



According to Rose

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Happy Holidays To You And Yours

During this holiday season we are wishing you and yours all the best and wish you a healthy, happy and prosperous 2012.

THE SEATBELT DEFENSE

An interesting decision was recently given by the Supreme Court of Canada regarding what is known as the “seatbelt defense”. In Canada, there is a duty on every occupant of a motor vehicle to take care for his or her own safety by wearing an available seatbelt. If a seatbelt is not worn, the “seatbelt defense” will be

brought into play by the party defending the law suit. The seatbelt defense requires the defendant to prove that the plaintiff’s failure to wear a seatbelt caused him to suffer greater injuries. If this is proven then the damages that the plaintiff will be entitled to is proportionality reduced to reflect how much worse



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the plaintiff's injuries are due to the failure to wear a seatbelt. Canadian courts have consistently deducted 5 – 25 percent of a plaintiff's damages for contributory negligence for failure to wear a seatbelt.

A recent Supreme Court of Canada decision however provides that in some circumstances drivers have a duty to take reasonable care to ensure that passengers are wearing seatbelts. The case of Galaske v. O'Donnell concerned an 8 year old plaintiff who had suffered se-

vere injuries in a motor vehicle accident. The 8 year old was with a parent at the time of the accident that was not the driver. The 8 year old was not wearing a seatbelt when the motor vehicle accident occurred. The Supreme Court of Canada held that drivers had a duty to ensure that any child in the vehicle under the age of 16 was wearing a seatbelt. This would likely also apply to an adult that had some form of disability that would lead to a conclusion that there was a duty upon the driver to take special care of that person as an occupant of their vehicle.

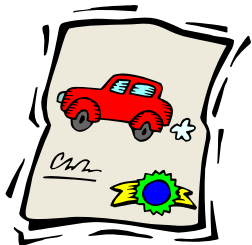
THE LIMITED DUTY ON ICBC

In previous newsletters we have discussed the requirement to take reasonable steps to identify a motorist who has fled the scene of an accident. If reasonable steps have not been taken to identify the motorist who has fled the scene, compensation for the injuries that have been sustained is not available. The onus is on the plaintiff to demonstrate that they have taken all reasonable steps and only if they are able to demonstrate that is compensation for injuries available.

A recent BC Supreme Court case has stated that the ICBC adjuster has no obligation to advise a plaintiff of the nature of the steps she needs to take in order to satisfy the court that she has taken all necessary and reasonable steps to ascertain the identity of an unidentified driver. The court justified this by stating that to impose such an

obligation on ICBC would place ICBC in the position of quasi-authority, requiring it to provide an element of legal advice.

This case underscores an important principle when dealing with ICBC adjusters. Although as an individual you will feel that ICBC is your insurer and should be acting in your best interests, in reality their role is simply to adjust or assess claims. They are not there as your advocate nor does the law require them to be. As policy holders we all expect ICBC to pay as little as possible for claims. This highlights the reality that when it comes to ICBC claims you have to be either prepared to educate yourself and be an advocate on your own behalf, or hire legal counsel to be an advocate for you.



DEFAMATION IN THE AGE OF THE INTERNET

Defamation is always a hot topic as is the internet. The Supreme Court of Canada recently had an opportunity to comment on both. Hyperlinks are links which are included within a website that then take you to another place on the internet. The case that was considered by the Supreme Court of Canada involved a website with hyperlinks. Defamation occurs when something untrue is “published” about another. What “published” means has been considered many times by our courts over the years. In this decision, the Supreme Court of Canada held that a hyperlink is essentially a reference and that a mere general reference to a website is not enough to find publication unless the text that includes the hyperlink consti-

tutes an adoption or endorsement of the content it links to. This is an important decision in the age of computers because you cannot control when another website is changed or altered. The decision at its essence eliminates liability for what is on that remote website that is not controlled or owned, as long as there is no adoption of the content of that website within your own website. So what does this mean for you if you are hosting a website with hyperlinks? This decision should protect you from liability for what is posted on the website that you are hyperlinked to, as long as you do not state in the text containing the hyperlink that are adopting the positions and content of the material at the hosted hyperlink.

