



## Liability In Motor Vehicle Accident Cases: *Left-Hand Turns, Pedestrian Knock-Downs, and Rear-End Collisions.*



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Your comments are appreciated and If there are any accident benefits or tort topics that you would be interested in reading about, please feel free to **email** me and I will certainly explore the possibility of writing an article. Contact: [defender@beardwinter.com](mailto:defender@beardwinter.com)

The analysis and investigation of liability in a motor vehicle accident case are crucial to the evaluation of every claim. Any percentage of liability that can be attributed to the plaintiff or co-defendant results in a direct financial saving to your particular claim. There is no set law that provides us with an unqualified answer as to apportionment of liability as each case is fact specific. With that being said, past precedent provides us guidance for the principles that are important to consider when analyzing liability. The importance of analyzing liability right from the outset of the case, as early as when an insured calls his/her insurer to report the accident, cannot be overstated. The statements taken by adjusters, (whether by phone or in writing), help shape our liability defence and impact the litigation going forward.

This is particularly important in the current day and age of summary judgment motions. The courts are now more inclined to make a determination of liability without a full-fledged trial and often without oral witness evidence. Judges are making rulings based on affidavit evidence, discovery transcripts, statements from witnesses, and police reports. The proper development of a case right from the outset will help develop an evidentiary basis in order to evaluate the

strengths and weaknesses of commencing/defending against summary judgment motions.

Some of the most common liability situations are left-hand turn cases, pedestrian knock-downs, and rear-end collisions. The principles set-out below can be extrapolated to address most motor vehicle liability situations. At the end, I have included a series of key sample questions that can be used as a reference for adjusters to ask the parties to a lawsuit at the outset of a case. Statements obtained from potential claimants, third parties, and independent witnesses before counsel has spoken to them provides us with a golden opportunity to get an unfettered insight into what happened.

### **Left-Hand Turn Cases**

In the vast majority of cases, the left turning vehicle in a motor vehicle accident collision is primarily at fault for the accident. With that being said, an insurer should not simply accept without analysis that the left turning vehicle is 100% responsible. The facts of each case provide us with guidance that liability in left-hand turning cases is not always clear. We start from the default position that the left turning vehicle is obligated to make sure to complete his/her turn in safety, and

then we look at all of the circumstances of the loss. Section 141(5) of the *Highway Traffic Act* states that:

“No driver or operator of a vehicle in an intersection shall turn left across the path of a vehicle approaching from the opposite direction unless he or she has afforded a reasonable opportunity to the driver or operator of the approaching vehicle to avoid a collision.

In *Mayers v. Khan* (2017 – Court of Appeal) the plaintiff alleged that she was making a left-hand turn on an advance green when she was struck by the defendant who was driving straight through the intersection. The defendant, who was driving a heavy brinks truck, alleged that he was driving straight through the intersection on a green light and that it changed to yellow while he was in the middle of the intersection. The defendant alleged that the plaintiff made a left-hand turn on a yellow light and caused the accident. There was a statement of an independent witness who mostly supported the defendant’s version of the accident however he also stated that the defendant truck was driving “really fast” and did not know the colour of the light when the defendant entered the intersection. However, the witness did say that the plaintiff made a left turn on a yellow light. The defendant brought a summary judgment motion on liability. The Court relied heavily on the statement of an independent witness in finding that the plaintiff did not have an advance green and that the defendant did not run a red light. His evidence supported that the accident happened quickly and that the defendant could not have avoided the accident. The plaintiff was found 100% at fault for making a left-hand turn not in safety. Among other things, the importance of the evidence of an independent witness with no “skin in the game” was front and centre in terms of make a decision regarding liability.

In *Nowakowski v. Mroczkowski Estate*, (2003) the Court found that if there is evidence of negligence on the part of a driver going through an intersection, that driver may be contributorily liable for the accident. An oncoming driver must take reasonable care to avoid an accident.

In *Marcoccia v. Ford Credit Canada Limited*, (2009 Ontario Court of Appeal) the defendant was found partly liable for making a turn without a proper lookout even when the plaintiff drove through a red light. The court held that “both drivers

committed major blunders that led directly to the disastrous accident and the respondent’s injuries”.

