The

resulting opinion will often form the cornerstone of your case. There are a variety of extremely qualified experts that we use to provide these opinions, many of which you would not be able to see except through referrals such as this from our office. We will typically provide that opinion to your primary treating practitioner so that the expertise that was involved in the opinion can also benefit you in your treatment and recovery.

You also at some point in your case will likely be asked to undergo a medical examination by a doctor chosen by the other side. The purpose of this examination is somewhat different than the purpose of examinations arranged by our office. These examinations are scheduled solely to assist the defense with defending the case. The purpose of the examination is to limit the damages that you will be entitled to. These experts will be asked to look at the case in a different way. They will take an infinitely more optimistic view of your injuries and likely recovery. Their opinion will often be based on statistical likelihoods rather than the reality of your particular circumstances. The re-





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sulting opinion will be used by the insurance company to justify ceasing payment for treatment or taking the position that you are ready to return to work. On occasion however these opinions can be helpful in pointing out potential treatment options that have not been previously recognized by your treating practitioners. The defendant's are entitled as of right under the rules that govern our court cases to have an expert of their choosing assess you. Although the resulting opinions are generally not helpful to your case, they will be subjected to cross examination at which time frequently evidence helpful to your case can be obtained.

Prior to conducting the examination for the defense, the doctor will be provided with a letter of instruction summarizing how you were injured, the type of injury that you suffered, the type of work that you did prior to injury and any factors in your past health that may be relevant to what you are currently experiencing. Prior to meeting with you the doctor will review all the available medical records, including records relating to your health prior to the injury. When the doctor meets with you they will spend a significant amount of time asking you about how you got injured, what you have experienced since injury and your health prior to the injury. They will then examine you. Typically during the examination certain tests will be performed to test

whether you are giving your "maximal effort". The point of these tests is to discover whether you are embellishing the extent of injury or restriction. Other tests will be conducted to test the validity of your reported symptoms. After the examination the doctor will prepare a written report containing their opinion with respect to the nature and extent of injury, the ongoing restrictions particularly as they relate to your ability to work and any treatment recommendations.

Both of these types of examinations are different than what you will experience with a treating practitioner. The focus of these examinations is to provide evidence in your case, either in support of your case or to defend against claims made in your case. They are an integral part of any personal injury law suit. Attending these examinations can be time consuming and stressful but they are absolutely necessary. In an ideal world the results of these examinations and the access to these experts that you otherwise would not have seen will help your treating practitioners understand the nature and extent of injury and plan for treatment. In an independent assessment there is significantly more time spent in examining you, analyzing your past medical history and assessing how best to provide treatment to help you achieve maximum recovery. The information obtained in these assessments while essential to your legal case, can also be invaluable in providing direction for your care.



FACEBOOK AND TWITTER – PRIVATE OR NOT?

In litigation the parties are required to produce documents that relate to matters at issue in the case. Much time is spent between lawyers arguing about what is required to be produced or not. Ultimately when lawyers cannot agree, judges will be asked to make a decision about whether a particular document or type of document has to be disclosed. In the electronic age, this often results in applications for production of materials that are stored on computers, iPhones, blackberries and social media sites. Most people utilize privacy settings on any social networking sites but are likely aware that these privacy settings are easily breached. It is not unheard of in litigation for parties to hire private investigators to do cyber sleuthing. These investigators are adept at accessing sites which individuals have thought were “private” and accessible only to individuals that they choose to allow access.



A recent decision in the British Columbia Supreme Court considered the defendant’s application to the plaintiff’s facebook and twitter accounts and her iPhone. The plaintiff had been the victim of medical malpractice. One of the impacts of the doctor’s negligence was a traumatic brain injury. The plaintiff alleged that the brain injury caused cognitive impairment which affected her thinking process. She also testified that her social life had been effected since the surgery. The defense sought

production of the plaintiff’s computer hard drive, including her social media accounts, iPhone and digital camera images. The plaintiff resisted production of these materials arguing that they were not relevant and that this would result in a significant infringement on her privacy.

Although previous decisions in British Columbia and other provinces have resulted in orders that plaintiff’s produce these types of materials, the judge in this case did not order production. The issue of privacy has been previously commented on by the courts in the following terms:

...I accept that a litigant must accept such intrusions upon her privacy as are necessary to enable the judge or jury to get to the truth and render a just verdict. But I do not accept that by claiming such damages as the law allows, a litigant grants her opponent a licence to delve into private aspects of her life which need not be probed for the proper disposition of the litigation.

In dismissing the defendant’s application for the plaintiff’s social media accounts, iPhone and digital camera, the judge drew parallels to spoken communications. The trial judge stated as follows:

I am unable to envisage any ra-

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tional justification for breaching the privacy rights of an individual in civil proceedings simply because it is alleged that the individual's general health, enjoyment of life and employability are directly at issue. Merely because a record may be made of the communication shouldn't make it any different than a private telephone conversation. If not, surely applications in civil proceedings for recordings of private communications can't be far behind.

This decision is a welcome one from my perspective as counsel for plain-

tiff's who are bringing forward personal injury claims. Applications for production of highly personal items such as contents of social media accounts, email accounts and hard drive's of computers frequently occur. It is a tremendous invasion of the privacy of individuals. Prior to this decision the bulk of the decisions have held that if these materials may have some bearing or relationship to the claims being put forward by a plaintiff, they must be produced. This is obviously very troubling for clients and difficult to deal with. This recent decision now provides a way for lawyers representing injured individuals to fight these types of applications and assert privacy interests on behalf of our clients.

