LIABILITY ISSUES IN MOTOR VEHICLE ACCIDENTS INVOLVING CYCLISTS AND PEDESTRIANS

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As cities grow and the popularity of walking and cycling increases, the potential for collisions between motorists and other users of the road increases. When collisions do occur, the consequences can be tragic.

A factor in many collisions is an apparent belief on the part of some pedestrians and cyclists that the rules of the road do not apply to them when they use a public road.

In addition to the duties on the part of motorists, this paper will focus on the duties imposed on pedestrians and cyclists, and the outcomes at trial where courts have apportioned liability between the involved parties.

The case law has made it clear that, in addition to risking serious injuries, pedestrians and cyclists who do not take proper care for their own safety risk being found either partially or entirely at fault for the collisions giving rise to their injuries.

COLLISIONS INVOLVING PEDESTRIANS

Since the decision of the Supreme Court of Canada in ***Gill et. al*. v. *Canadian Pacific Railway***[1], it has been an accepted premise of motor vehicle accident litigation that all users of the road owe a duty of care to other users and are obligated to exercise due care for the safety of others, in addition to their own.

The courts have recognized the following specific obligations on the part of motorists:

- Motorists must keep a proper lookout for other users of the road, including pedestrians.
- Motorists must exercise particular and additional care when in areas where pedestrians are known to be present, such as residential areas, school zones, and areas of heavy pedestrian use.
- Motorist must pay attention to their surroundings at all times.
- Motorists must ensure that their vehicles are in fit mechanical condition, which includes ensuring that the windows are not obstructed and the mirrors are properly placed.
- Motorists must travel within the limits of their competence and according to the state of their health.

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[1] 1973 CarswellBC 112.

- Motorists must maintain a speed and a distance from other users of the road that permits a timely response to emergencies.

- Motorists must not operate their vehicles while distracted by their passengers, by using electronic devices, eating or drinking, or being engaged in some other task.

In addition to these specific duties on the part of motorists, once a pedestrian plaintiff establishes the fact of an accident on a roadway, the Ontario *Highway Traffic Act* imposes a reverse onus on motorists who collide with pedestrians. The relevant provision reads as follows:

> **193. (1)** 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. 2005, c. 31, Sched. 10, s. 3.

The rationale behind the reverse onus is it creates an additional incentive to motorists to be more careful of pedestrians who are more vulnerable to injury. In addition, since severely injured pedestrians often cannot remember the circumstances surrounding an accident, the reverse onus compensates for this practical disadvantage.

The Courts have indicated that a defendant cannot discharge the reverse onus by showing that the plaintiff's loss or damage was caused in part by the negligence of the plaintiff. Discharging the reverse onus can only be done by the defendant showing that there was *no* negligence or misconduct on his or her part.[2]

Notably, s. 193(1) only applies to public roadways. The reverse onus does not apply to private roadways such as parking lots, driveways, or other non-public areas where a vehicle may be travelling.

This presumption of negligence is tempered, to a degree, by an entitlement on the part of motorists to expect that other users of a road will behave properly and responsibly. The Courts have held that a motorist is entitled to assume that pedestrians will proceed in a manner that is reasonable and careful, unless specifically alerted to the possibility of the opposite. On this point, the Court of Appeal for Ontario, in ***Gellie* v. *Naylor Reflex***,[3] stated:

> 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

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[2] *Shapiro* v. *Wilkinson* [1943 CarswellOnt 48 (Ont. C.A.)]; aff'd by [1944 CarswellOnt 81 (S.C.C.)].

[3] 1986 CarswellOnt 600 at para. 9.

> anticipation of negligent conduct renders such conduct foreseeable and makes it incumbent on the motorist to take additional precautions: see generally Fleming, The Law of Torts, (6th ed., 1983), at p. 115:
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> > Liberty to act on an expectation of non — negligence in others ceases as soon as there are indications that they are, or are likely to be, acting imprudently. The ever present possibility of negligent behaviour demands constant scrutiny in every direction whence danger may loom, and the greater the risk the more tentative must be the assumption that others will conduct themselves with reasonable care.