The Ontario Court of Appeal found in *Sant v. Sekhon* (2014) that even if a driver drives through a red light, the other driver with a right of way still has a duty to exercise reasonable care to avoid a collision: “(1) if the driver becomes aware or should become aware that the driver without the right of way is going to go through the intersection and (2) if the circumstances are such that the driver with the right of way had the opportunity to avoid the collision”.

The decision of *Gardiner v. MacDonald* (2016) sets out the increased liability obligations that fall on a professional driver. The court held that a defendant bus driver who had a green light was 20 percent at fault for an accident in which the other defendant drove through a red light. The trial judge relied on evidence that the bus driver was a professional with control of a vehicle that weighed in excess of 12,000 kg, and had admitted (a) he had an obligation to adjust his driving since the road surface was affected by the weather conditions and (b) it was prudent in the circumstances to go slower. Consequently, the court held that the bus driver “ought to have been travelling with greater caution with due regard for the weather and road conditions”. This was particularly important given the expert evidence that “a wet and slushy road surface would have resulted in a reduced coefficient of friction between bus tires and road surface, a factor which, coupled with excessive speed, would have compounded the challenge faced by [the bus driver] in driving defensively and eventually facing the hazard posed by the MacDonald vehicle as it entered the intersection”.

The added potential liability to professional bus drivers likely can be expanded to other professionals who drive for a living including taxi cabs, Ubers, couriers, truck drivers and anyone else who is responsible for driving for a living.

In *Gardiner*, the court also found that a driver travelling in excess of the posted speed limit will not *per se* be found negligent. The rate of speed which may be considered excessive and thereby constitute negligent driving will vary depending on the nature and condition of the particular road travelled upon and the traffic faced by the driver. The speed of the dominant driver exercising reasonable prudence is a question of fact that turns on the circumstances of each

case. Accordingly, if we are dealing with a situation in which a defendant is driving 75 km/hr in a 60 km/hr zone this in itself does not make that party liable. The issue of speed is relevant to the circumstances of the loss. Indeed, a party that is driving 50 km/hr in a 60 km/hr zone on a road surface that is icy might be considered excessive in light of the weather conditions.

## Pedestrian Knock-Downs

Section 193 (1) of *Highway Traffic Act* imposes a “reverse onus” on the driver who impacts a pedestrian on public roadways. In a motor vehicle accident involving a pedestrian, the driver of the motor vehicle is presumed to be negligent unless he/she can be proven otherwise. This makes it more challenging for a defendant driver to avoid liability but ultimately the Courts are going to look at the facts of each case in order to determine who is at fault for the loss. It is important to note that for the purpose of motor vehicle accident law, a bicyclist is considered to be a pedestrian.

The reverse onus provisions do not apply to accidents that occur on private roadways. So, if an accident occurs in places such as a parking lot, shopping centre, on someone’s driveway then the burden remains with the Plaintiff to prove that someone is at fault.

Despite the fact that the reverse onus provisions apply, this does not absolve a pedestrian plaintiff for being responsible for their own actions. In the absence of an indication to the contrary, motorists are entitled to assume that pedestrians will behave rationally and responsibly. In *Gellie v. Naylor reflex*, (1986) the Court of Appeal said:

“A motorist need not anticipate that pedestrians will unexpectedly dash from a safe position on the curb into the path of his moving vehicle. He may assume that pedestrians, as well as other motorists, will not act unreasonably and foolishly. However, if the motorist is alerted by the previously observed conduct of another person that there is a distinct possibility the other person may act negligently and expose himself to danger, then the assumption loses its justification. The anticipation of negligent conduct renders such conduct foreseeable and makes it incumbent on the motorist to take additional precautions.”

In the majority of cases, a pedestrian knock-down situation revolves around claimants crossing the road at a crosswalk or not. Many of these cases arise from British Columbia but are cited in Ontario cases as applicable precedents. What we learn from these cases include as follows: (1) pedestrians who are not crossing the street in the crosswalk (“i.e. jaywalking”) will frequently share in liability; (2) when a pedestrian enters a crosswalk area first, then absent any exceptional circumstances, he has the right of way and (3) when a driver approaches an area where children are waiting to cross the roadway, the driver is obligated to be especially conscious of a child running across the street.