DEDUCTIBILITY OF PENSION BENEFITS

A recent decision of the British Columbia Court of Appeal clarified the deductibility of pension benefits during the period of notice after termination of an employee. In a without cause termination, the dismissed employee is entitled to either reasonable notice of termination, or damages in lieu of providing notice. Those damages will be equivalent to the earnings that the employee would have received during the period of notice. Generally, any earnings a dismissed employee earns during the period of notice following termination will be deducted from the amounts payable by the employer.

The British Columbia Court of Appeal recently considered the issue of whether pension received by a dismissed employee from the employer's funded pension plan will be deductible during the period of notice. The employer argued that the pension benefits being received during the period of notice should be deducted in a similar way to other earnings during the period of notice. The employee argued that the pension benefits should not be deducted as they were collateral to the earnings.

The Court of Appeal agreed with the

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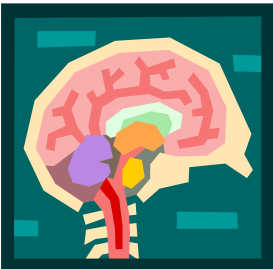
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employee. The Court of Appeal focused on whether the employee and employer would have intended the pension benefits to be deductible from salary during the period of reasonable notice. The pension was a benefit earned by and belonging to the employee by virtue of past years of work. It was not paid as a substitute for lost wages. The Court of Appeal held that in that sense the pension was a “collateral” benefit, it was “collateral” to salary earned by the employee. The vested pension benefits were a property right belonging to the employee. The Court of Appeal found that the vested pension were similar to an in-

vestment or RRSP earned by him through many years of labour.

The principle of collateral benefits are equally applicable in personal injury cases. When an injured person is entitled to a payment that can be considered a “collateral benefit”, this payment will not be deducted from the amount payable for the injury, regardless of whether this will result in double recovery to the injured party. The confirmation by the Court of Appeal in this case that the pension benefits are not deductible from the amounts payable by the employer for notice is consistent with principles established by the Supreme Court of Canada regarding collateral benefits and in my view rightly applies those principles.

THE PROBLEM WITH TRAUMATIC BRAIN



Between one and one and a half million people seek medical attention for traumatic brain injuries each year. The majority of traumatic brain injuries are sustained in motor vehicle accidents, motor cycle accidents and bicycle accidents. The effect of traumatic brain injury can be absolutely devastating on an individual and his or her loved ones. The effect however is invisible to those around the victim. As a lawyer representing victims of traumatic brain injuries, the invisible nature of the injury can make ensuring full compensation a difficult challenge. This however pales in comparison to the challenge faced by the victim and his or her friends and family in under-

standing and dealing with this often tragic injury.

For those around the victim of a traumatic brain injury, there are many fallacies and widely held beliefs about traumatic brain injury that simply are not true. For example, many believe that there must be a loss of consciousness for an individual to suffer a brain injury. That simply is not true and has been medically refuted repeatedly. Another often held belief that is simply wrong is that an individual has to suffer a blow to the head to suffer a traumatic brain injury. A traumatic brain injury can be suffered without any impact to the head, most often this



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will occur in a motor vehicle accident where the head is snapped forward and back with impact. When this motion happens, the brain moves inside the skull and can impact the bony inside of the skull. This area is full of sharp edges and the damage that can result to the brain from impacting this area can be significant. Finally and probably one of the most challenging aspects of traumatic brain injury is that the victim looks normal. Because of this it is difficult for people around the victim to understand that behaviour that they are observing is due to the brain injury.

Behavioural changes almost always accompany traumatic brain injury. The nature and type of change depends on the location and severity of the brain injury. Some of the symptoms that can result from traumatic brain injury include:

- Loss of simple movement of various body parts
- Inability to plan a sequence of steps needed to complete a task
- Loss of spontaneity in interactions
- Loss of flexibility in thinking
- Difficulty in recognizing faces
- Difficulty in understanding spoken words
- Difficulties with attention
- Short term memory loss
- Long term memory loss

- Increased or decreased interest in sexual behavior
- Aggressiveness
- Difficulty with organization
- Problems with balance and movement
- Dizziness and nausea
- Sleep disturbance
- Slurred speech

The above list of possible consequences of a traumatic brain injury is not exhaustive. It demonstrates the significant difficulties that those who have suffered a traumatic brain injury face and the significant challenges that have to be dealt with in their everyday navigation of the world. There is assistance for most problems associated with traumatic brain injury. Rehabilitation will not eliminate the problems but can assist the victim in dealing with them and decreasing the impact on their day to day life and functioning. Involvement with a medical team familiar with the effects of traumatic brain injury is essential to the wellbeing of a victim of traumatic brain injury.






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NOTABLE QUOTES

“Before you criticize someone, you should walk a mile in their shoes. That way, when you criticize them, you are a mile away from them, and you have their shoes.” *Frieda Norris*

“Success is not final, failure is not fatal; it is the courage to continue that counts.” *Winston Churchill*

“Success is not measured by what you accomplish, but by the opposition you have encountered, and the courage with which you have maintained the struggle against overwhelming odds: *Orison Swett Marden*

“When you get into a tight place and everything goes against you, till it seems as though you could not hold on a minute longer, never give up then, for that is the place and time that the tide will turn.” *Harriet Beecher Stowe*

“Are you a creature of your circumstances or a creator of circumstances?” *Cavett Robert*

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.
