

PEDESTRIAN ACCIDENTS: A DISCUSSION

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This presentation will focus on the duties of pedestrians and drivers and will discuss some of the liability assessments which have been apportioned against pedestrians and drivers in recent decisions.

Many pedestrians, at their peril, believe that they have an absolute right of way when they seek to cross or in some other way, engage upon a roadway.

When pedestrians do not observe due care for their own safety, not to mention the safety of others, the courts have not hesitated to find them either completely or partly responsible for the collision or injuries that result.

Justice Spence of Canada's Supreme Court in *Canadian Pacific Ltd. v. Gill et al.*, [1973] S.C.R. 654 stated the following:

"... faced with a sudden emergency for the creation of which the driver is not responsible, he cannot be held to a standard of conduct which one sitting in the calmness of a courtroom later might determine was the best course."

The basis premise is that a duty of care is owed by driver's to pedestrians and pedestrians are also obligated to exercise due care for their own safety and the safety of others.

A duty to anticipate risk can arise, depending on the circumstances, and based on the driver's ongoing obligation to maintain a proper lookout

Reverse Onus

The *Highway Traffic Act* imposes a reverse onus on a driver who impacts a pedestrian on a public roadway. The duty of care is outlined in section 193(1), which section reads as follows:

"When loss or damage is sustained by any person by reason of a motor vehicle on a highway, the onus of proof that the loss or damage did not arise through the negligence or improper conduct of the owner, driver, lessee or operator of the motor vehicle is upon the owner, driver, lessee or operator of the motor vehicle."

Therefore, a driver is presumed negligent unless proven otherwise. A driver must therefore establish in court that they acted reasonably and properly in the circumstances.

Reverse Onus

The Plaintiff need only prove that the collision occurred and that the collision caused the damages.

Justice Read wrote at paragraph 64 of *H.C. v. Loo*, 2003 ABQB 52 :

"The onus creates a rebuttable presumption that the injury arose from the defendant's negligence.... If the whole of the evidence shows that the defendant was only partly at fault, the presumption may be rebutted in part, and liability can be divided...."

It is important to note that a bicyclist is considered to be a pedestrian.

When does the Reverse Onus Not Apply?

The reverse onus provision does not apply to private roadways (parking lots, unassumed roads, private property, etc.).

Therefore, should an accident occur on someone's driveway or a parking lot, the burden remains with the Plaintiff to prove liability for the accident.

Factors Considered by the Court

The case law has shown that the apportionment of liability is primarily fact driven. It is apparent from the case law that the main factors which will be considered by the court include:

- Whether the pedestrian acted reasonably and rationally.
- Whether the pedestrian and driver maintained a proper look out.
- Whether the pedestrian was crossing at a crosswalk.

Recent decisions have indicated that drivers will not be found at fault if it can be shown that the pedestrian was not acting with due care for their own safety.

1. Pedestrians are assumed to act rationally and reasonably

In the Court of Appeal decision of *Gellie v. Naylor Reflex* (1986), the court held that motorists are entitled to assume that pedestrians will behave rationally and responsibly, unless the actions of the pedestrian suggest otherwise.

"A motorist need not anticipate that pedestrians will unexpectedly dash from a safe position on the curb into the path of his moving vehicle...However, if the motorist is alerted, by 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"

1. Pedestrians are assumed to act rationally and reasonably

Irvine v. Smith [2008] O.J. No. 547 (S.C.J.)

The Defendant noticed the pedestrian walking along the side of the road, he did not slow down but moved his vehicle to the middle of the road to give the pedestrian a wide berth. The pedestrian suddenly ran from the shoulder onto the road, jumped, and collided with the right side of the Defendant's truck. The Court held that the accident was not caused by any negligence on the part of the Defendant. The actions of the Pedestrian were unforeseen and unexpected. The Defendant could have done nothing more to avoid the accident.

1. Pedestrians are assumed to act rationally and reasonably

O'Connor v. James [2009] B.C.J. No. 1639 (S.C.)