WEB SITES

The web is a fabulous resource of information and many of us spend hours surfing. Some of my favorite surfing sites are the following:

Dailygood.org- this site highlights inspirational stories of everyday heroes and celebrities who are making a difference in the world.

ArchivesCanada.ca – this is a gateway to archival resources found in a number of Canadian Repositories

CollectionsCanada.gc.ca – this site contains the collections of Library and Archives Canada

CompletePlanet.com – this site provides access to more than 70,000 searchable databases and specialty search engines

HeinOnline.org – this site provides access to library collections including research materials

LibrarySpot.com - this site is a collection of databases, online libraries, references and other resources





MITIGATION...AGAIN

Mitigation has been a frequent topic in these newsletters and this reflects the fact that definitely in a personal injury case and often in an employment law case, a primary issue will be whether the plaintiff, the person putting forward the claim, has properly mitigated their damages. What this means is that the question will be asked whether the person putting forward the claim has done all that they can to lessen the damages that they have suffered. There is a duty at law for the plaintiff to do so. It is however up to the defendant, or the person responding to the plaintiff's claim, to establish that it is more likely than not that the plaintiff has failed to do all that he or she could do to lessen their damages and that if they had taken other defined or recommended steps, their damages would have been less. The consequence of failing to mitigate is that the damages that a plaintiff will be awarded will be decreased proportionally with their failure to mitigate.

The British Columbia Court of Appeal has recently confirmed what as a personal injury lawyer I know to be a well established test for failure to mitigate when a plaintiff has not pursued a course of conduct by her doctors. The Court of Appeal confirmed that for the defendant to be successful in a defense of failure to mitigate in those circumstances they must establish:

1. That the plaintiff acted unreasona-

bly in not following the recommended treatment; and

2. The extent, if any, to which the plaintiff's damages would have been reduced if they had followed the recommended treatment.

A recent case in the British Columbia Supreme Court demonstrated how the requirement to mitigate damages is applied. In this claim for damages following a motor vehicle accident the plaintiff was found to be entitled to \$30,000 for non pecuniary damages, or for pain and suffering. However, the trial judge found that the plaintiff had largely not followed the recommendations of her doctor. Specifically she had not embarked on a supervised exercise program, she had not attended counseling sessions, she had not worked on stretching or posture improvement, she had not sought out a clinical psychologist to assist her in chronic pain management, she did not take time off work to pursue rehabilitation and she continued to rely on passive therapies to treat her injuries despite recommendations otherwise. Because of all of these factors the trial judge reduced her non pecuniary damages by 1/3.

In another motor vehicle accident case the trial judge found that the plaintiff's failure to discuss the difficulties that she was experiencing at an early stage or on an ongoing basis with appropri-





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ate medical advisors, or to obtain guidance or advice on the treatment of those difficulties, and to engage actively and diligently in a course of physical or rehabilitative therapy, constituted a failure to mitigate. In that case non pecuniary damages were reduced from \$60,000 to \$45,000 to reflect that failure to mitigate. This decision was an example of a plaintiff who simply did not attend the doctor on a regular basis and they were penalized for the failure to do so.

The difficulty with decisions such as this one and in general with claims of failure to mitigate is that they often do not take the personal circumstances of the plaintiff into consideration. There may be all sorts of reasons that recommended courses of treatment were not

undertaken by a plaintiff, including lack of funds or lack of other supports to enable them to pursue a recommended course of treatment. At trial it is important that the reasons for the failure to follow any recommended course of treatment are highlighted and explained in the evidence of the plaintiff. When that is properly done the defense of failure to mitigate can often be defeated. However, any person making a claim for damages needs to be aware that they would be called to account for the decisions that they make in attempting to lessen their damages. If there was a course of treatment that could have resulted in a lessening of damages it needs to be attempted if at all possible, or the plaintiff will face the likelihood of having their damages at trial reduced accordingly.



ARE YOU PROPERLY INSURED?