Despite the long list of specific obligations on the part of motorists and the operation of a reverse onus, motorists are frequently able to rebut this presumption of negligence and either avoid a finding of any liability on their part or establish a significant degree of contributory negligence on the part of the pedestrian plaintiff.

Though each case turns on its facts, the most common bases for findings of contributory negligence on the part of pedestrian plaintiffs are as follows:

- ***Unforeseen and Unexpected Conduct***

In ***Irvine* v. *Smith***,[4] the plaintiff, who had been experiencing psychiatric symptoms that were unusual and out of the ordinary for him, bolted from his home and ran away in the middle of the night. The Defendant later noticed the Plaintiff walking by the side of the road and, as a precaution, he moved his vehicle toward the middle of the road away from him without slowing down his vehicle. The Plaintiff then suddenly ran towards the Defendant's vehicle, jumped into the air and collided with the right front bumper of the vehicle. The Plaintiff died from his injuries. The Court held that the actions of the Plaintiff were "unforeseen, unexpected and unanticipated" and that there was nothing more than the Defendant could have done to avoid this accident. The action was dismissed.

- ***Failing to Make Use of A Crosswalk***

In ***Taylor* v. *Asody*,**[5] a decision of the Supreme Court of Canada, a pedestrian was struck by a vehicle as he crossed a street not at a crosswalk. The Court held that a motorist is under a greater obligation to maintain a sharp look-out at crosswalks where pedestrians obviously are more likely to be present. Quoting the Ontario decision in *Lalonde* v. *Kahkonen*, the Court further stated that although pedestrians have a right to cross a road not at a regular crossing for foot pedestrians, when doing so they have a duty "to take special care and to use greater vigilance". Liability was divided equally between the parties.

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[4] 2008 CarswellOnt 723 (S.C.J.).

[5] [1975] 2 S.C.R. 414. A 1975.

In ***Ashe* v. *Werstiuk*,**[6] the Plaintiff was struck while crossing a two-lane roadway at a mid-point of the block, outside of a crosswalk. She has no reasonable explanation for not using the nearby crosswalk. The Defendant had no reasonable explanation for not noticing the Plaintiff. On the basis of her failure to use the crosswalk, the Court held that the Plaintiff was 25% at fault.

See also *Cooper* v. *Crockford*, 2007 ABQB 411; *Bishop (Litigation Guardian of)* v. *Hiebert*, 1997 CarswellBC 1375 (B.C.C.A.); *Claydon* v. *Insurance Corp. of British Columbia,* 2009 BCSC 1077.

- ***Failing to Keep a Proper Look-Out***

In ***Lloyd (Litigation Guardian of)* v. *Rutter***,[7] the 11-year-old Plaintiff was walking home from school and attempted to cross a street at a spot other than a crosswalk. Although he looked both ways before attempting to cross, he did not see the Defendant's vehicle approaching. The Defendant had a clear view of the pedestrians on the road but he did not see the Plaintiff. He was also travelling in excess of the speed limit. The Court found fault on the part of both parties for failing to keep a proper look-out, in addition to the Plaintiff's failure to use a crosswalk. Liability was apportioned at 30% to the Defendant and 70% to the Plaintiff.

See also *British Columbia Electric Railway* v. *Farrer*, [1955] S.C.R. 757; *Paskall* v. *Scheithauer*, 2014 BCCA 26; and *Ballah* v. *Gardner*, 1992 CarswellBC 2148 (B.C.S.C.).

- ***Failing to Yield***

In ***Gos* v. *Nicholson***,[8] the Plaintiff was crossing a busy street between intersections, rather than using a nearby crosswalk. When she observed traffic approaching, she chose to continue crossing the street instead of returning to the safety of the sidewalk. The Court focused on the fact that the Plaintiff was found to have failed to yield the right of way to oncoming traffic in breach of s. 144(22) of the Ontario *Highway Traffic Act*. The Plaintiff's contributory negligence was assessed at 25%.

See also *Wong-Lai* v. *Ong*, 2011 BCSC 1260.