### A. Crossing Not At a Crosswalk

In *Lloyd (Litigation guardian of) v. Rutter*, an 11-year-old pedestrian was struck by an inexperienced driver while he was crossing not at a crosswalk. The child looked both ways before crossing and even though his view was unobstructed, he failed to see the defendant’s vehicle as it approached. The child was one of a group of three children and the driver acknowledged that they looked like they wanted to cross but he expected them to let him pass first. It was held that the Plaintiff is 70% liable and the defendant 30%. Because the Defendant had a clear view of the children who looked as though they might cross he was required to proceed at a speed which allowed him to stop if there was a sudden emergency. He failed to do so, even though he was well within the posted limit. The Plaintiff contributed to the accident by failing to keep a proper lookout. He should not have left the curb until safe to do so.

In *Beauchamp v. Shand*, the plaintiff was standing on a median, waiting for three lanes of travel to clear. She was not at a crosswalk or a traffic light. A driver in the lane closest to the median stopped to allow her to cross, as did the driver in the middle lane. She waited, but then decided to cross. She was struck by the defendant’s vehicle, which was driving in the curb lane. The Plaintiff’s case was dismissed. The Plaintiff was under a duty to yield the right of way to the defendant, yet she walked quickly into the curb lane without first determining whether it was safe to do so. The defendant was neither speeding nor failing to keep a proper lookout.

In *Bishop (Guardian ad litem of) v. Hiebert*, the 15-year-old plaintiff wearing a Walkman radio (*nowadays imagine the use*

of cell phone instead of a Walkman), stepped into the road 15 feet away from the available crosswalk. The defendant approached the intersection at a speed slightly higher than the posted speed limit just as the light turned amber. Although she had time to stop she accelerated through the intersection and struck the Plaintiff. It was held that the defendant was 35% liable for either failing to see the change of light or choosing to accelerate through it. The Plaintiff was 65% liable for stepping off the curb, outside the crosswalk, and jogging into the defendant's path. She might have heard the car accelerating if she had not been listening to her Walkman. Nowadays, the fact that pedestrians are routinely looking down at their cell phones while walking certainly is a relevant factor to explore.

## **B. Crossing At A Crosswalk**

In *Ng. v. Nguyen*, the Plaintiff was struck by the defendant's vehicle in a crosswalk that was controlled by a stop sign. The Plaintiff stepped into the crosswalk and was crossing the street and did not notice the defendant vehicle at all as his attention was focused elsewhere. Similarly, the defendant came to a stop at the intersection and did not see notice the Plaintiff walking across the street either. Neither the defendant or plaintiff noticed one another in the middle of the intersection but the defendant was found 100% at fault due to the fact that the plaintiff had the right of way as he entered the crosswalk.

In *Ballah v. Gardner* the Plaintiff was crossing a six-lane highway in an unmarked crosswalk. Traffic was backed up in the first two lanes and he passed between vehicles. At the edge of the third lane, he looked left, then concentrated on traffic coming from his right. He stepped into the third lane and was struck by the defendant's vehicle which was coming from his left at 50 km/hr. It was held that liability be split on a 50-50 basis. The defendant was under a duty to yield to pedestrians in the crosswalk and was also negligent in passing vehicles prior to the unmarked crosswalk. The Plaintiff was liable for leaving a place of safety.

In *Loewen v. Bernardi* a 69 pedestrian was crossing a five-lane highway in a crosswalk. He crossed the two eastbound lanes and the first westbound lane. A driver in the next westbound lane slowed to a stop for the crosswalk, and the plaintiff waved to him before starting to jog into the curb lane. The

defendant was in the curb lane. He saw the vehicles in the other lanes stop but thought that they intended to turn. The pedestrian appeared in front of him and was hit. It was held that the defendant was 90% liable for failing to see the crosswalk signs or to be alerted by the actions of the other drivers, while the plaintiff was found to be 10% liable for jogging into the curb lane without looking.

## **Rear-End Collisions**

The Court of Appeal in *Iannarella v. Corbett (2015)* clarified the law with respect to rear-end collisions and made it more difficult for defendants to avoid liability. The Court found that the plaintiff is obligated to prove that a rear-end collision occurred. After this is proven, the evidentiary burden shifts to the defendant who must prove that the Plaintiff is entirely or partially liable for the loss. It goes without saying that in the vast majority of times the defendant is 100% at fault in rear-end collision cases.

