Can Jaywalkers Injured By A Vehicle Seek Pain And Suffering In An ICBC Claim?

February 3rd, 2009

If you are jaywalking and are injured in a BC Car Accident, can you make a claim for pain and suffering? The answer is it depends on the circumstances.

Reasons for judgment were released today by the BC Supreme Court illustrating the principle that simply because someone is in breach of the law at the time of a car crash they can still succeed in advancing a negligence claim (a claim for pain and suffering and other damages against another party).

In today's case (Lemesurier v. McConnachie) the Plaintiff was injured when she was struck by a vehicle as she was crossing Victoria Street in Trail, BC. At the time she was jaywalking. For this she was found at fault for the collision. However, the court also found that the motorist that struck the Plaintiff at fault concluding that the motorist was not driving with appropriate caution at the time of the collision. The court made the following analyisis in finding the jaywalker 60% at fault for the crash and the motorist 40% at fault:

[21] Where, however, there are circumstances known to a motor vehicle operator, that render questionable the presumption that the rules of the road will be respected by pedestrians, the exercise of due care is not met by behaving in accordance with the presumption. One cannot be deemed to presume facts at odds with known circumstances. "Due care" on the night of this accident included the known, and (by the plaintiff), specifically observed circumstance that there were pedestrians about and, that given the nature of the event, they might not be taking all due care for their own safety. This required an extra degree of caution in the circumstances. The plaintiff acknowledged this herself in turning into the centre lane to avoid pedestrians.

[22] The question then becomes whether the plaintiff has proved that the plaintiff's want of due care, applying s. 181, contributed to the collision. ***Liston v. Streiger****, CA 18770, CA19363 Vancouver Registry (June 25, 1996) is a case in which the Court of Appeal apportioned negligence 60-40 against a pedestrian who was struck in Penticton during the "Peach Festival" in a somewhat comparable atmosphere, in that the exercise of due care included adjusting ones' driving habits to accommodate the possibility of careless behaviour by pedestrians. There the facts, as found by the trial judge and accepted by the Court of Appeal, included the plaintiff "running barefoot across a busy street at night, in a poorly lit area in a state of intoxication... she glanced into the curb lane and proceeded to run into it ... ."*

[23] The defendant's position is that apart from any discussion of legal presumptions and duties, the effect of the evidence is that the plaintiff simply ran into the defendant's car in circumstances where the defendant had no opportunity to avoid striking her. The widths of the lanes established in evidence suggest that the distance from the curb to the point of impact is not great and could be traversed in a matter of seconds by a person who was running. The defence submits that the plaintiff's evidence that she simply did not see the defendant until she was upon her may be attributed to the probability that the plaintiff was running.

[24] The useful evidence is, again, that of the defence witness Ms. Howes. Apart from establishing that the collision occurred while the traffic signals were against the plaintiff, and that the plaintiff was not in the crosswalk, Ms. Howes' evidence is that she saw a large group of people crossing the road from her vantage in the intersection. Some were running. Her evidence is that the plaintiff was among the last of that group attempting to cross. Ms. Howes saw shadows crossing the road and had enough time to form the impression that someone was going to be hit because approaching cars were not slowing down.

[25] I accept that Ms. Howes probably saw the plaintiff running. It may well be, as the defence assets that she ran right in front of the car leaving the defendant very little time to react to her specific presence. This does

not, however, explain how the defendant could approach the intersection without slowing or without the utmost caution given that a large group of people had proceeded to cross moments before contrary to the traffic signal. The effect of Ms. Howes' evidence, which I accept, is that the presence of people on the road was manifest, and that the defendant should have been alert to that fact. She should not, in view of the circumstances, have been "surprised" by pedestrians behaving as the plaintiff did.

[26] I am of the view that the plaintiff should bear the larger portion of the responsibility for what happened to her. With respect to the division of liability, I find it difficult to distinguish the relative degrees of responsibility here from those established in ***Liston*** *(supra). Accordingly, I divide responsibility for what occurred 60% to the plaintiff and 40% to the defendant.*

This case goes to show that simply because one party is breaking the law at the time of a BC car crash another party can still be (partially or wholly) responsible. Each case turns on its own circumstances and a breach of a law of one party will not excuse careless driving by another when it comes to the law of negligence (the law that governs ICBC claims for pain and suffering).