- ***Moving with Excessive Haste***

In ***Karran* v. *Anderson***,[9] the Plaintiff attempted to jog across a four-lane road during rush hour contrary to a red light. Vehicles in two lanes stopped to permit the Plaintiff to

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[6] 2004 BCCA 75.

[7] 2003 CarswellOnt 4909 (S.C.J.).

[8] 1999 CarswellOnt 3773 (C.A.).

[9] 2008 BCCA 429.

cross and the Plaintiff ran in front of the Defendant's lane of travel without looking to see if that lane was free of traffic. The Defendant did not notice that other vehicles in his direction of travel had stopped and he proceeded forward, striking the Plaintiff. The Court held that the Defendant ought to have recognized the traffic pattern around him and as a precaution, slowed from driving at the maximum speed limit to take into account the potential hazard ahead of him. Had he done so, he would have had sufficient distance and time to avoid the accident. However, the Court recognized that the Plaintiff was largely at fault an assessed her contributory negligence at 75%.

See also *Bishop (Litigation Guardian of)* v. *Hiebert* 1997 CarswellBC 1375 (B.C.C.A.)

- ***Proceeding in a Reckless/ Dangerous Manner***

In ***Murdoch* v*. Biggers***,[10] the Plaintiff ran across a crosswalk to catch a bus, although she saw that the traffic control light facing her was red and that vehicles were proceeding through the intersection. The Plaintiff made eye contact with the Defendant and believed that the Defendant would stop to let her proceed. The Defendant did not and struck her. The Court held that it was reckless of the Plaintiff to have left a place of safety and proceeded into the intersection contrary to a red light, at a time when traffic was heavy, and in doing so contributed significantly to the accident. However, noting that other motorists had seen the Plaintiff and stopped, the Court held that the Defendant ought to have as well. The Court held the Plaintiff 75% at fault and the Defendant 25%.

- ***Creating a Situation of Danger***

In ***Carr* v. *Anderson***,[11] the Plaintiff and Defendant were involved in what appeared to be an incident of road rage. The Plaintiff exited his vehicle and slashed the Defendant's tires using a knife with a six inch blade. The Defendant, who had remained in his vehicle, accelerated to leave the scene and in the course of doing so, struck the Plaintiff. The Court accepted that the Plaintiff's conduct put the Defendant in a justifiably-perceived situation of emergency and that he was right to attempt to escape from the danger posed by the Plaintiff. However, the Court held that the Defendant did not need to accelerate as sharply as he did. The Court divided fault equally.

In ***Heyman* v. *South Coast British Columbia Transportation Authority***,[12] the Plaintiff was jogging to catch a bus and he waved his hand frantically to try to get the Defendant bus driver's attention. The Defendant driver saw the Plaintiff and understood that he was hurrying and waving his arm to attract his attention with a view to catching the bus. While waving his hand, the Plaintiff came into contact with the bus, possibly striking it with his fist, which caused him to spin and fall to the ground. The bus then proceeded

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[10] 2012 BCSC 747.

[11] 2000 CarswellOnt 2282 (S.C.J.).

[12] 2013 BCSC 1724.

forward and ran over the Plaintiff's ankle. The Court held that the Plaintiff presented a visible hazard and in light of that, the Defendant driver ought to have proceeded with caution. However, the Court held that the Plaintiff bore a greater degree of responsibility for the accident. In the Court's view, deliberately striking a vehicle while it was moving demonstrated a failure to take reasonable care for one's own safety. The Court attributed 60% of fault to the Plaintiff.

- ***Being Distracted***

In ***MacArthur* v. *Dawson,***[13] the Plaintiff was held to have been walking on the wrong side of the road and to have walked into the path of the Defendant's vehicle. The Court held that neither Plaintiff nor the Defendant were keeping a proper lookout: the Plaintiff was distracted by looking at two non-involved vehicles who seemed about to collide, and the Defendant was intently looking for a parking space. The Court held that both the Plaintiff and the Defendant were distracted. However, the Plaintiff bore more responsibility for the accident and 80% of liability was attributed to her.