As an insurer defending against a rear-end collision case, the goal would be to try and change the narrative to establish that this is not a true rear-end collision. While as most of the time the facts of the collision do not lend themselves to challenge the mechanism of the accident, attempts to impart liability on the vehicle that was rear-ended should focus on the following:

- (1) Did the third party perform a lane change and thereby cause the collision
- (2) Did the third party make a negligent right / left -hand turn immediately prior to the collision
- (3) Did the third party make an unexpected and negligent stop on the roadway
- (4) Was the third parties' brake lights properly functioning (occasionally one brake light might have burnt out)
- (5) Are we dealing with a multi-vehicle collision in which the middle vehicle was rear-ended and pushed into the lead vehicle.

One of the key pieces of evidence when analysing the circumstances of the loss is the property damage documentation; and especially the photographs. An analysis

of where the damage is to the vehicles will often give us a good indication as to whether the description of the accident is supported by the property damage documentation. If it is not, then perhaps there is a viable alternative explanation for the cause of the loss as opposed to a straight rear-end collision.

In cases revolving around accidents involving rental vehicles on ice/snow questions should be asked as to the particulars of the tires on the vehicle. If the third party vehicle slid on icy road surfaces there might be liability on the rental vehicle company for failing to equip the vehicle with quality winter tires.

## Conclusion

Liability in the motor vehicle accident case is always a key factor to evaluate a claim. This is especially the case in pedestrian knock-down accidents when we are often dealing with objective injuries and a significant quantum of damages. The motor vehicle accident / self-reporting collision reports often provide no more than a partial version of the loss and further analysis should be undertaken. A few choice facts can significantly change the complexion of the case and apportionment of liability. A proper understanding of law with respect to how cases have been interpreted in the past provides us with guidance as to how we should consider cases into the future. The law is not as simple to accept that a party making a left-hand turn is 100% at fault for an accident and that a driver is always entirely at fault when a pedestrian is struck. Information obtained from third parties and especially independent witnesses are vital to effective defences.

For left-hand turn cases, fault will likely primarily fall to the party making the turn; but both parties are responsible for paying proper attention. Professional drivers might have added responsibility depending on the circumstances of the accident. Pedestrians who are crossing the road not in the crosswalk will frequently bear a significant share of liability. This is despite the reverse onus provisions. When a pedestrian enters a crosswalk area first, then absent any exceptional circumstances, he has the right of way. When a child is involved in an accident a driver is obligated to be even more careful in the circumstances regardless as to where in the roadway the accident occurred. In a rear-end collision it is

very challenging factually / legally for the rear-ending vehicle to avoid liability. However, if the narrative can be changed to assert that this is not a true rear-end collision then perhaps liability might still be in play.

All-in-all, the facts certainly drive the apportionment of liability in all cases. If we conduct a quality investigation throughout the life of the file, with a particular understanding of the law, we will be better served to address liability. In some circumstances, this may lend itself to bringing a summary judgment motion, a favourable negotiation position, or a realization that fighting liability is a lost cause. A little bit of investigation can go a long way. Liability is the first important factor to be considered in a motor vehicle accident loss and the opportunity to properly investigate same should not be squandered.

## KEY QUESTIONS TO ASK IN LEFT-HAND TURN CASES

### (A) TO ASK THE PARTY MAKING LEFT-HAND TURN

Were you at a complete stop at the intersection waiting to make a left-hand turn?

Was your left turn indicator on before you made your left-hand turn?

When was the first time that saw the vehicle approaching the intersection?

Was there anything obstructing your vision of the approaching vehicle?

What was the speed of the vehicle approaching the intersection?

Were you watching the vehicle approaching at all times before you made your left turn? If not, why?

Why did you not wait for the vehicle to come to a complete stop before you made your left turn?

What was the colour of the light when you commenced making your left-hand turn?

What was the colour of the light when the accident occurred?

Were there any vehicles behind you waiting to make a left-hand turn too? *Perhaps vehicle making left-hand turn felt pressure to make the turn.*

## **(B) TO ASK THE PARTY DRIVING THROUGH THE INTERSECTION**

When was the first time that saw the vehicle waiting to make a left-hand turn?

