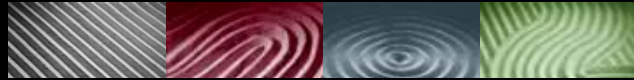


# MILLER THOMSON LEGAL NOTES



## Watch out for Pedestrians: by Randy Carter

### THE PEDESTRIAN ONUS SHIFT

It is the time of year when people are out in droves walking, running, bicycling, skateboarding and such. Drivers, after a winter of worrying about ice and snow, now have to re-focus their senses on these lawful users of the roadway.

This brief paper will focus on the duties of pedestrians to watch out for drivers, and will summarize some of the liability assessments which have been apportioned against pedestrians and the reasons for those apportionments.

We start from the premise that the *Highway Traffic Act* creates a rebuttable presumption of negligence against the driver, if a pedestrian is struck. Section 193(1) of the *Highway Traffic Act* says: "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 does not arise through the negligence or improper conduct of the owner or driver of the motor vehicle is upon the owner or driver."

What kind of circumstances have given rise to owners or drivers being able to discharge, in whole or in part, this onus of proof?

In the case of Gordon v. Trotter, a 6 year old girl ran from between two stationary southbound cars and darted into the path of a northbound vehicle. In this case, the court made factual findings that the driver could not have seen the child until the child was almost into the northbound lane, that the driver braked as quickly as possible after the child appeared, that the driver was traveling at an appropriate speed prior to braking and that the driver was correctly positioned in the northbound lane prior to any emergency arising. While the accident was certainly unfortunate, no negligence was found against the driver. This is probably a very exceptional case.

In the case of Gos v. Nicholson, the pedestrian Plaintiff was found to have contributed to her own injuries to the extent of 25% when she crossed a busy one-way street between intersections and not at a crosswalk, even though she knew that traffic was approaching.

The case law supports a rather heavy responsibility on even young pedestrians to maintain a watchful lookout. In the case of Lloyd v. Rutter, an 11 year old, walking home from school, crossed at an undesignated location even though, while asserting that he looked both ways, he failed to see the vehicle approaching although his view was unobstructed. The child was found to be 70% responsible.

In the case of Chisholm v. Prosser, a 15 year old Plaintiff was found to be completely responsible when she ran across the street from behind a parked truck into the path of the motor

vehicle when she should have known of the approach of the vehicle, with its headlights on. Essentially in this instance, the court held that the driver did not stand a chance. There was no reason for him to expect a girl to run out from behind a parked truck at the location. Speed and attentiveness were not factors against the driver.

The above is intended to be only a brief summary of some of the factors which might give rise to a Defendant driver being able to discharge the onus of proof against him or her and create a finding of either no liability on the part of the Defendant driver or contributory negligence on the part of the pedestrian Plaintiff. While pedestrians have been held to have an undoubted right to cross a highway at an undesignated location (confirmed by the Ontario Court of Appeal in Lalonde v. Kahkonen), they also have a corresponding duty to use greater vigilance, precisely because drivers will have a reduced expectation. Drivers are entitled to assume that pedestrians will act rationally, not unreasonably or foolishly. Having said that, however, a motorist must always be alert to the possibility of foreseeable negligent conduct and take all reasonable precautions in that regard.

In addition to always having some level of anticipation of negligent conduct, drivers are, of course, always expected to maintain a proper look out in all circumstances, travel at an appropriate speed under all of the circumstances and react appropriately to the presence of any and all observed pedestrians by slowing down, moving over, attempting to make eye contact, honking their horn if appropriate and, if in doubt and all else fails, stop the vehicle.

The above brief summary of the relevant case law was extracted from much more extensive research on this topic, prepared by our articling student, Cynthia Pon. Of course, we are always happy to take the time to discuss tricky liability situations with you or provide a more extensive liability opinion, if the circumstances warrant.



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