See also *Bishop (Litigation Guardian of)* v. *Hiebert*, 1997 CarswellBC 1375 (B.C.C.A.)

- ***Being Impaired***

In ***Zeleniski Estate* v. *Fairway***,[14] the Plaintiff he was walking in the middle of an unlit road, at night, wearing dark clothing that was not reflective, and under the influence of alcohol. He had narrowly missed being struck by two other vehicles before being fatally struck by the Defendant's oncoming vehicle. On appeal, it was argued that there was no causal connection shown between the Plaintiff's alcohol reading and the accident. It was also argued that only blameworthy conduct can be considered negligent, and it was not blameworthy for the pedestrian Plaintiff to have worn dark clothing or to have been drinking. The Court of Appeal rejected both arguments, stating that the inherent blameworthiness of conduct is irrelevant. To the Court, the relevant question is whether the Plaintiff failed to take reasonable care for his own safety. The Court held that even had the Plaintiff not been wearing dark clothing or been drinking, the fact that the Plaintiff continued to walk down the middle of a road after nearly being struck twice constituted contributory negligence. The finding that the Plaintiff was 90% at fault for the accident was upheld on appeal.

See also *Cooper* v. *Crockford*, 2007 ABQB 411.

- ***Multiple Failings by the Plaintiff***

In ***Talbot* v. *Kijanowska***,[15] the Plaintiff had consumed five beers that day and was listening to music through a set of headphones when he attempted to cross a street, not

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[13] 1999 CarswellAlta 633 (Q.B.).

[14] 1998 CarswellBC 2601 (B.C.C.A.).

[15] 2013 BCSC 728.

at a crosswalk. He stepped into the path of an oncoming vehicle and was struck. The Court declined to attribute any negligence at all to the Defendant, stating that the accident was entirely the fault of the Plaintiff. The action was dismissed.

In ***O'Connor* v. *James***,[16] the evidence indicated that the Plaintiff was walking in the middle of the road rather than on the shoulder, was dressed entirely in black clothing without reflective elements, and also was somewhat impaired due to consuming alcohol. The Court held that the Plaintiff did not display good judgment in deciding to walk on the road rather than on a median, and demonstrated a lack of reasonable care for his own safety. The Court also held that 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. The Court apportioned 90% of liability to the Plaintiff and 10% to the Defendant.

See also *Bishop (Litigation Guardian of)* v. *Hiebert* 1997 CarswellBC 1375 (B.C.C.A.)

From the case law, the following specific obligations on the part of pedestrians emerge:

- Pedestrians must maintain a proper look-out.
- Pedestrians must cross a road at a crosswalk if one is reasonably close by.
- When a pedestrian crossing a road at a point other than a crosswalk, extra care is required.
- Pedestrians must make themselves visible to traffic.
- Pedestrians must yield to vehicular traffic with the right of way.
- Pedestrians are obligated to obey traffic control signs and signal devices.
- Pedestrians must not permit themselves to become distracted, by electronic devices or otherwise, or be upon roads when impaired by alcohol.
- Pedestrians must not create a hazard and expect others to avoid it.
- Pedestrians must act reasonably and rationally as a road user with due regard for his or her own safety.

In summary, in cases involving collision between motorists and pedestrians, the Courts will consider all the same issues and indicia of negligence when assessing the contributory negligence of a pedestrian plaintiff that the courts do in assessing the liability of a defendant. Where negligence on the part of the plaintiff is established, the Courts will often apportion a significant amount of liability to the plaintiff.

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[16] 2009 BCSC 1119.

COLLISIONS INVOLVING CYCLISTS

Under the *Highway Traffic Act* of Ontario, a bicycle is a vehicle and has the same rights and responsibilities as other road users. Consistent with this premise, cyclists, like pedestrians, have a responsibility for their own safety and operators of bicycles must be as vigilant and conscientious as the drivers of vehicles.

However, and perhaps inconsistently with the status of a bicycle as a vehicle for the purposes of the *Highway Traffic Act*, the reverse onus contained within s. 193(2) of the Ontario *Highway Traffic Act* also applies in favour of cyclists.

