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Liability: The Pedestrian Knock-Down Case

Liability is often contentious in motor vehicle accident cases and can have a significant influence on the ultimate quantum of a case. There is no set law that provides us an unqualified answer as to apportionment of liability as each case is fact specific. Yet, it would be fool-hardy to ignore past case law decisions dealing with the determination of fault, as they certainly provide us with some guidance as to what factors are important. Specifically, in the pedestrian knock-down case, it would appear that pedestrians often bear a significant share of responsibility for their actions when they cross a street. By being knowledgeable in the law with respect to these cases, it may strengthen your negotiations regarding the contributory negligence of the Plaintiff. Indeed, since pedestrian knock down cases often deal with serious objective injuries, any percentage savings that you achieve may in fact be quite substantial on a case by case basis. The cumulative savings to the insurer when assessed over a number of years may mean hundreds of thousands of dollars.

Background Law

First, 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 it can be proven otherwise. It should be pointed out that for the purpose of motor vehicle accident law, a bicyclist is considered to be a pedestrian.

However, the reverse onus provisions do not apply to private roadways. So, if an accident occurs on someone's driveway or the parking lot of a mall then the burden remains with the Plaintiff to prove that someone is at fault. Ultimately, regardless of the evidentiary burden, a trier of fact will look at the facts and try to make a determination of fault.

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 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."

Below is a fair representative sample of cases that involve pedestrians: (1) Crossing Not At A Crosswalk ("Jaywalking") and (2) Crossing At a Crosswalk. Many of these cases arise from British

Cary Schneider is a partner at Beard Winter LLP specializing in insurance and civil litigation matters including the growing area of cyber and privacy law. He is a member of the International Association of Privacy Professionals (IAPP), is in the process of being certified as a Certified Information Privacy Professional/Canada (CIPP/C), and studies cyber security at Harvard University. Cary advises insurers on breach and coverage situations, as well as assists businesses in preparing pre-breach data plans and post breach responses.

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Columbia, but are sited in Ontario cases as applicable precedents.

Crossing Not At A Crosswalk ("Jaywalking")

In *Lloyd (Litigation guardian of) v. Rutter* (2003 Ont.), an 11 year old pedestrian was struck by the defendant's vehicle 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 defendant was an inexperienced and unlicensed driver. The child was one of a group of three children and he 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* (2004, B.C.), 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* (1996 B.C.), the 15 year old plaintiff wearing a Walkman radio, 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.

In *Schmelich v. Lang* (1992 Ont.), the Plaintiff intended to cross the road in a northerly direction. It was dark and there were two lanes of eastbound traffic stopped for a stop light. She crossed between the stationary vehicles and walked or ran into the side of the defendant's westbound vehicle, hitting it in an area of the side-view mirror. The defendant had a fleeting glimpse of her as she stepped between the stopped vehicles. He braked and swerved but was unable to avoid hitting her. It was held that the action was dismissed. The Plaintiff was the author of her own misfortune.

Crossing At A Crosswalk

In *Ng. v. Nguyen* (2008 B.C.), the Plaintiff was struck by the defendant's vehicle in a crosswalk. It was held that the defendant was completely at fault for the accident. The Plaintiff stepped out onto the street when he 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 at her left. She did not have a clear view of that traffic while stationed at the stop sign and so she slowly crept forward. As she did so, she maintained her gaze leftward. 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.

In *Ballah v. Gardner* (1992 B.C.), 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* (1994 B.C. Appeal), 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.

In *Gilmore v. Butt* (1985 Ont.), a mother permitted her 4 year old child to go to a store in the care of an 11 year old who was considered to be responsible. The children stopped about 15 feet

from the crosswalk. The defendant driver saw them and slowed down, but proceeded with the side of his car 1.5-3 feet from the curb. The 4 year old ran out suddenly and was struck. The mother was not contributory negligent. The defendant driver should have been alerted to the fact that they might cross and was solely liable.

Conclusion

What is clear that emanates from these cases is that pedestrians who are "jaywalking" will frequently bear the lion's share of liability. This is despite the reverse onus provisions. A defendant may be found partially liable if he was not paying proper attention or was doing something negligent in his own right, (such as speeding). Otherwise, a Plaintiff may be found to be the author of their own fate for failing to cross at a crosswalk.

However, when a pedestrian enters a crosswalk area first, then absent any exceptional circumstances, he has the right of way. Moreover, when a motorist approaches an area where children are waiting to cross the roadway, he is obligated to be especially conscious of a child running across the street. In circumstances where a pedestrian is walking across a crosswalk in stopped traffic, both the pedestrian and the motorists are obligated to be cognizant of their surrounding circumstances. In the latter case, the apportionment of liability can vary dramatically.

All-in-all, the facts certainly drive the apportionment of liability in pedestrian knock-down cases. Yet, having a strong background as to how the facts have been interpreted in the past will serve you well when negotiating a favorable liability split.

Contact us at: defender@beardwinter.com