Did the party have his left turn indicator on?

Did you appreciate that this party was going to make a left-hand turn?

Were you watching the left turning vehicle at all times before you drove through the intersection? If not, why?

What was the colour of the light when 10 meters (pick a distance) from the intersection? What was the colour of the light as you entered into the intersection?

What was your speed as you were 10 meters from the intersection? What was your speed as entered the intersection?

How much time passed between when you saw the party start the left-hand turn and the collision?

What steps did you take to try and avoid the collision? (i.e. brake, serve, change lanes, etc).

## **KEY QUESTIONS TO ASK DRIVERS IN PEDESTRIAN KNOCK-DOWN CASES**

Did the accident occur in a crosswalk?

If not, where was the nearest crosswalk? (i.e. was the pedestrian near the crosswalk)

When was the first time that you saw the pedestrian?

Where was the pedestrian when you first saw him?

How much time passed between when you first saw the pedestrian and the accident? *The relevance was how much time able to observe the plaintiff and react.*

Where in the intersection did the accident occur?

- The importance is how far into the intersection the pedestrian had walked. Was the pedestrian there to be seen
- Did the pedestrian just step off the curb and then struck. Was there no opportunity for the defendant driver to avoid the pedestrian.

If night time, what was the pedestrian wearing (i.e. dark clothes in the darkness of night)?

What was the pedestrian doing when you saw him? (i.e. looking down at cell phone, had headphones on, staggering like drunk, walking a dog, not paying attention, etc).

Was the pedestrian walking, jogging, or running?

In cases involving children, questions to be asked include how close to a school was the accident? Special considerations are given to cases involving children as drivers are obligated to be more vigilant.

What steps did you take to try and avoid the collision?

Was the bicyclist walking the bike across the crosswalk or riding it?

How close to the curb was the bicyclist riding their bike?

Did the bicyclist come to a complete stop (if at all) at the crosswalk?

Did the bicyclist signal their intention to turn with hand signals?

Did the bicyclist have lights on their bike for nighttime riding?

## **KEY CONCEPTS TO EXPLORE IN REAR-END COLLISIONS (Re: Is This A True Rear End Collision)**

When did the third party perform a lane change immediately before it was rear-ended? *Are we dealing with a negligent lane change case as opposed to a true rear-end collision.*

When did the third party make a right or left-hand turn immediately before it was rear-ended? *Are we dealing with a negligent turn case as opposed to a true rear-end collision.*

Where was the property damage to the vehicles? *If the damage to the vehicle that was rear-ended was to the rear-quarter panels then perhaps this was not a true rear-end impact.*

Why did the third party make a negligent sudden and unexpected stop in the roadway thereby causing a situation of danger? *Were they avoiding an animal on the road, looking for a store/street, etc.*

Were the vehicle's brake lights both functioning? *Might be a rare situation in which one of the rear brake lights were not functioning.*

When did the rental company equip the vehicle with winter tires if the accident occurred on icy road conditions? The type and newness of the winter tires? How many seasons have these tires been utilized? Were they new or after-market winter tires used? When were these tires last checked before the accident? Have these tires been used since the accident? Are these tires available for inspection/pictures taken? All records to support that these tires were on this vehicle at the time of the loss.

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### **A Year In Review: How The LAT Has Interpreted The MIG**

The Licensing Appeal Tribunal ("LAT") has been in existence for one year and decisions are being rendered at a fast and furious pace over the past few months. As we know, this is a new system and very much different from what we are accustomed too in many key respects. It is difficult to predict what an Adjudicator will consider important to their decision making in terms of the influence of past law and evidence. For these reasons, it is important to closely review the decisions of the Adjudicators to analyze any trends and thought processes.

### **What You Need To Know About Non-Earner Benefits (Now and Into the Future)**

Since the changes to the Schedule came about on September 1, 2010, claims for non-earner benefits have skyrocketed. The increase is not as a result of claimants' suffering more substantive injuries than ever before, but it is because of a narrowing of the types of benefits available to claimants.

### **Deduction of Collateral Benefits: Matching "Apples to Apples" (Tort)**

The question as to what a tort defendant is entitled to deduct in terms of a plaintiff's entitlement to accident benefits is one of the most important aspects of any assessment of a case.