As in the pedestrian context, despite the long list of specific obligations on the part of motorists and the operation of a reverse onus, motorists are frequently able to overcome the presumption of negligence and either avoid a finding of any liability on their part, or establish a significant degree of contributory negligence on the part of the cyclist plaintiff.

The basic fact patterns in which this occurs mirror those in pedestrian cases.

- ***Failing to Keep a Proper Look-Out***

In *Hersh* v. *Stinson*,[17] the Plaintiff was riding his bicycle in a hunched over or leaning-forward position, resting his arms on the handlebars. The Defendant was turning left slowly across the two northbound lanes traffic into a driveway. Neither party saw the other before the impact. The Court held that both were negligent for failing to keep a proper look-out, the Plaintiff for not keeping a proper lookout for traffic turning left, and the Defendant for not first ascertaining that his left turn could be made with safety before turning left the road. Each was found 50% at fault for the accident.

See also *Repic* v. *Hamilton* (City), [2009] OJ No 4657 (S.C.J.), aff'd 2011 ONCA 443; and *Stalzer* v*. Nagai*, 2014 BCSC 1388 (B.C.S.C.).

- ***Proceeding When it Was Unsafe to Do So***

In ***Bradley* v. *Bath*,**[18] the Plaintiff was riding his bicycle on the sidewalk across an entrance to a gas station. The Plaintiff saw the Defendant's vehicle existing the gas station but did not make eye contact with him, and proceeded on the assumption that the Defendant saw him and would not accelerate. The Defendant did not see him and struck the Plaintiff. The Court found the Plaintiff did not take reasonable care for his own safety by continuing to ride his bicycle across the path to be taken by the Defendant's vehicle exiting the gas station. The Plaintiff's contributory negligence was assessed at 50%.

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[17] 1992 CarswellBC 1918 (B.C.S.C.)

[18] 2010 BCCA 10.

- ***Failing to Dismount At A Crosswalk***

In ***Pelletier* v. *Ontario***,[19] the Plaintiff was riding a bicycle with minimal reflection and no lights. He was not wearing helmet and his clothing was dark. He rode from a dark parking lot into an intersection and through a pedestrian crosswalk. An OPP officer turned right across the crosswalk and struck the Plaintiff. The officer's evidence was that it was not uncommon to see cyclists riding on sidewalks, and it was also not uncommon for them to ride their bikes across pedestrian crosswalks. The Court held that the Plaintiff was partly at fault for riding his bicycle into a crosswalk, contrary to the provisions of the *Highway Traffic Act*, and that his lack of a helmet and his dark clothing contributed to the accident. The Court found the Plaintiff 40% at fault.

In ***Bajkov (Guardian ad litem of)* v. *Canil***,[20] the Plaintiff was 13 years old and riding his bicycle to school. As he approached an intersection, he jumped his bicycle over a bump in the asphalt and landed in the cross-walk. The Defendant did not see the Plaintiff until immediately before the impact. The Court held that the Defendant was at fault for failing to keep a proper look-out. However, to the Court it was significant that the Plaintiff was in the crosswalk on his bicycle contrary to the applicable legislation. Because he was prohibited from proceeding on his bicycle in a crosswalk the Plaintiff was not entitled to rely on the fact that he had the right of way. Each was found 50% at fault for the accident.

See also *Evans* v. *Toronto (City) et. al.* [2004] ON No 5844 (Sm. Cl. Ct).

- ***Failing to Wear a Helmut***

In ***Evans* v. *Toronto (City) et. al.***,[21] the Plaintiff's bicycle was struck by a vehicle door opened by a motorist. The Court apportioned 25% liability to the Plaintiff for not wearing a helmet and for not checking the interior of cars to see if a vehicle occupant was about to exit.