A difficult problem to explain to client's is what happens when there simply is not enough insurance to pay for the damages suffered in a motor vehicle accident. All motorists in British Columbia are required to have \$200,000 in insurance coverage. That is the minimum. Unfortunately, many motorists have only the minimum. This often presents a significant problem for individuals injured in a motor vehicle accident. When you are in-

jured due to the fault of another motorist, the total amount of recovery for all injured parties and the value of the vehicle damage is limited to the amount of insurance. For example if the at fault driver has only \$200,000 in insurance, that is the total amount of money that is available to pay for the physical damage to the involved vehicles and to compensate for the injuries of all individuals injured in the accident. What happens when the dam-



PERSONAL PHOTOGRAPHS – PRIVATE OR NOT?

In any type of litigation there is an obligation on the parties to disclose all documents that may relate to the matters that are at issue in the litigation. In a personal injury case this means that the clinical records of any of the treating practitioners will have to be disclosed to the other side. It also means that any documents you have regarding expenses that you have incurred due to your injuries need to be disclosed and it sometimes means that pre accident clinical records will have to be disclosed if your pre accident health or condition is an issue. This type of disclosure is easy enough to understand. More difficult however is the sometimes need to disclose personal photographs.

In a recent British Columbia Supreme Court decision the defendants brought an application to force the plaintiff to disclose photographs from vacations that she took one and seven months after a motor vehicle accident. The court held that the entire photographic record of those 2 trips was clearly relevant to the issues between the parties and required the plaintiff to provide copies of the photographs depicting her activities while on those 2 vacations. Interestingly, to anyone technologically inclined, the Court ordered the production of the metadata associated with the photographs, which was held to require digital copies of the photos with metadata preserved to be required to be produced.



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ages exceed \$200,000? If you have underinsured motorist protection (UMP) you have available another pot of insurance from which to draw upon to compensate you for the damages suffered in the accident. UMP is available to all motorists and at a very small fee. I encourage you to ensure that you have the full amount of available UMP coverage and to ensure that your friends and family do likewise. That is insurance which will directly benefit you if you ever are in need of it. With-

out UMP coverage, you can be left in a situation where you simply are not fully compensated for your injuries, which may result in needed treatment not being covered. Check your policy and make sure that you have purchased UMP coverage!!





ASSESSMENT OF PAIN

We all know that each individual's experience of pain is unique. There is no way of measuring pain. There is no way of quantifying pain. There is no way of validating pain. The experience of pain is difficult to describe. People respond to pain differently depending on their background and their make up. Pain is an individual experience for the sufferer and its quality as such makes it difficult to present personal injury cases.

In a recent British Columbia Supreme Court case the trial judge recognized and affirmed the personal nature of pain stating:

Pain is subjective: People are built differently and respond differently to different injuries.

This is an important recognition by the court, and although it has been stated in a variety of ways over the years by a myriad of judges, it is always good to see this kind of statement in a personal injury judgment. There are generally accepted periods of recovery from injury. This is particularly so with soft tissue injury or whiplash.

The cases that are before our courts generally involve cases that have not recovered within the expected time frame. In such cases the defense will focus on the fact that the expected normal recovery from the injury is a set time frame and the fact that the plaintiff has not recovered within that expected time frame is suspect. Medical experts will however generally agree that approximately 20% of individuals will not experience recovery within the expected time frame and that there are a variety of reasons outside of the control of the individual that may contribute to their failure to achieve recovery as may be expected. As a personal injury lawyer my focus is always on the individual experience of the plaintiff and the fact that people are different and they will respond differently to their injuries. As can be seen in this recent case, that individual experience is accepted by trial judges as valid and cases will be judged based on that individual experience, despite how the defense attempts to attack the case!






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INSPIRATIONAL WORDS

The results that you achieve will be in direct proportion to the effort that you apply
- Denis Waitley

"Every time you are tempted to react in the same old way, ask if you want to be a prisoner of the past or a pioneer of the future."
- Deepak Chopra

"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 just the place and time that the tide will turn."
- Harriet Beecher Stowe

"If you'll not settle for anything less than your best, you will be amazed at what you can accomplish in your lives."
- Vince Lombardi

"It doesn't matter where you are coming from. All that matters is where you are going."
- Brian Tracy

"Whatever you do, or dream you can, begin it. Boldness has genius and power and magic in it."
- Johann Wolfgang von Goethe

"Deep within man dwell those slumbering powers; powers that would..."

Are you a creature of circumstance 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.