The Plaintiff claimed that he was struck from behind by the Defendant's vehicle while walking on a grassy shoulder at night. The Court apportioned 90% of liability to the Plaintiff and 10% to the Defendant. The evidence indicated that the Plaintiff was walking in the middle of the road and not on the shoulder, demonstrating a lack of reasonable care for his own safety. The Defendant was negligent in driving over the speed limit in imperfect road and visibility conditions in an area where he knew there were no sidewalks.

1. Pedestrians are assumed to act rationally and reasonably

Cooper v. Crockford, 2007 ABQB 411

The pedestrian, who was intoxicated, walked into an ambulance which was racing by with sirens blazing and he sustained serious injuries.

The pedestrian was near, but not on, a pedestrian crosswalk when struck.

The Court held the following:

"... the Defendant driver could have reasonably avoided the accident. However the Plaintiff was the primary cause of the accident as his actions represent a major departure from the standard of reasonable conduct by a normal pedestrian. As such I find the Plaintiff pedestrian 2/3 liable for the accident; and the Defendants 1/3 liable for not having seen the Plaintiff earlier and for not avoiding the accident."

2. Maintaining a Proper Look-Out

DUTY OF THE DEFENDANT DRIVER:

Atwater v. Reese [2009] B.C.J. N. 537 (S.C.)

The Defendant driver was turning out of a parking lot when she struck the Plaintiff who had walked in front of her car.

The Defendant driver admitted that she did not look to her right before commencing her turn and that she accelerated before the collision.

The Court found the Defendant to be entirely responsible for the accident as she did not see the Plaintiff because her attention was focused on the traffic to her left.

2. Maintaining a Proper Look-Out

DUTY OF THE PLAINTIFF:

Ballah v. Gardner (1992 B.C.)

The Plaintiff was crossing a six-lane highway in an unmarked crosswalk. He looked left and then looked at the traffic coming from his right.

As he proceeded through the crosswalk, he was struck by the Defendant's vehicle which was coming from his left.

The Court split liability on a 50-50 basis.

The Defendant was under a duty to yield to pedestrians in the crosswalk. However, the Defendant driver's liability was decreased as a result of the Plaintiff having left a place of safety.

3. Location of the Pedestrian

A higher duty is owed to pedestrians crossing at regular street crossings\pedestrian crosswalks. Although they still must exercise care, they have higher rights than if they attempted to cross elsewhere.

A pedestrian does have a right to cross a highway in an area that is not a regular crossing for pedestrians, but in such a case, they must take special care and use greater vigilance (as per the Ontario Court of Appeal in *Lalonde v. Kahkonen*).

However, if a pedestrian crosses somewhere other than a crosswalk, it must be determined whether the driver could have or should have seen the pedestrian in time to avoid the collision.

3. Location of the Pedestrian

Even in circumstances where a Defendant driver failed to maintain a proper look out or was driving at an excessive speed, the Court has attributed a majority of liability to the Plaintiff where they did not cross at a crosswalk:

Lloyd (Litigation guardian of) v. Rutter (2003 Ont.)

An 11 year old pedestrian was not crossing at a crosswalk and was struck by the Defendant's vehicle.

Although the Defendant had a clear view of the children, who looked as though they might cross, the Plaintiff contributed to the accident by failing to keep a proper lookout as he should not have left the curb until it was safe to do so.

The Plaintiff was found to be 70% liable and the Defendant 30% liable.

3. Location of the Pedestrian

Karran v. Anderson [2009] B.C.J. No. 1625 (S.C.)

The Plaintiff jogged across a street against the light in front of the vehicles that were stopped in heavy traffic. Liability was apportioned 75% to the Plaintiff and 25% to the Defendant. The Plaintiff's conduct constituted a serious departure from the standard of care expected of a pedestrian who was familiar with the intersection and surrounding street, by jogging across the street against the light she created a risk of harm. The Defendant should have taken precautions against the possibility of danger given that his vision was obstructed by stopped traffic in the adjacent lanes.

3. Location of the Pedestrian

Bishop (Guardian ad litem of) v. Hiebert (1996 B.C.)

The 15 year old Plaintiff who was wearing a Walkman radio stepped on to the roadway some 15 feet from the 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.

The Defendant was found to be 35% liable for failing to see the change of light and 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. Also, the court stated she may have heard the car accelerating if she had not been listening to her walkman.