In ***Niitamo* v. *Insurance Corp of British Columbia***,[22] the Plaintiff was riding within a crosswalk when a car turning across the crosswalk struck him. The Plaintiff was not wearing a helmet at the time and the expert medical evidence indicated that his injuries may not have been as extensive had he been wearing a helmet. The Court found that the Plaintiff's failure to wear a helmet demonstrated a lack of reasonable care and conduct, which contributed to his injuries. His contributory negligence was assessed at 15%.

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[19] 2013 ONSC 6898 (S.C.J.).

[20] 1990 CarswellBC 862 (B.C.C.A.).

[21] [2004] ON No 5844 (Sm. Cl. Ct).

[22] 2003 BCSC 608.

- ***Failing to Wear Proper Clothing***

See *Stalzer* v*. Nagai*, 2014 BCSC 1388 (B.C.S.C.); *Repic* v. *Hamilton* (City), [2009] OJ No 4657 (S.C.J.), aff'd 2011 ONCA 443; and *White* v*. Aransibia*, [2003] OJ No 2580 (S.C.J.).

- ***Travelling at an Excessive Speed***

In ***Langille* v. *D.G. Wolfe Enterprises Ltd.***,[23] the Plaintiff was biking along a sidewalk across the entrance to a laneway. The motorist turned to his right intending to cross that sidewalk and drive along the laneway, and in the course of doing so struck the Plaintiff. The Plaintiff was found to have been negligent in biking on the sidewalk, rather than the road, and in travelling at such a speed that, when she became aware of the presence of the motor vehicle about to cross the crosswalk, she was not able to take effective evasive action. It also was found that had she been keeping a better lookout, the probability is that she would have seen the motor vehicle sooner. In addition, it was dusk and the Plaintiff's bicycle was not equipped with lights. On appeal, the Plaintiff was found to be 25 % at fault and the Defendant 75%.

- ***Creating a Situation of Danger***

In ***Bartosek (Litigation Guardian of)* v. *Turret Realties Inc.***,[24] a six-year-old Plaintiff rode his bicycle down a ramp sloping from an upper parking level area to the sidewalk and street level, and into the path of the Defendant's vehicle. The Court held that the Plaintiff risked not being able to control his bicycle and he should have been able to avoid the danger. His contributory negligence was assessed at 50%.

- ***Failing to Avoid an Accident***

In ***Torok (Guardian ad litem of)* v. *Sekhon***,[25] the helmetless 14-year-old Plaintiff was riding his bike downhill on a sidewalk towards an intersection as fast as he was able to peddle and was keeping pace with the cars travelling in the same direction on the opposite side of the street. It was raining and the ground was wet. The Defendant signalled an intention to turn right and made a right turn across the Plaintiff's path. The Defendant saw the Plaintiff approaching and knew that their paths were about to cross. The Plaintiff applied his brakes and put one foot on the ground but was unable to stop before colliding with the Defendant. The Court found that the Plaintiff and the Defendant each saw the other and each failed to take the necessary precautions to allow for the other's presence and possible movements. Liability was equally divided.

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[23] 1987 CarswellNS 6 (N.S.C.A.).

[24] 2001 CarswellOnt 4292 (S.C.J.).

[25] 2010 BCSC 850.

- ***Being Distracted***

In ***McIlvenna (Litigation Guardian of)* v. *Viebig***,[26] the Plaintiff was a small boy riding his bicycle when he was injured in a collision with a motor vehicle that was making a left turn. The Court found that the Plaintiff was distracted by his desire to keep up with his older brother who was ahead of him. As a result of this distraction, the Plaintiff overlooked the rules of the road. His degree of fault was assessed at 40%.