3. Location of the Pedestrian

According to Section 140(4) of the *Highway Traffic Act*, while a pedestrian is entitled to the right of way when crossing at a crosswalk, the pedestrian must not leave a place of safety if it is impractical for the driver to yield.

The Supreme Court of Canada, in the cases of *Petijevich v. Law* [1968] S.C.J. No. 95, 1 D.L.R. (3d) 690 and *Coso v. Poulos*, 1969 CanLII 95 (S.C.C.), [1969], S.C.R. 757, has stated that once a pedestrian has safely entered a crosswalk, the pedestrian may assume that motorists will yield to the right of way and will share no responsibility if struck in a crosswalk.

3. Location of the Pedestrian

Ng. v. Nguyen (2008 B.C.)

The Plaintiff stepped out onto the street and did not notice the Defendant's vehicle after looking to his left. The Plaintiff was in the crosswalk first and had the right of way.

The Defendant did not see the Plaintiff because her attention was focused exclusively on the oncoming traffic to the left and she did not have a clear view of the traffic while stopped.

The Defendant did not establish that the Plaintiff knew or ought to have known that the Defendant was not going to grant him the right of way.

As a result, the Court found the Defendant to be completely liable.

3. Location of the Pedestrian

Loewen v. Bernardi (1994 B.C. Appeal)

A 69 year-old pedestrian was crossing a five lane highway in a crosswalk. The Plaintiff reached the yellow line dividing the east and westbound traffic. There were no automobiles in the left turn lane. The vehicle in the next lane slowed down prior to coming to a complete stop. As this car came to a stop the Plaintiff waved in a "thank you" gesture. At this point, plaintiff "started to jog", "started to run" or "quickenened his pace" as he entered the path of the Defendant's car where he was struck by the left front portion of the defendant's motor vehicle.

It was held that the Defendant was 90% liable for failing to see the crosswalk signs or to be alerted by the actions fo the other drivers. The Plaintiff was 10% liable for jogging into the curb lane without looking.

A few simple rules of the road to be considered when assessing pedestrian collisions:

- Drivers of motor vehicles must keep a proper lookout for pedestrians
- Drivers must not allow their car windows to be obstructed
- Drivers must adjust to weather conditions and control their vehicle accordingly;
- Drivers must pay attention to their surroundings at all times
- Drivers must exercise more caution in areas where pedestrians are to be expected (school areas, near plazas, in residential areas, etc.)

- Pedestrians should always cross at a designated crossing\crosswalk
- Pedestrians must look out for traffic and not cross in the face of oncoming traffic
- Pedestrians must ensure they are visible to the driver
- Pedestrians should walk, not run or jog, across the roadway
- Pedestrians should keep distractions to a minimum (avoid cellphone use, iPod\walkman use, etc.) while crossing the road

CONCLUSIONS

The reverse onus provision of the Highway Traffic Act shifts the onus to a driver to establish that he/she was driving with due care and attention.

The reverse onus creates a rebuttable presumption and does not always lead to fault being found against the driver.

What appears to be clear from the case law is that if a pedestrian is “jaywalking” they will generally be at least partially liable for the accident.

Regardless of what the pedestrian is doing, if a driver is not keeping a proper look out or was negligent by speeding, a driver will be found at least partially liable.

A pedestrian has a duty to maintain a proper look out before and while crossing at a crosswalk. If the pedestrian does not maintain a proper lookout they may be found partially at fault.

RECOMMENDATIONS

- Given the reverse onus, it is extremely important that accidents involving pedestrians be investigated early on.
- Photographs of the accident scene should be taken right away so that the location specifics can be preserved.
- A statement should be taken from the driver so that it can be used to refresh their memory later.
- A statement should be obtained from the pedestrian immediately (if possible) before they have a chance to “revise” their version of events.
- Any independent witnesses should be located and statements be obtained from them.
- The investigating officer should be interviewed so that his\her conclusions and any measurements can be obtained.
- While this all may seem somewhat onerous, early investigation is essential in order to allow you to properly assess liability.

■ THANK YOU FOR LISTENING!