In ***Ormiston (Litigation guardian of)* v. *Insurance Corp of British Columbia***,[27] the Plaintiff was descending a steep hill when a vehicle veered into his path as he was passing it on the right. The Plaintiff was listening to music via ear phones attached to an iPod however, he testified it was at a low level. The Court largely focused on the fact that the Plaintiff passed the vehicle at issue on the right contrary to the applicable legislation, however, his use of the iPod was taken into consideration. The Plaintiff's contributory negligence was assessed at 30%

- ***Being Impaired***

In ***Potts* v. *Heutink***,[28] a collision occurred near a T-intersection when the Plaintiff cyclist crossed the road outside of a crosswalk and was struck by the Defendant driver. The Court found that the Plaintiff had breached his duty of care as a cyclist and his negligence was a contributing cause of the accident. He failed to use a marked crosswalk and he crossed the road on a diagonal thereby increasing the chances of being struck. Furthermore, the Plaintiff's depth perception, balance, vision, judgement and coordination was impaired by alcohol. The Plaintiff's contributory negligence was assessed at 80%

- ***Multiple Failings by the Cyclist***

In ***White* v. *Aransibia***,[29] the Plaintiff was struck by a left-turning vehicle while he was operating a bicycle not equipped with lights or reflectors and while he was not wearing a helmet. The Court additionally found that he was travelling at an excessive rate of speed into a pedestrian crosswalk and was not keeping a proper lookout. The Court divided liability equally between the parties.

In ***Repic* v. *Hamilton (City)***,[30] a 14-year-old helmetless cyclist he rode his bicycle onto the on-ramp leading to a major highway without stopping and without looking properly

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[26] 2012 BCSC 218 (CanLII).

[27] 2014 BCCA 276.

[28] 2006 BCSC 1637.

[29] [2003] OJ No 2580 (S.C.J.).

[30] [2009] OJ No 4657 (S.C.J.), aff'd 2011 ONCA 443.

for oncoming traffic. He was wearing dark clothing and his bicycle did not have any lights though it was night time. The Court found that the Plaintiff either did not look or failed to properly look for oncoming traffic before entering the roadway, and had he done so, he would have seen the Defendant's vehicle. The Court attributed 45% of the fault to the Plaintiff.

In ***Stalzer* v*. Nagai***,[31] the Plaintiff was operating his bicycle in the dark without a light, and was wearing dark clothing without any reflective material. He rode his bicycle in a crosswalk and was struck by the Defendant. The Court found that the Plaintiff was not riding with any care and that he failed in his duty to act with reasonable care. The Plaintiff was found entirely at fault.

See also *Pelletier* v. *Ontario*, 2013 ONSC 6898 (S.C.J.); *Langille* v. *D.G. Wolfe Enterprises Ltd.*, 1987 CarswellNS 6 (N.S.C.A.); *Torok (Guardian ad litem of)* v. *Sekhon*, 2010 BCSC 850; and *Langille* v. *D.G. Wolfe Enterprises Ltd.*, 1987 CarswellNS 6 (N.S.C.A.).

Although these issues have not been the subject of reported decisions, there is no reason why a cyclist engaging in "unforeseen, unexpected and unanticipated" acts as per ***Irvine* v. *Smith***, would not also attract a dismissal of the action against the defendant motorist or a finding of significant contributory negligence on the part the cyclist.

The case law clearly indicates that, like pedestrians, cyclists have specific obligations as road users. Those obligations include:

- Cyclists must make themselves visible to traffic by the presence of lights on their bicycles, by wearing reflective clothing, and by their speed and location on roads.
- Cyclists must cross a road at a crosswalk if one is reasonably close by. When a cyclist crosses a road at a point other than a crosswalk, extra care is required.
- Cyclists must maintain a proper look-out.
- Cyclists must yield to vehicular traffic with the right of way.
- Cyclists are obligated to obey traffic control signs and signal devices.
- Cyclists must not permit themselves to become distracted, by electronic devices or otherwise, or be upon roads when impaired by alcohol.
- Cyclists must not create a hazard and expect others to avoid it.
- Cyclists must act reasonably and rationally as road users with due regard for their own safety.

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[31] 2014 BCSC 1388 (B.C.S.C.)

- Cyclists must maintain a speed and a distance from other users of the road that permits a timely response to emergencies.

In summary, in cases involving collision between motorists and pedestrians, the Courts will consider all the same issues and indicia of negligence when assessing the contributory negligence of a pedestrian plaintiff that the courts do in assessing the liability of a defendant. Where negligence on the part of the plaintiff is established, the Courts will often apportion a significant amount of liability to the plaintiff.